

## Preparing for the New Form 8-K Rules—Effective August 23, 2004

### August 2004

#### *Introduction*

We described the new Form 8-K rules that the SEC adopted in March 2004 in our June 2004 memorandum. With the August 23 effective date of these rules rapidly approaching, we believe it is important for public companies to consider taking steps to prepare for the new rules if they have not yet done so. In addition, you should be aware that on August 4, 2004, the SEC issued some minor technical corrections to the new rules (see SEC Release No. 34-49424A) and the staff of the SEC recently provided informal advice regarding transition issues related to the new rules.

#### *Preparing for August 23*

We suggest public companies consider the following ten-step checklist in their preparations for the new Form 8-K rules:

1. Identify those employees who may become aware of material contracts, amendments to material contracts, direct financial obligations and off-balance sheet arrangements. These will likely include finance staff, human resources staff, business development staff, legal staff working on commercial transactions and potentially some sales personnel. Educate these personnel on the requirements of the new Form 8-K rules. You may find the quick reference guide in [Exhibit A](#) helpful in this regard.
2. Consider policies requiring early notification of internal or external securities counsel of transactions potentially involving entry into, amendment or termination of a material contract, or creation, acceleration or increase in a financial obligation or off-balance sheet arrangement.
3. Educate legal, sales and other personnel working on commercial transactions on the disclosure requirements for material contract accelerations and terminations. Encourage them to avoid such provisions where practical and to ensure that the triggering of such provisions is clear and requires sufficient and prompt notice in future agreements.
4. Consider maintaining up-to-date lists of material contracts and contracts containing cross-default, cross-termination, acceleration or penalty provisions that could require disclosure in a Form 8-K filing under Item 2.04 of the new rules.
5. Consider implementing policies specifying that Board or Board Committee action is required to effect a restructuring, restatement, impairment or delisting action that would trigger a Form 8-K filing.
6. Educate officers, directors and human resources personnel on the disclosure requirements associated with resignations and new appointments.
7. Confirm that your auditors understand the disclosure implications under Item 4.02 of the new rules of their “advising” the company that a restatement is required, to ensure that no confusion arises with regard to any preliminary discussions of a possible restatement.
8. Consider interviewing departing Board members to confirm for the record that no “disagreement” is required to be disclosed under Item 5.02 of the new Form 8-K rules.
9. After August 23, use the revised forms for Forms 8-K, 10-Q and 10-K. Please contact your WSGR attorneys for updated compliance checklists, including our new Form 8-K compliance checklist.
10. Document the steps taken to prepare for the new Form 8-K rules and keep that documentation with your disclosure controls and procedures records.

### ***Technical Amendments***

In the August 2004 release, the SEC made some minor technical corrections to its March 2004 Form 8-K rules. In addition, the August 2004 release made the following more substantive changes:

#### ***—Item 2.01***

The August 2004 release clarifies that Item 2.01 of new Form 8-K, *Completion of Acquisition or Disposition of Assets*, requires disclosure of the identity of the source of funds used in an acquisition only if a material relationship exists between the company and the source of funding, rather than between the company and the person from whom the assets were acquired, as the March 2004 release indicated.

#### ***—Item 5.05(c)***

Pursuant to Item 5.05(c) of new Form 8-K, *Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics*, a company need not file a Form 8-K to disclose certain amendments to or waivers of its code of ethics if it posts the required disclosure on its company website. The August 2004 release clarifies that such website disclosure must be made within four business days of the amendment or waiver, rather than five business days as the March 2004 release indicated.

#### ***—Forms 10-Q and 10-K***

The March 2004 release made certain changes to Forms 10-Q and 10-K that were necessitated by the new Form 8-K rules. The August 2004 release clarifies that the SEC did not intend to delete Item 5(b) of Form 10-Q, which requires a company to

disclose changes to the procedures by which its stockholders may recommend candidates to the board of directors. The August 2004 release also corrects the March 2004 revisions to Item 5(a) of Form 10-K, which erroneously included previously deleted regulatory text permitting the exclusion of disclosure of sales made under Regulation S.

### ***Transition Matters***

Neither the March 2004 release nor the August 2004 release address the transition from the SEC's previous Form 8-K rules to the new rules. Both merely state that the new rules are effective August 23. Based on our conversations with senior members of the staff of the SEC, we have confirmed the following points related to transitional matters:

- If an event occurs ***prior to August 23*** that triggers the filing of a Form 8-K under the ***previous Form 8-K rules***, a company may file a Form 8-K pursuant to the ***previous rules and use the time periods specified in the previous rules*** (rather than the accelerated four business day deadline under the new rules). As a practical matter, however, beginning August 23, the SEC's Edgar filing system will only accept a Form 8-K that uses the new item numbers specified in the new Form 8-K rules. Accordingly, companies filing a Form 8-K on or after August 23 pursuant to the previous rules must ***use the new item numbers specified in the new Form 8-K rules*** (see Exhibit B for a list of the new item numbers and the corresponding item numbers under the previous rules).
- If an event occurs ***prior to August 23*** that would ***not*** trigger the filing of a Form 8-K under the previous Form 8-K rules but would trigger a filing under the new rules, a company is ***not*** required to file a Form 8-K.

