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SEC ISSUES FINAL RULES REGARDING ADDITIONAL FORM 8-K DISCLOSURES AND ACCELERATED FILING DEADLINE

By Carl C. Hanemann and Celeste E. Rasmussen

On March 16, 2004, the SEC issued final rules amending Form 8-K to expand the number of events that are required to be reported on the form. The amendments also shorten the Form 8-K filing deadline for most items to four business days after the occurrence of an event triggering the disclosure requirements. According to the SEC, the final rules are responsive to the "real time issuer disclosure" provisions in Section 409 of the Sarbanes-Oxley Act of 2002. The effective date of the new rules is August 23, 2004.

Additional guidance about the new 8-K filing requirements can be found in the SEC's final rules release. ([Click here to link to the full text of the final rules release.](#))

Summary of the New Rules

Complete Overhaul of Form 8-K. The final rules (i) add eight new disclosure requirements, (ii) transfer, in part, two disclosure requirements currently in Forms 10-Q and 10-K to Form 8-K and (iii) expand the scope of disclosure under two existing Form 8-K items. The final rules also implement a new topical numbering scheme for Form 8-K, which is described in more detail below.

Accelerated Filing Deadlines. Public companies will now have to file a Form 8-K within four business days after a triggering event. The four business day filing period does not apply, however, to Regulation FD disclosures that are furnished under new Item 7.01 (currently Item 9) or filed under new Item 8.01 (currently Item 5), the deadlines for which are governed by Rule 100(a) of Regulation FD.

New Limited Safe Harbor. As amended, Form 8-K will include a limited safe harbor from public and private claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The safe harbor will apply to any failure to timely file a Form 8-K relating to new Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a). The safe harbor is limited because it will only protect a company from claims that it violated Section 10(b) or Rule 10b-5 *as a result of a late filing*. Thus, material misstatements or omissions in a Form 8-K will continue to be subject to Section 10(b) and Rule 10b-5

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liability. The safe harbor expires on the due date of the company's next periodic filing on Form 10-Q or Form 10-K for the relevant period in which the Form 8-K was not timely filed.

Eligibility for Use of Form S-2 or Form S-3. In connection with the amendments to Form 8-K, the SEC also amended the registration statements on Forms S-2 and S-3 under the Securities Act of 1933. Under the revised instructions to Forms S-2 and S-3, companies that are late in filing a Form 8-K required by Item 1.01 (entry into a material definitive agreement), 1.02 (termination of a material definitive agreement), 2.03 (creation of either a direct or off-balance sheet financial obligation), 2.04 (acceleration or increase of either a direct or off-balance sheet financial obligation), 2.05 (exit or disposal activities), 2.06 (material impairments) or 4.02(a) (non-reliance on previously issued financial statements) will not lose their eligibility to use Form S-2 and S-3 registration statements. However, a company must be current in its Form 8-K filings with respect to the items listed above on or before the date that it files a registration statement on Form S-2 or S-3 in order to satisfy the eligibility requirements of these forms. With respect to the other Form 8-K items, a company's failure to timely file a Form 8-K will result in the loss of Form S-2 or S-3 eligibility for the 12 months following the Form 8-K due date.

Eligibility for Use of Rule 144. Because of the significant burden that would be placed on selling security holders if eligibility to rely on Rule 144 under the Securities Act were conditioned on a company's satisfaction of the new Form 8-K requirements, the final rules amend Rule 144 to clarify that a company need not have filed all required Form 8-K reports during the 12 months preceding the sale of securities pursuant to Rule 144 to satisfy the rule's "current public information" condition.

No "Mini-MD&A" Analysis Required. The final rules eliminate the proposal for a "mini-MD&A" in connection with new Items 1.02, 2.04, 2.05 and 2.06 that would have required management to supply a brief analysis of the effect of these events on the company. The SEC noted, however, that any disclosure made in a report on Form 8-K, as always, must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading.

