



Securities Briefing Vol. 3, No. 2

June 1, 2004

Topics in this Securities Briefing:

This Securities Briefing provides:

- A summary of the SEC's final rules revising the Current Report on Form 8-K to add new disclosure requirements and shorten the filing deadline; and
- A schedule of compliance dates for the SEC's final rules adopted in 2003 pursuant to the Sarbanes-Oxley Act.

This Securities Briefing is intended only as a summary of the new Form 8-K requirements and you are encouraged to review the full text of the SEC's final rules revising Form 8-K.

Final SEC Rules Revising Form 8-K

Overview

The SEC adopted final rules revising Current Reports on Form 8-K on March 11, 2004 to reflect the requirements of Section 409 of the Sarbanes-Oxley Act for public companies to engage in "real time" disclosure of material changes in financial condition or operations. The revised Form 8-K contains eight new disclosure items, expands the disclosure required under two existing Form 8-K items and transfers two items previously reported in quarterly reports to Form 8-K. The new rules also shorten the Form 8-K filing deadline to four business days after the occurrence of a triggering event for disclosure, subject to certain limited



exceptions specified in the new rules. The revised Form 8-K has been reorganized into topical categories with new item numbers as follows:

Section 1 - Registrant's Business and Operations

Item 1.01 Entry into a Material Definitive Agreement

Item 1.02 Termination of a Material Definitive Agreement

Item 1.03 Bankruptcy or Receivership

Section 2 - Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets

Item 2.02 Results of Operation and Financial Condition

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 or an Obligation under an Off-Balance Sheet Arrangement

Item 2.05 Costs Associated with Exit or Disposal Activities

Item 2.06 Material Impairments

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

Item 3.02 Unregistered Sales of Equity Securities



Item 3.03 Material Modification to Rights of Security Holders

Section 4 - Matters Related to Accountants and Financial Statements

Item 4.01 Changes in Registrant's Certifying Accountant

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

Section 5 - Corporate Governance and Management

Item 5.01 Changes in Control of Registrant

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

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

Item 5.04 Temporary Suspension of Trading under Registrant's Employee Benefit Plans

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

Section 6 - Reserved

Section 7 - Regulation FD

Item 7.01 Regulation FD Disclosure

Section 8 - Other Events

Item 8.01 Other Events

Section 9 - Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits

Effective Date



The new rules revising Form 8-K become effective on August 23, 2004.

Item 1.01 Entry into a Material Definitive Agreement

Item 1.01 is a new disclosure requirement. A company that enters into a material definitive agreement not made in the ordinary course of business must disclose the following:

- the date on which the agreement was entered into or amended, 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 or amendment; and

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

The SEC's proposed rule had required disclosure of letters of intent and non-binding agreements in addition to definitive agreements. After "substantial comment," which raised questions of competitive harm and excessive speculation in the marketplace, the SEC limited disclosure to definitive agreements.

The definition of "material definitive agreement" has been included in the rule and means "an agreement that provides 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 to the agreement, in each case whether or not subject to conditions." The definition is expressly tied to Item 601(b) (10) of Regulation S-K, and requires disclosure in compliance with this regulation.

Agreements do not need to be filed as exhibits to the Form 8-K, as was originally proposed by the SEC. Commentators noted problems with requests for confidential treatment of agreements under the short Form 8-K filing period and logistics of submitting lengthy agreements in proper EDGAR format. While agreements may be filed with the company's next periodic report, the SEC encourages voluntary filing with the Form 8-K.

Material amendments must also be disclosed under Item 1.10. This may mean the disclosure of an amendment where the original agreement has not been filed. For example, the amendment may result in the agreement becoming material, or the agreement may have been originally entered into before the effective date of Item 1.01.

The SEC also amended the Form 8-K to include boxes on the cover page so, that in the case of business combinations and extraordinary corporate transactions, the company may check one or more boxes to



satisfy its filing obligations under Rule 165 under the Securities Act and Rule 14d-2(b) or Rule 14a-12 under the Exchange Act.

