

Capital Markets and Securities

A bulletin prepared by the Capital Markets Group at Vedder Price designed to keep corporate executives and investment banking professionals informed of major developments in the securities industry.

April 2004

SEC ADOPTS SIGNIFICANT CHANGES TO FORM 8-K

On March 16, 2004, the SEC adopted final rules amending the requirements for Current Reports on Form 8-K under the Securities Exchange Act of 1934. The new rules:

- accelerate the filing deadlines for all required reports on Form 8-K to four business days from the current deadlines of up to fifteen days;
- expand the types of business, financial and management events required to be reported on Form 8-K; and
- adopt a limited safe harbor for failure to file timely certain required Form 8-K reports.

The new Form 8-K requirements, which will become effective on August 23, 2004, are intended to provide investors with important information about public companies on a “real time” basis, furthering the goals of Section 409 of the Sarbanes-Oxley Act of 2002. As finally adopted, the changes to Form 8-K do not purport to require immediate disclosure of all material developments, but rather identify certain categories of events that, because they are deemed material, will now be subject to mandatory current reporting. Nonetheless, in managing disclosure practices and investor relations,

companies should continue to consider the advisability of prompt disclosure of all material developments, as contemplated by stock exchange listing standards and consistent with current widespread practices.

Accelerated Filing Deadlines

An issuer will be required to file a Form 8-K within four business days of an event that triggers a Form 8-K filing requirement. This is a change from the proposing release, where the SEC proposed a two-day filing deadline. The new deadlines do not apply to elective filings on Form 8-K made to comply with Regulation FD, to report voluntary disclosures or to file certain exhibits.

“An issuer will be required to file a Form 8-K within four business days of an event that triggers a Form 8-K filing requirement. This is a change from the proposing release, where the SEC proposed a two-day filing deadline.”

Expansion and Reorganization of Form 8-K Disclosure Items

As amended, Form 8-K has eight new required disclosure items and two items formerly required to be included in periodic reports under the Exchange Act. In addition to those items currently reportable on Form 8-K, the new rules require the following events to be disclosed on Form 8-K:

- entry into, material amendments to or termination of a material agreement;
- new financial obligations or obligations under an off-balance sheet arrangements,

and the occurrence of an event triggering an increase or acceleration;

- any exit or disposal plan, sale of long-lived assets or termination of employees pursuant to a plan of termination under which an issuer will incur material charges under GAAP;
- determination that a material charge for impairment of assets is required under GAAP;
- receipt of notices from an exchange regarding delisting or failure to comply with continuing listing rules or standards;
- notification by any issuer to an exchange of material noncompliance with continuing listing rules or standards;
- any determination by an issuer to transfer or withdraw its listing;
- unregistered sales of equity securities;
- material modifications to rights of security holders;
- non-reliability of previously issued financial statements;
- departures of executive officers and directors for any reason;
- appointments and elections of new executive officers and directors; and
- amendments to charter and bylaws.

The SEC has reorganized Form 8-K into topical sections to enable investors to more readily identify the content of current reports. Further detail on the new Form 8-K items is set forth below under “New Form 8-K Structure.”

The final rules do not require “mini-MD&A” discussions for certain items, as was originally proposed. As argued by many commentators, the SEC concluded that the new abbreviated filing timeframe is too short and disclosure would be more complete if presented along with full financial statements.

Limited Safe Harbor

The SEC amended rules 13a-11 and 15d-11 under the Exchange Act to provide that the failure to timely file a Form 8-K relating to the following events will not be deemed to violate Section 10(b) and Rule 10b-5 under the Exchange Act:

“As amended, Form 8-K has eight new required disclosure items and two items formerly required to be included in periodic reports under the Exchange Act.”

- entry into, material amendments to or termination of a definitive material agreement;
- new financial obligations or obligations under an off-balance sheet arrangements, and the occurrence of an event triggering an increase or acceleration;
- any exit or disposal plan, sale of long-lived assets or termination of employees pursuant to a plan of termination under which an issuer will incur material charges under GAAP;
- determination that a material charge for impairment of assets is required under GAAP; and
- non-reliability of previously issued financial statements due to Company error.

If an issuer fails to file timely a Form 8-K for any of these items, the issuer must include the required disclosure in its next periodic report. Forms S-2 and S-3 eligibility requirements will now provide that failure to timely file a Form 8-K for the items listed above will not result in a loss of eligibility to use those forms, so long as the issuer files the disclosure required by the items listed above on or before the date the registration statement is filed.