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Summary of Amended Form 8-K Disclosure Items

The SEC has reorganized the Form 8-K disclosure items into topical categories. The following is a brief summary of the disclosure items, in numerical order, under the amended Form 8-K. Please note that this summary only highlights the broad substantive requirements under each item and that additional details can be found in the SEC's final rules release, a link to which is included above.

Section 1 – Registrant's Business and Operations

Item 1.01 – Entry into a Material Definitive Agreement

- This new item requires a company to file a Form 8-K when it (i) enters into a material definitive agreement other than in the ordinary course of business or (ii) amends a material definitive agreement, even if the underlying agreement previously had not been disclosed by the company (for example, if it was entered into prior to the effective date of this item). The company also must provide a brief description of the agreement or the amendment.
- A “material definitive agreement” is defined as an agreement that provides for obligations that are material to and enforceable against the company, or rights that are material to and enforceable by the company against one or more other parties to the agreement, in each case whether or not subject to conditions.
- This item does not require the disclosure of entry into a non-binding agreement, such as a letter of intent.
- A company is encouraged to, but does not have to, file the relevant agreement as an exhibit to the Form 8-K. The company can wait until its next periodic report, giving time for it to submit a confidential treatment request, if necessary.

Item 1.02 – Termination of a Material Definitive Agreement

- This new item requires a company to file a Form 8-K when it terminates any material definitive agreement not made in the ordinary course of business, other than by expiration of the

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agreement on a stated termination date or as a result of all parties completing their obligations under the agreement.

- The company must provide a brief description of (i) the terms and conditions of the agreement that are material to the company, (ii) the material circumstances surrounding termination and (iii) any early termination penalties incurred by the company.

Item 1.03 – Bankruptcy or Receivership

- Item 1.03, relating to a company's entry into bankruptcy or receivership, is substantively unchanged from current Item 3 of Form 8-K.

Section 2 – Financial Information

Item 2.01 – Completion of Acquisition or Disposition of Assets

- Item 2.01 is substantively unchanged from current Item 2 of Form 8-K. This item requires the filing of a Form 8-K if the company, or any of its majority-owned subsidiaries, has acquired or disposed of a significant amount of assets, other than in the ordinary course of business.
- The SEC will no longer require disclosure regarding the nature of the business in which the acquired assets were used and whether the company intends to continue such use.

Item 2.02 – Results of Operations and Financial Condition

- Item 2.02, which provides for filings as to quarterly and annual earnings releases and other releases of non-public financial information for completed periods, is substantively unchanged from current Item 12 of Form 8-K.

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

- This new item requires a company to file a Form 8-K when it becomes obligated under a material direct financial obligation or if it becomes directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement.

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- A “direct financial obligation” includes any material long-term debt obligation, capital lease obligation, operating lease obligation or short-term debt obligation, each as defined in Item 303 of Regulation S-K.
- The company must describe the amount of the obligation, including the terms of its payment, and provide, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the company to recover from third parties.
- The disclosure requirement is not triggered if the obligation is a registered security (for example, registered notes or other evidences of indebtedness).

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

- This new item requires a company to file a Form 8-K after any triggering event causing the increase or acceleration of any direct financial obligation, if the consequences of the event are material to the company. It also requires the filing of a Form 8-K after a triggering event that causes (i) any obligation under an off-balance sheet arrangement to increase or be accelerated or (ii) any contingent obligation under an off-balance sheet arrangement to become a direct financial obligation of the company, in each case if the consequences of the event are material to the company.
- The company must also disclose any other material obligations that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event.

Item 2.05 – Costs Associated with Exit or Disposal Activities

- This new item requires a company to file a Form 8-K when its board of directors, a board committee, or an officer (if board action is not required) commits the company to any of the following actions as a result of which the company will incur material charges under GAAP: (i) an exit or disposal plan, (ii)

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other disposal of a long-lived asset or (iii) termination of employees, in each case under a plan of termination described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146, "Accounting for Costs Associated with Exit or Disposal Activities."