Item 1.02 Termination of a Material Definitive Agreement

New Item 1.02 requires disclosure if a material definitive agreement not made in the ordinary course of business is terminated and the termination is material to the company. An agreement that terminates by its own accord or situations where the parties' obligations under the agreement have been completed do not need to be disclosed.

Where disclosure is required, the company must disclose:

- 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.

"Material agreement" has the same meaning as in Item 1.01.

Because of concerns raised by commentators that a party might use this item as a negotiation tool to modify an agreement or that negative market reaction might occur about disclosure of possible termination of an agreement, no disclosure is required during discussions about terminating a material agreement. Rather, disclosure is only required upon the actual termination.

Moreover, Instruction 2 to Item 1.02 has been clarified in response to comments to the proposed rules. No disclosure is required if a company has a good faith belief that an agreement has not been terminated, unless the company has received a notice of termination. The SEC added that if a company provides

disclosure under Item 1.02 but believes in good faith that the agreement has not been terminated, it could discuss why it does not believe termination occurred, including that all conditions to termination have not been satisfied. An amendment to the Form 8-K would be required if a company no longer concludes in good faith that the agreement has not been terminated.

While a company does not have to provide analysis of the effect of termination, which had been originally proposed by the SEC and described as a "mini-MD&A" by some commentators, any disclosure must include all material information so that the disclosure, in light of the circumstances under which it is made, is not misleading.

Item 1.03 Bankruptcy or Receivership

This is an existing disclosure requirement and retains the "basic substantive requirements" included in former Item 3 of Form 8-K regarding a company's entry into bankruptcy or receivership. The SEC made minor changes to the item in an attempt to make it more readable.

Item 2.01 Completion of Acquisition or Disposition of Assets

This is an existing disclosure requirement and it retains most of the substantive elements included in former Item 2 of Form 8-K. Item 2.01 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. For purposes of Item 2.01, an acquisition or disposition is deemed to involve a "significant amount of assets" if:

- the company and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for such assets upon acquisition or disposition exceeded ten percent of the total assets of the company and its consolidated subsidiaries, or
- it involved "business" that is "significant," each as defined in Rule 11-01 of Regulation S-X.

Item 2.01 specifically requires that a company disclose the following information regarding the acquisition or disposition of a significant amount of assets:

- the date of completion of the acquisition or disposition;

- a brief description of the assets involved;

- the identity of the person(s) from whom the assets were acquired or to whom they were sold;

- the nature of any material relationship between such person(s) from whom the assets were acquired or to whom they were sold and the company, any of its affiliates (including its officers and directors) or any associate of any of the company's officers and directors;

- the nature and amount of consideration given or received for such assets;

- if any material relationship is disclosed as required above, the formula or principle followed in determining the amount of such consideration; and

- if the transaction being reported is an acquisition and if any material relationship is disclosed as required above, the source(s) of the funds used, unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank, in which case the identity of such bank may be omitted provided that that the registrant has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Exchange Act, and states in the report that the identity of the bank has been omitted and filed separately with the SEC.

Item 2.01 differs from former Item 2 in that a company is no longer required to disclose:

- the source of funds used for an acquisition and the formula or principle followed in determining the amount of consideration for the acquisition or disposition if no material relationship is disclosed as required in Item 2.01; and

- the nature of the business in which the acquired assets were used and whether the company acquiring the assets intends to continue such use.

The SEC acknowledges that there will frequently be a relationship between the disclosures provided under Item 2.01 and the disclosures required by Item 1.01. The SEC anticipates that, in certain circumstances, a company will report its entry into a material definitive agreement to acquire or dispose of assets under Item



1.01, and will then later disclose the closing of the acquisition or disposition under Item 2.01. The SEC notes, however, that 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 only those acquisitions or dispositions of a "significant amount of assets" are required to be disclosed in Item 2.01

Item 2.02 Results of Operations and Financial Condition

This is an existing disclosure requirement and it retains all of the substantive requirements of former Item 12 of Form 8-K. Item 2.02 requires disclosure if a company, or any person acting on behalf of a company, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the company's results of operations or financial condition for a completed quarterly or annual fiscal period. Item 2.02 specifically requires that a company disclose the date of the public announcement or release, briefly identify of the announcement or release and include the text of the public announcement or release as an exhibit to the Form 8-K.