The SEC also amended the “current public information” requirement of Rule 144 under the Securities Act to provide that the rule will be satisfied even if an issuer has not filed all required Form 8-K reports during the 12-month period preceding a Rule 144 sale. Therefore, affiliate resales under Rule 144 will not be jeopardized by an issuer’s failure to timely comply with Form 8-K reporting; however, insiders would be well-advised not to sell securities into the market unless the issuer has in fact filed any required Form 8-K reports in order to avoid potential insider trading concerns.

Application of Section 906 of the Sarbanes-Oxley Act of 2002

In the adopting release, the SEC clarifies its position that Section 906 certifications are not required to accompany Form 8-K reports.

ANNUAL MEETING REMINDER: STOCK EXCHANGE COMPLIANCE CERTIFICATES

NYSE and Nasdaq-listed companies are required to provide NYSE or Nasdaq, as the case may be, with a certificate signed by the chief executive officer of the company as to compliance with the new corporate governance listing standards of each exchange within 30 days following a company’s 2004 annual meeting of shareholders. Forms of these certificates are available on the Nasdaq web site at www.nasdaq.com and on the NYSE website at www.nyse.com. NYSE-listed companies are also required to provide NYSE with a “written affirmation” regarding compliance with the new listing standards, along with the chief executive officer certificate, the requirements for which are also available on the NYSE website.

NEW FORM 8-K STRUCTURE

Section 1 – Registrant’s Business and Operations

Item 1.01: Entry Into a Material Definitive Agreement *

Generally, a “material definitive agreement” would include those that an issuer would be required to file as an exhibit to periodic reports on Forms 10-K or 10-Q under Item 601(b)(2) and (10) of Regulation S-K, such as executive compensation or acquisition agreements. Note that the agreement is only required to be filed as an exhibit to the 10-K or 10-Q covering the period the agreement was entered into, however, the SEC encourages earlier filing. If the disclosure relates to a business combination transaction, the issuer will be able to check a box on the Form 8-K cover to indicate that the filing also satisfies any filing requirements under Regulation M-A (and, as of the effective date of the new rules, no additional 425 or 14a-12 filings will be required).

Item 1.02: Termination of a Material Definitive Agreement*

Termination of an agreement due to expiration of or completion of all obligations under the agreement would not require disclosure under this item.

Item 1.03: Bankruptcy or Receivership (formerly Item 3)

Section 2 – Financial Information

Item 2.01: Completion of Acquisition or Disposition of Assets (formerly Item 2)

In the adopting release, the SEC clarified that while Item 1.01 would be used to report entry into a material definitive agreement to acquire or dispose of assets, this item would only be used to report completion of transactions that meet the item’s reporting threshold (i.e., significant asset test).

Item 2.02: Results of Operations and Financial Condition (formerly Item 12 – still considered to be “furnished”)

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

A direct financial obligation is defined as: (1) a long-term debt obligation, (2) capital and operating lease obligations, or (3) a short-term debt obligation arising other than in the ordinary course of business. If the obligation required to be disclosed is a security to be sold pursuant to an effective registration statement, no disclosure under this item is required; provided the final prospectus relating to the security is filed with the SEC pursuant to the requirements of Rule 424 under the Securities Act.

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

Direct financial obligations, for purpose of this item, also include obligations arising out of off-balance sheet arrangements that are accrued as a probable loss contingency.

Item 2.05: Costs Associated with Exit or Disposal Activities*

This item is intended to track the disclosures required in the footnotes to financial statements required by SFAS No. 146.

Item 2.06: Material Impairments*

Disclosure will not be required under this Item if the determination that a material charge for impairments of assets is required under GAAP is made in connection with the preparation and review of financial statements at the end of a fiscal quarter or year and the disclosure required by this item is included in the periodic report for that period.

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*

No disclosure will be required under this item if delisting occurs because: (1) redemption, maturity or retirement of an entire class of securities in accordance with the terms of such securities or (2) all rights relating to the entire class of securities have been extinguished, as set forth in Exchange Act Rule 12d-2.

Item 3.02: Unregistered Sales of Equity Securities (formerly required in Forms 10-K and 10-Q)

No disclosure will be required under this item if the aggregate number of securities sold since an issuer's last report containing disclosure under this item is less than 1% of the issuer's outstanding securities of that class.

Item 3.03: Material Modifications to Rights of Security Holders (formerly required in Form 10-Q)

Section 4 – Matters Related to Accountants and Financial Statements

Item 4.01: Changes in Registrant's Certifying Accountant (formerly Item 4)

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

Item 4.02(a) requires disclosure when a company concludes that prior statements should not be relied on due to an error and Item 4.02(b) requires disclosure when an issuer's independent accountants has provided notice to the issuer that it should take action to prevent future reliance on previously issued financial statements audited or reviewed by the independent accountants.

