



# CORPORATE ADVISOR

**Babirak, Vangellow & Carr, P.C.**

## **SEC Adopts Eight New Form 8-K Disclosure Requirements and Accelerates the Filing Deadline for Most Items to Four Business Days**

### Overview

On March 11, 2004, the SEC adopted amendments to the Form 8-K disclosure requirements that would significantly increase the events required to be reported on the form. These amendments to the Form 8-K are probably one of the most important disclosure rulemakings in several years and represent a significant move toward the “real time” disclosure mandated by Section 409 of the Sarbanes-Oxley Act of 2002.

The amendments add eight new disclosure items, transfer two disclosure items from periodic reports and expand disclosure under two existing items. The amendments also require the Form 8-K to be filed within four business days, except for disclosures under Regulation FD and voluntary disclosures and certain exhibits. There is no provision for extension of this filing deadline.

The eight new disclosure items are:

- Entry into a material non-ordinary course agreement
- Termination of a material non-ordinary course agreement
- Creation of a material direct financial obligation or material obligation under an off-balance sheet arrangement
- Triggering events that accelerate or increase a material direct financial obligation or material obligation under an off-balance sheet arrangement
- Material costs associated with exit or disposal activities
- Material impairments
- Notice of delisting or failure to satisfy a continued listing rule or standard
- Non-reliance on previously issued financial statements or related audit report or completed interim review (restatements)

The two disclosure items transferred from periodic reports are:

- Unregistered sales of equity securities
- Material modifications to rights of security holders

The expanded disclosure requirements are:

- Departure of directors or principal officers, election of directors, or appointment of principal officers
- Amendments to articles of incorporation or by-laws and change in fiscal year

The amendments to the Form 8-K are effective August 23, 2004.

### **Summary of New Form 8-K Disclosure Requirements**

#### **1. Entry into Material Definitive Agreement (Item 1.01)**

New Item 1.01 requires disclosure of material definitive agreements entered into by a company not in the ordinary course of business, including business combination agreements and other agreements that relate to extraordinary corporate transactions.

Disclosure is also required of any material amendments to a material definitive agreement (even if the original agreement was entered into before the effective date of this Item).

#### **2. Termination of a Material Definitive Agreement (Item 1.02)**

New Item 1.02 requires disclosure if a material definitive agreement not made in the ordinary course of business to which a company is a party is terminated, other than by expiration of the agreement on a stated termination date or as a result of all parties completing their obligations under the agreements.

#### **3. Creation of a Direct Financial Obligation (Item 2.03)**

New Item 2.03 requires disclosure of information if the company becomes obligated under a direct financial obligation that is material to the company. A "direct financial obligation" includes certain long term debt, capital leases, operating leases, and short term debt incurred outside the ordinary course of business. Also, the item requires disclosure if the company becomes directly or contingently liable for a material obligation arising out of an off-balance sheet transaction.

#### **4. Events that Accelerate or Increase a Direct Financial Obligation or Obligation under an Off Balance Sheet Arrangement**

New Item 2.04 requires a company to file a Form 8-K if a triggering event causing the increase or acceleration of a material direct financial obligation of the company occurs. Disclosure is also required if such obligation is increased, accelerated, or results in a company's contingent obligation becoming a direct financial obligation.

5. Costs Associated with Exit or Disposal Activities (Item 2.05)

New Item 2.05 requires disclosure when the Board of Directors, a committee of the Board, or an authorized officer commits the company to an exit or disposal plan or otherwise disposes of a long-lived asset or terminates employees under a plan of termination under which material charges will be incurred under GAAP. For purposes of the item, “commitment” means a final determination regarding a course of action.

6. Material Impairments (Item 2.06)

New Item 2.06 requires disclosure when the Board of Directors, any committee of the Board, or an authorized officer concludes that a material charge for impairment of one or more of its assets, including securities or goodwill, is required under GAAP.

7. Notice of Delisting or Failure to Satisfy Continued Listing Standard or Rule; Transfer of Listing (Item 3.01)

New Item 3.01 requires a company to report its receipt of a notice of delisting from a national securities exchange (such as NYSE or AMEX) or national securities association (such as NASDAQ) that maintains the principal listing for any class of its common equity. The company is also required to disclose if: (i) it has notified any such exchange or association which maintains the principal listing for the company’s equity of any material noncompliance with any continued listing requirement, (ii) if the exchange or securities association issues a public reprimand letter, or (iii) if action has been taken to terminate the company’s listing, including the transfer of a listing.

8. Unregistered Sales of Equity Securities (Item 3.02)

New Item 3.02 requires disclosure of sales of equity securities in transactions that are not registered under the Securities Act of 1933, as amended, and is transferred from the Forms 10-Q and 10-K (or Form 10-QSB or 10-KSB).

9. Material Modifications to Rights of Security Holders (Item 3.03)

New Item 3.03 requires disclosure of material modifications to the right of the holders of any class of registered securities, and is transferred from the Form 10-Q (or Form 10-QSB).

10. Non-Reliance on Previously Issued Financial Statements or Related Audit Report or Completed Interim Report (Item 4.02)

New Item 4.02 requires disclosure if the Board of Directors, a committee of the Board, or an authorized officer concludes that previously issued financial statements of the company for one or more years or an interim period should no longer be relied upon because of an error (as addressed in APB No. 20). Also, disclosure is required if the company’s independent accountant advises that disclosure should be made to prevent reliance on a previously issued audit report.

11. Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers (Item 5.02)

New Item 5.02 expands the former Item 6 requirement. Under the new item, disclosure is required if a director resigns or refuses to stand for election since the date of the last annual meeting because of a disagreement with the company, known to an executive officer of the company, on any matter relating to the company's operations, policies or practices, or if a director has been removed for cause. If the director furnishes the company with any written correspondence concerning the circumstances surrounding his resignation, refusal or removal, a copy must be filed as an exhibit to the Form 8-K. The company must provide to the director a copy of any disclosures it is making no later than the day the company files the disclosure with the SEC and provide the director 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 and, if not, the respects in which he or she does not agree. Disclosure under this item is also required if certain principal officers resign, a director retires, resigns, is removed or declines to stand for reelection (without the disclosure required above), and disclosure of the appointment of new officers or new directors.

12. Amendments to Articles of Incorporation or Bylaws; Changes in Fiscal Year (Item 5.03)

New Item 5.03 requires disclosure of any amendment to the company's articles of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement. Also, disclosure is required if the company's fiscal year is changed other than by a vote of security holders or by amendment to its articles.

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***If you have any question regarding any of these changes, please feel free to call Neil R.E. Carr or Bertin Henry Pérez of the firm at (202) 467-0920.***