A company is not required to furnish to the SEC a Form 8-K under Item 2.02 with respect to the disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast or by similar means if:

- the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished to the SEC on Form 8-K under Item 2.02 prior to the presentation;
- the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;
- the financial and other statistical information contained in the presentation is provided on the company's website; and
- the presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the company's website where the information would be available.



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

This is a new disclosure requirement. Item 2.03 requires disclosure if a company becomes obligated under a material, direct financial obligation or becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement. For purposes of Item 2.03, an "off-balance sheet arrangement" has the definition set forth in Item 303(a)(4) of Regulation S-K and a "direct financial obligation" is defined as:

- long-term debt obligations, capital lease obligations and operating lease obligations, each as defined in Item 303(a)(5)(ii) of Regulation S-K, and
- other than arising in the ordinary course of business, short-term debt obligations, which are defined as payment obligations under a borrowing arrangement that is scheduled to mature within one year or, for those companies that use the operating cycle concept of working capital, within a company's operating cycle that is longer than one year (as discussed in Accounting Research Bulletin No. 43, Chapter 3A, Working Capital)

Direct Financial Obligations

Item 2.03 specifically requires that a company disclose, as applicable, the following information if it becomes obligated under a material, direct financial obligation:

- the date on which the company becomes obligated on the material, direct financial obligation;
- a brief description of the transaction or agreement creating the material, direct financial obligation;
- the amount of the material, direct financial obligation, including the terms of its payment;
- a brief description of the material terms under which the material, direct financial obligation may be accelerated or increased;



- the nature of any recourse provisions that would enable the company to recover from third parties; and
- a brief description of any other material terms and conditions of the transaction or agreement.

A company is not required to file a Form 8-K under Item 2.03 until it enters into an enforceable agreement, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. If there is no such agreement, the company is required to file a Form 8-K under Item 2.03 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.

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 is required to disclose the entering into of the facility, program or similar arrangement, and is further required to disclose its material obligations 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 on Form 8-K 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 under Item 2.03, provided that the prospectus relating to the sale contains the information required by this item and is filed within the required time period under Rule 424 of the Securities Act.

Obligations Under Off-Balance Sheet Arrangements

Item 2.03 specifically requires that the company disclose, as applicable, the following information if it becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement:

- the date on which the company becomes directly or contingently liable on the obligation;
- a brief description of the transaction or agreement creating the arrangement and obligation;
- a brief description of the nature and amount of the company's obligation under the arrangement;



- the material terms under which the obligation may become a direct obligation;
- the material terms under which the obligation may become accelerated or increased;
- the nature of any recourse provisions that would enable the company to recover from third parties;
- if different, the maximum potential amount of future payments (undiscounted) that the company may be required to make; and
- a brief description of any other material terms and conditions of the obligation or arrangement.

A company is required to disclose off-balance sheet arrangements regardless of whether 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 the fourth business day after the contingent obligation is created or arises, and the day on which an executive officer of the company becomes aware of the contingent obligation.

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

This is a new disclosure requirement. Item 2.04 requires disclosure if a triggering event causing any of the following occurs and the consequences of such are material to the company:

- the increase or acceleration of a direct financial obligation of the company;
- the increase or acceleration of the company's obligation under an off-balance sheet; or
- a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company.



For purposes of Item 2.04, "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." "Off-balance sheet arrangement" and "direct financial obligation" generally have the same definitions set forth in Item 2.03; provided, however, that for purposes of Item 2.04 "direct financial obligation" also includes "an obligation arising out of an off-balance sheet arrangement that is accrued under the FASB Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies* (SFAS No. 5) as a probable loss contingency."