- If, at the time of filing, the company is unable to make a good faith estimate of the amount of the charges, it will not need to disclose an estimate at that time, but must still file the Form 8-K. It must amend its Form 8-K to include the estimate within four business days after the estimate is formulated.

Item 2.06 – Material Impairments

- This new item requires Form 8-K disclosure when a company's board of directors, a committee of the board of directors, or an authorized officer or officers (if board action is not required) concludes that a material charge for impairment to one or more of the company's assets, including, without limitation, an impairment of securities or goodwill, is required under GAAP.
- No Form 8-K disclosure is required pursuant to this new item if the conclusion regarding the material charge is made in connection with the preparation, review or audit of financial statements at the end of a fiscal quarter or year and the charge is disclosed in the company's next Form 10-Q or Form 10-K.

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

- This new item requires a company to file a Form 8-K after it receives any notice from a stock exchange (such as the NYSE) or national securities association (such as Nasdaq) indicating that (i) it does not satisfy the exchange's or association's continued listing requirements or (ii) it has been delisted.
- A company must also file a Form 8-K under this item if (i) it has taken definitive action to transfer from one exchange to another or to withdraw its listing or (ii) it has notified the

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exchange that the company is aware of any material noncompliance with a listing rule or standard.

- A company is not required to report receipt of an “early warning” notice that it is in danger of falling out of compliance with a listing standard.

Item 3.02 – Unregistered Sales of Equity Securities

- This new item requires a company to file a Form 8-K reporting the sale of equity securities in a transaction that is not registered under the Securities Act (for example, in a private placement). This disclosure is currently required by Item 2(c) of Form 10-Q and Item 5(a) of Form 10-K.
- Form 8-K disclosure is not required if the equity securities sold in the aggregate since the company’s last report filed under this item or last Form 10-Q or 10-K, whichever is more recent, constitute less than 1% of the company’s outstanding securities of that class. Any transactions below this threshold will be required to be reported in the company’s next Form 10-Q or 10-K.

Item 3.03 – Material Modifications to Rights of Security Holders

- This new item requires a company to (i) disclose material modifications to the rights of the holders of any class of its registered securities and (ii) briefly describe the general effect of the modifications.
- The substance of this disclosure is the same as currently required by Items 2(a) and (b) of Form 10-Q.

Section 4 – Matters Related to Accountants and Financial Statements

Item 4.01 – Changes in Registrant’s Certifying Accountant

- The disclosure under Item 4.01, relating to the resignation, dismissal or engagement of the company’s independent accountant, is substantively unchanged from current Item 4 of Form 8-K.

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

- Part (a) of new Item 4.02 requires a company to file a Form 8-K if its board of directors, a board committee, or an officer (if board action is not required), concludes that any of the company's previously issued financial statements should no longer be relied upon because of an error in the financial statements as addressed in Accounting Principles Board Opinion No. 20.
- Part (b) of new Item 4.02 requires a company to file a Form 8-K if its independent accountant informs it that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements. Any Form 8-K filed under Item 4.02(b) must be provided to the company's independent accountant on the day it is filed. In addition, the company also must request its independent accountant to furnish to the company as promptly as possible a letter addressed to the SEC stating whether the accountant agrees with the statements made by the company in the Form 8-K and, if not, stating the respects in which it does not agree. The company must then amend its previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K within two business days of the company's receipt of the letter.

Section 5 – Corporate Governance and Management

Item 5.01 – Changes in Control of Registrant

- The disclosure under Item 5.01 is substantively unchanged from current 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(a)

- Item 5.02(a) broadens the scope of current Item 6 of Form 8-K, which requires disclosure only if a director departed as a result

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of a disagreement, provided a letter to the company describing the disagreement, and then requested that the company publicly disclose the letter.