Section 5 – Corporate Governance and Management

Item 5.01: Changes in Control of Registrant (formerly Item 1)

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

If any information required under this item (i.e., information regarding employment agreements, related party information) is not available at the time of the required Form 8-K filing, the issuer must amend the Form 8-K 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 (formerly Item 8)

If an issuer files only the text of an amendment to a charter or bylaws as an exhibit to the Form 8-K, the restated charter or bylaws must be filed as an exhibit to the issuer's next periodic report.

Item 5.04: Temporary Suspension of Trading Under Registrant's Employee Benefit Plans (formerly Item 11)

Item 5.05: Amendments to Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics (formerly Item 10)

Section 6 – [Reserved]

Section 7 – Regulation FD

Item 7.01: Regulation FD Disclosure (formerly Item 9 – still considered to be “furnished”)

Section 8 – Other Events

Item 8.01: Other Events (formerly Item 5)

Section 9 – Financial Statements and Exhibits

Item 9.01: Financial Statements and Exhibits (formerly Item 7)

*NEW FORM 8-K DISCLOSURE ITEM

Capital Markets and Securities bulletin is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and other interested parties informed of developments in corporate finance and securities matters. It is not a substitute for professional advice.

© 2004 Vedder, Price, Kaufman & Kammholz, P.C. Reproduction of this bulletin is permitted only with credit to Vedder, Price, Kaufman & Kammholz, P.C.. For an electronic copy of this newsletter, please contact us at info@vedderprice.com.

If you have any questions regarding material in this issue of *Capital Markets and Securities*, or suggestions for a specific topic you would like addressed in a future issue, please contact the executive editor, Steven J. Gray, at 312/609-7528 or at sgray@vedderprice.com.

Contributing Authors: Jennifer R. Evans and Robyn B. Goldman.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York City and Livingston, New Jersey. The attorneys in the firm's Capital Markets Group regularly represent corporations and investment bankers, both foreign and domestic, in a wide variety of matters, including:

- debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;
- private placement of securities, including Rule 144A and Regulation S transactions;
- tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- international offerings of securities and compliance by foreign issuers with U.S. securities laws;
- litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters; and
- municipal bond financings.

Chicago

222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Robert J. Stucker

New York

805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Neal I. Korval

New Jersey

354 Eisenhower Parkway, Plaza II
Livingston, New Jersey 07039
973/597-1100
Fax: 973/597-9607
John E. Bradley

Principal Members of the Capital Markets Group:

Steven J. Gray (<i>Chair</i>)	312/609-7528
John T. Blatchford	312/609-7605
Thomas P. Desmond	312/609-7647
Christopher R. Elston	312/609-7595
Jennifer R. Evans	312/609-7686
Robyn B. Goldman	312/609-7662
Jennifer Durham King	312/609-7835
James W. Morrissey	312/609-7717
Meeghan O'Donnell	312/609-7529
Richard L. Williams III	312/609-7588
Jason K. Zachary	312/609-7757
Steven R. Berger (<i>New York</i>)	212/407-7714

Participating Members of the Capital Markets Group:

Dana S. Armagno	312/609-7543
James A. Arpaia	312/609-7618
William J. Bettman	312/609-7776
David C. Blum	312/609-7811
Deborah B. Eades	312/609-7661
Karin Jagel Flynn	312/609-7805
Dean N. Gerber	312/609-7638
Douglas M. Hambleton	312/609-7684
Paul R. Hoffman	312/609-7733
John T. McEnroe	312/609-7885
Daniel C. McKay II	312/609-7762
Maureen A. Miller	312/609-7699
Robert J. Moran	312/609-7517
Lane R. Moyer	312/609-7586
Michael A. Nemeroff	312/609-7858
Timothy W. O'Donnell	312/609-7683
Cathy G. O'Kelly	312/609-7657
Daniel O'Rourke	312/609-7669
John R. Obiala	312/609-7522
Thomas E. Schnur	312/609-7715
Daniel T. Sherlock	312/609-7551
Guy E. Snyder	312/609-7656
Robert J. Stucker	312/609-7606
David A. Sturms	312/609-7589
Dalius F. Vasys	312/609-7623
Issa O. Yesufu	312/609-7591
Dan L. Goldwasser (<i>New York</i>)	212/407-7710
Ronald Scheinberg (<i>New York</i>)	212/407-7730
Donald A. Wassall (<i>New York</i>)	212/407-7707