Direct Financial Obligations

Item 2.04 specifically requires a company to disclose, as applicable, the following with respect to a triggering event causing the increase or acceleration of a direct financial obligation of the company, the consequences of which are material to the company:

- the date of the triggering event;

- 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;

- 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 direct financial obligation.

Off-Balance Sheet Arrangements

Item 2.04 specifically requires a company to disclose, as applicable, the following with respect to a triggering event causing the increase or acceleration of the company's obligation under an off-balance sheet or causing a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, the consequences of which are material to the company:

- the date of the triggering event;

- 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;

- 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.

Instructions to Item 2.04

The SEC has set forth certain guidance in the instructions to Item 2.04. In particular, the SEC has stated that a company will not be required to file a Form 8-K under Item 2.04:

- 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; or

- if its believes, in good faith, that no triggering event has occurred, unless the company has received appropriate notice of such triggering event.



Further, the SEC has stated that a company will be required to file a Form 8-K under Item 2.04:

- 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, regardless of whether the company is also a party to the transaction or agreement under which the triggering event occurs; or
- if the 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 under that obligation an accrual for a probable loss is required under SFAS No. 5, the obligation arising out of the off-balance sheet arrangement becomes a direct financial obligation for purposes of Item 2.04 and the consequences are material to the company.

Item 2.05 Costs Associated with Exit or Disposal Activities

This new item requires disclosure when the board, a board committee, or an authorized officer or officers are initially authorized to take an action committing the company to a plan that results in a material write-off or restructuring charge under GAAP. Item 2.05 requires the company to disclose:

- the date upon which the company committed to the proposed action;
- a description of the proposed action, including the facts and circumstances leading up to the expected action and the expected completion date; and
- a breakdown of the amounts and range of amounts of each major cost, total costs and future cash expenditures associated with the course of action being taken.

If the costs of the expected action are not known at the time of filing such costs do not need to be disclosed. But the company must make an amended report on Form 8-K after it makes an estimate or range of estimates on the costs of the proposed action.

Item 2.06 Material Impairments

New Item 2.06 requires disclosure when a company's board, a board committee, or an authorized officer or officers conclude that the company is required to record a "material charge" for impairment to one or more of its assets under GAAP. Item 2.06 includes the disclosure of a material impairment of securities or goodwill. Item 2.06 requires the company to disclose:

- the date on which the conclusion was reached;

- a description of the assets subject to impairment and the facts and circumstances leading up to the impairment; and

- a breakdown of the amounts or range of amounts of the impairment charge and future cash expenses associated with the impairment charge.

As with Item 2.05, if the costs of the impairment cannot be properly estimated at the time of filing, such costs do not need to be immediately disclosed. But the company must make an amended report on Form 8-K after it makes an estimate or range of estimates on the costs of the proposed action.

In its instructions to Item 2.06, the SEC recognizes that tests for impairment often can occur in connection with the preparation, review or audit of financial statements. To this end, the SEC has instructed that no Form 8-K disclosure is required if the conclusion is made in connection with the review, preparation or audit of financials at the end of a fiscal quarter or year and the plan is disclosed in the company's Exchange Act report for that period.

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

New Item 3.01 is triggered when a company receives notice from a national securities exchange or national securities association that (a) the company or a class of its securities no longer meets listing requirements or other standards, (b) a class of the company's securities has been delisted, or (c) the company receives a public reprimand letter indicating material noncompliance. After receiving such a notice or public reprimand letter, the company must file a Form 8-K that discloses:

- the date the company received the notice or reprimand letter;



- the listing requirement or other standard that the company failed to satisfy; and
- the company's planned response.