- The revised version of this item will require a company to file a Form 8-K if (i) a director has resigned or refuses to stand for re-election because of a disagreement with the company, known to any executive officer, on any matter relating to the company's operations, policies or practices, or (ii) a director has been removed from the board of directors for cause. The company must provide a copy of the Form 8-K to the director no later than the day of filing.
- The company must provide a brief description of the disagreement that management believes caused, in whole or in part, the director's resignation, refusal to stand for reelection or removal. The term "disagreement" is not defined in Item 5.02 (a).
- In addition, the company must file as an exhibit to the Form 8-K any written correspondence between the director and the company regarding the circumstances surrounding the director's resignation, refusal to stand for reelection or removal, regardless of whether the director requests the writing to be filed. The company must also provide the director with the opportunity to furnish a letter addressed to the company as promptly as possible, stating whether he or she agrees with the company's disclosures in response to this item and, if not, the respects in which he or she does not agree. The company will be required to file any such letter that it receives from the director within two business days by amending the previously filed Form 8-K.

Item 5.02(b)

- A company is required to file an 8-K under Item 5.02(b) when its principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns or is terminated from that position.

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- This item also requires disclosure when a director retires, resigns, is removed or declines to stand for re-election and the company is not required to provide disclosure under Item 5.02 (a) (because there was no “disagreement” with the company).

Items 5.02(c) and (d)

- Item 5.02(c) requires the filing of a Form 8-K 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 certain background information about the new officer, including any related-party transactions with the company, and provide a brief description of any employment agreement between the company and the officer.
- Item 5.02(d) requires the filing of a Form 8-K if a new director is elected to the board, except by a vote of security holders at an annual meeting or a special meeting convened for such purpose. The company must disclose certain background information about the new director, including any related-party transactions with the company, the names of any committees to which the director is expected to be named, and a description of any arrangement or understanding pursuant to which the new director was selected to become a director.

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

- This new item requires a company to file a Form 8-K if it amends its articles of incorporation or bylaws and a proposal for the amendment was not disclosed in a proxy or information statement filed by the company. The company must provide the effective date of the amendment, a description of the provision adopted or changed by the amendment and, if applicable, the previous provision. This item is only applicable to companies that have equity securities registered under Section 12 of the Exchange Act.
- If the company only files the text of the amendment as an exhibit to the Form 8-K, it must file the entire restated articles of incorporation or bylaws as an exhibit to its next Form 10-Q or Form 10-K.

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- In addition, this new item requires a company to file a Form 8-K when it determines that it will change its fiscal year. No filing will be required if the change will be made by amending the company's articles of incorporation or bylaws or by submitting the change to a vote of its security holders, through the solicitation of proxies or otherwise.

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

- This item requires the same disclosure as current 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

- This item requires the same disclosure as current Item 10 of Form 8-K.

Section 6 – Reserved

Section 7 – Regulation FD

Item 7.01– Regulation FD Disclosure

- This item requires the same disclosure as current Item 9 of Form 8-K.

Section 8 – Other Events

Item 8.01 – Other Events

- This item requires the same disclosure as current Item 5 of Form 8-K.

Section 9 – Financial Statements and Exhibits

Item 9.01 – Financial Statements and Exhibits

- This item requires the same disclosure as current Item 7 of Form 8-K.

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SEC PROPOSES MANDATORY ELECTRONIC FILING OF FORM ID

By Amos J. Oelking, III

On March 15, 2004, the SEC released proposed rules that would require the electronic filing of Form ID, the application for access codes to file on the SEC's EDGAR system. Currently, applicants are required to file a Form ID in paper form by fax.

In order to help ensure the authenticity of electronically-filed Forms ID, the proposed rules would require applicants to file in paper form by fax, within two business days before or after electronically filing a Form ID, a notarized document manually signed by the applicant that includes the information contained in the Form ID and confirms the authenticity of the filed Form ID. The SEC expects to eventually replace this procedure with a requirement that applicants use a certificate from a certification authority, which would work like an electronic "pass card," to authenticate their Form ID filings.

The SEC expects the new rules requiring electronic filing of Form ID to become effective in late April 2004, by which time a new on-line filing system is scheduled to be completed.

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Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

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