In its instructions, however, the SEC has noted that disclosure related to a delisting notice is not required if it is the result of one of the following (which are parallel to the exceptions set forth in Rule 12d2-2, whereby national securities exchanges file with the SEC to delist a security):

- the entire class of the securities has been called for redemption, maturity or retirement and if required by the securities, funds for the payment of all of the securities have been deposited with an agency to make such payments and the funds have been made available to the shareholders;
- the entire class of the securities has been redeemed or paid at maturity or retirement;
- the instruments representing the entire class of securities have come to evidence other securities in substitution thereof and represent no other right (except the right to receive an immediate cash payment); and
- all rights pertaining to the entire class of security have been extinguished.

The SEC has also made it clear that Item 3.01 does not require a company to file a Form 8-K in response to receiving an "early warning" notice. Such a notice merely informs the company that it is in danger of falling out of compliance and therefore does not require disclosure; Item 3.01 is clear that the notice must alert the company that it is actually out of compliance.

Item 3.01 also applies when the company notifies a national securities exchange or national securities association that the company is aware of a material noncompliance with a continued listing standard or when it voluntarily terminates or transfers its listing. After delivering such a notice or terminating/transferring its listing, the company must file a Form 8-K that discloses:

- the date the company provided the notice;



- the listing requirement or other standard that the company failed to satisfy; and
- the company's planned response.

Item 3.02 Unregistered Sales of Equity Securities

Disclosure under Item 3.02 is triggered by the sale of a company's securities in a transaction that is not registered by the Securities Act, if such a sale (based on the company's last periodic report) is equal to or greater than 1% of the company's total outstanding shares, or 5% for small business issuers.

Following such a sale, the company must make the disclosures specified in subsections (a) and (c) through (e) of Item 701 of Regulation S-K.

If a sale of unregistered securities is not required to be reported under Item 3.02, it must still be reported in the company's applicable Form 10-Q, Form 10-QSB, Form 10-K and Form 10-KSB.

Item 3.03 Material Modifications to Rights of Security Holders

This is a new disclosure requirement for Form 8-K. However, the substance of the disclosure is the same as previously required by Items 2(a) and (b) of Forms 10-Q and 10-QSB. New Item 3.03 requires a company to disclose any material modifications to the rights of holders of the company's registered securities and describe the general effect of such modifications on such rights. Once a company has made a material modification disclosure on Form 8-K, the company is not required to include a duplicative disclosure about the modification in any later filed periodic report.

Item 4.01 Changes in Registrant's Certifying Accountant

This is an existing disclosure requirement concerning the resignation, dismissal or engagement of independent auditors. The new Item 4.01 essentially retains all of the substantive requirements of former Item 4 of Form 8-K.

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

This is a new disclosure requirement for Form 8-K. Under Item 4.02(a), whenever a company concludes that any of the company's previously issued annual or interim financial statements should no longer be relied upon, the company must disclose:

- the date such conclusion was reached;
- identification of the financial statements that should no longer be relied upon;
- a description of the facts underlying the conclusion; and
- a statement as to whether the company discussed the subject matter underlying the conclusion with its independent auditors.

Under Item 4.02(b), whenever a company is advised or receives a notice from its independent auditors that disclosure should be made or action taken to prevent future reliance on a previously issued auditor's report or review related to previously issued financial statements, the company must disclose:

- the date the company was so advised or notified;
- identification of the financial statements that should no longer be relied upon;
- a description of the information provided by the auditors; and
- a statement as to whether the company discussed the subject matter giving rise to the notice with the independent auditors.

Item 4.02(b) requires that the company provide the independent auditors with a copy of the disclosures the company has made under Item 4.02(b) no later than the same day it files those disclosures with the SEC. The company must request that the independent auditors furnish to the company a letter addressed to the SEC stating whether or not the independent auditors agree with the company's statements and, if not, stating the respects in which it does not agree. The company must file the independent auditor's letter as an exhibit to the previously filed Form 8-K (by filing an amendment to the previously filed Form 8-K) within two business days after receipt of the letter.



Item 5.01 Changes in Control of Registrant

This is an existing disclosure requirement. The new Item 5.01 essentially retains all of the substantive elements of former Item 1 of Form 8-K.

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

Item 5.02 expands the disclosures required under former Item 6 of Form 8-K.

Departures of Directors Due to Disagreement with the Company

Under Item 5.02(a), if a director resigns or refuses to stand for re-election due to a disagreement with the company (known to an executive officer of the company) relating to the company's operations, policies or practices, or if a director has been removed for cause, the company must disclose:

- the date of such resignation, refusal to stand for re-election or removal;
- any committee positions held by the director at the time of resignation, refusal to stand for re-election or removal; and
- a description of the circumstances representing the disagreement that the company believes caused the resignation, refusal to stand for re-election or removal.

Any correspondence the director has furnished to the company concerning the circumstances surrounding the resignation, refusal to stand for re-election or removal must be filed as an exhibit to the Form 8-K (even if the director has not requested that such correspondence be filed). The company must provide the director with a copy of the Form 8-K disclosures regarding the resignation, refusal to stand for re-election or removal no later than the day the company files the Form 8-K with the SEC and give the director the "opportunity" to furnish the company with a letter indicating whether or not the director agrees with the company's Form 8-K disclosures. Any response letter received from the director must be filed as an exhibit to the previously filed Form 8-K within two business days after receipt by the company.

Departures of Executive Officers and Other Director Departures



Under Item 5.02(b), if a company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns or is terminated, or if a director retires, resigns, is removed, or refuses to stand for re-election (except under circumstances described in Item 5.02(a)), the company must disclose the fact that such event has occurred and the date of the event.

Appointment of New Executive Officer

Under Item 5.02(c), if the company appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions, the company must disclose:

- the name, age, business background, position and term of office of the newly appointed officer;
- the date of the appointment;
- all positions previously held by the new officer with the company, if any;
- a description of any arrangements between the new officer and any other person regarding his or her appointment as an officer of the company;
- a description of any family relationships between the new officer and any director, executive officer or director nominee of the company;
- a description of any transaction or proposed transaction, since the beginning of the company's last fiscal year, between the new officer and the company in which the amount involved exceeds \$60,000; and
- a description of the material terms of any employment agreement with the new officer.

If information regarding the terms of the new officer's employment agreement is not determined or available at the time of filing, the company can include a statement to that effect in the Form 8-K and then file an amendment to the Form 8-K containing such information within four business days after the information is



determined or becomes available. A company can delay making the Item 5.02(c) disclosure if it intends to make a public announcement of the appointment of a new executive officer other than by means of a Form 8-K report until the day of such public announcement.

Election of New Director

Under Item 5.02(d), if a new director is elected, other than by a vote of shareholders at an annual or special meeting, the company must disclose:

- the name of the newly elected director;
- the date of election;
- a description of any arrangements between the new director and any other person regarding his or her selection as a director of the company;
- the board committees to which the new director has or will be appointed; and
- a description of any transaction or proposed transaction, since the beginning of the company's last fiscal year, between the new director and the company in which the amount involved exceeds \$60,000.

If information regarding the board committees to which the new director will be appointed or significant transactions between the new director and the company is not determined or available at the time of filing, the company can include a statement to that effect in the Form 8-K and then file an amendment to the Form 8-K containing such information within four business days after the information is determined or becomes available.

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

This is a new disclosure requirement.

Amendments to Articles of Incorporation or Bylaws

Under Item 5.03(a), if a company amends its articles of incorporation or bylaws and such amendment was not disclosed in a proxy or information statement, the company must disclose:



- the effective date of the amendment; and
- a description of the provision adopted or changed by the amendment, and if applicable, the previous provision.

In response to comments on the proposed rules, the instructions to Item 5.03(a) and Item 601 of Regulations S-K and S-B have been changed to provide 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 Form 8-K in lieu of filing restated articles of incorporation or restated bylaws. If the company elects to file only the text of the amendment as an exhibit to the Form 8-K, it must file the restated articles or restated bylaws as an exhibit to its next periodic report.

Changes to Fiscal Year

Under Item 5.03(b), if a company changes its fiscal year other than by a vote of shareholders or by amendment to its articles of incorporation or bylaws, the company must disclose:

- the date the company determined to change its fiscal year;
- the date of the new fiscal year; and
- the form on which the report covering the transition period will be filed.

Form 8-K Items That Have Been Renumbered

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

This is former Item 11 of the Form 8-K.

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

This is former Item 10 of the Form 8-K.



Item 7.01 (Regulation FD Disclosure) and 9.01 (Financial Statements and Exhibits)

This is former Item 9 of the Form 8-K.

Item 8.01 (Other Events)

This is former Item 5 of the Form 8-K.

Item 9.01 (Financial Statements and Exhibits)

This is former Item 7 of the Form 8-K.

Safe Harbor for Failure to Timely File Form 8-K

The SEC agreed with a number of commentators that several of the new Form 8-K disclosure requirements may require management to quickly assess the materiality of an event or to determine whether a Form 8-K disclosure is triggered. As a result, the SEC's final rules contain a limited safe harbor from public and private claims under Section 10(b) of the Exchange Act and Rule 10b-5 for the failure to timely file a Form 8-K disclosure for 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); and Item 4.02(a) (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report of Completed Interim Review in the case where a company makes the determination and does not receive a notice from its accountants described in Item 4.02(b)).

The safe harbor applies only to the failure to timely file the Form 8-K. Material misstatements or omissions in a Form 8-K will continue to be subject to liability under Section 10(b) and Rule 10b-5. In addition, if a company has a duty to disclose information that is covered by a Form 8-K item subject to the safe harbor for any reason other than the Form 8-K requirement, the safe harbor will not provide protection from liability under Section 10(b) and Rule 10b-5 that arises from the company's failure to satisfy such separate disclosure obligation.

The safe harbor extends only until the due date of the company's next periodic report. For example, if an event arises during a quarter that triggers a Form 8-K disclosure and the company does not timely file a Form 8-K disclosing such event, then the company must provide the Form 8-K disclosure required for such event in the quarterly or annual report filed for the quarter in which such event occurred.



Eligibility for Short Form Registration Statements

In response to comments on the proposed rules, the SEC's final rules provide that a company will not lose its eligibility to use the short form registration statements (Forms S-2 or S-3) if the company fails to timely file a Form 8-K required by Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a). The final rules provide, however, that the company must be current in its Form 8-K filings with respect to such items at the actual time of filing the Form S-2 or S-3.

Rule 144 Availability

In response to comments on the proposed rules, the SEC's final rules provide that a company need not have filed all required Form 8-Ks during the 12 months preceding a proposed sale under Rule 144 in order for the company to satisfy the "current public information" condition of Rule 144.

Copy of Final SEC Rules Revising Form 8-K

The final SEC rules revising Form 8-K are available on the SEC's website at <http://www.sec.gov/rules/final/33-8400.htm>.

Compliance Dates for Final Rules Implementing Sarbanes-Oxley Act

The following table lists the compliance dates for final rules adopted in 2003 by the SEC to implement the Sarbanes-Oxley Act. These final rules were discussed in our February 2003, April 2003, May 2003 and July 2003 Securities Briefings.

Members of Gray Plant Mooty Securities Practice Team

Attorneys on the Securities Team include:

Note on Distribution of Securities Briefing: If you have friends or business associates who would like to receive the Gray Plant Mooty Securities Briefing, please forward the URL of this page to them by e-mail.

This newsletter is a periodic publication of Gray, Plant, Mooty, Mooty & Bennett that should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general



information purposes only, and you are urged to consult legal counsel concerning your situation and any specific legal questions you may have.

Copyright 2004. All rights reserved.

Gray, Plant, Mooty, Mooty & Bennett, P.A.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.