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This memorandum is intended only as general information about the matters discussed, and should not be construed as legal advice. For more information about these matters, please contact your Wilson Sonsini Goodrich & Rosati partner.

## Exhibit A

### Revised Form 8-K Disclosure Requirements

Effective August 23, 2004

Beginning August 23, 2004, the revised Form 8-K reporting rules require companies to disclose, generally within *four business days*, the occurrence of any of the following triggering events:

#### ***Business and Operations***

- Entry into, amendment of, or termination of a material definitive agreement not made in the ordinary course of business (see Regulation S-K Item 601(b)(10))
- Bankruptcy or receivership of the company

#### ***Financial Information***

- Acquisition or disposition of a significant amount of the company's assets other than in the ordinary course of business
- Public announcement, release or update disclosing material, non-public information regarding the company's results of operations or financial condition for a completed period (e.g., earnings)
- Occurrence, acceleration or increase of a direct financial obligation (e.g., long-term debt obligation, capital or operating lease obligation, or short-term debt obligation other than in the ordinary course of business) that is material to the company
- Occurrence, acceleration or increase of a direct or contingent material financial obligation arising from an off-balance sheet arrangement
- Commitment to an exit or disposal plan, disposal of a long-lived asset or certain terminations of employees, in each case under which material charges to the company will be incurred (e.g., restructuring or write-offs, SFAS No. 146)
- Conclusion that a material charge for impairment to one or more assets (e.g., an impairment of securities or goodwill), is required under GAAP

#### ***Securities and Trading Markets***

- Certain notices of delisting or failure to satisfy a listing rule on the national securities exchange or association that maintains the company's listing; transfer of listing

- Unregistered sale of securities
- Material modifications to shareholder rights, either through modification of instruments defining shareholder rights or by issuance or modification of another class of securities

#### ***Accountants and Financial Statements***

- Resignation, dismissal of or change in the company's independent accountant
- Conclusion by the company, or advisement by its accountants, of the unreliability of previously issued financial statements, audit reports or interim reviews due to error (restatements)

#### ***Corporate Governance and Management***

- Change in control of the company
- Departure or appointment of principal officers; departure or appointment, outside a stockholders' meeting, of any director
- Amendment to articles or bylaws of the company not disclosed in a proxy statement
- Change in fiscal year of the company by means other than a shareholder vote or amendment to articles and bylaws
- Temporary suspension of trading under the company's employee benefit plan
- Certain amendments to or waivers of code of ethics

#### ***Regulation FD Disclosure***

- Disclosure of certain material non-public information

#### ***Other Events***

- Any event the company deems important to shareholders

**Exhibit B**

<b><u>New Form 8-K Item No.</u></b>	<b><u>Former Item No.</u></b>	<b><u>Safe Harbor</u></b>
<b>Section 1 – Registrant’s Business and Operations</b>		
Item 1.01 – Entry into a Material Definitive Agreement	<i>New Item</i>	<i>Yes</i>
Item 1.02 – Termination of a Material Definitive Agreement	<i>New Item</i>	<i>Yes</i>
Item 1.03 – Bankruptcy or Receivership	Item 3	
<b>Section 2 – Financial Information</b>		
Item 2.01 – Completion of Acquisition or Disposition of Assets	Item 2	
Item 2.02 – Results of Operations and Financial Condition	Item 12	
Item 2.03 – Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant	<i>New Item</i>	<i>Yes</i>
Item 2.04 – Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	<i>New Item</i>	<i>Yes</i>
Item 2.05 – Costs Associated with Exit or Disposal Activities	<i>New Item</i>	<i>Yes</i>
Item 2.06 – Material Impairments	<i>New Item</i>	<i>Yes</i>
<b>Section 3 – Securities and Trading Markets</b>		
Item 3.01 – Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing	<i>New Item</i>	
Item 3.02 – Unregistered Sales of Equity Securities	<i>Moved from Periodic Reports</i>	
Item 3.03 – Material Modifications to Rights of Security Holders	<i>Moved from Periodic Reports</i>	
<b>Section 4 – Matters Related to Accountants and Financial Statements</b>		
Item 4.01 – Changes in Registrant’s Certifying Accountant	Item 4	
Item 4.02 – Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	<i>New Item</i>	<i>Paragraph (a) Only</i>
<b>Section 5 – Corporate Governance and Management</b>		
Item 5.01 – Changes in Control of Registrant	Item 1	
Item 5.02 – Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers	Item 6 (significantly expanded)	
Item 5.03 – Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	Item 8 (significantly expanded)	
Item 5.04 – Temporary Suspension of Trading Under Registrant’s Employee Benefit Plans	Item 11	
Item 5.05 – Amendments to the Registrant’s Code of Ethics, or Waiver of a Provision of the Code of Ethics	Item 10	
<b>Section 6 – [Reserved]</b>		
<b>Section 7 – Regulation FD</b>		
Item 7.01 – Regulation FD Disclosure	Item 9	
<b>Section 8 – Other Events</b>		
Item 8.01 – Other Events	Item 5	
<b>Section 9 – Financial Statements and Exhibits</b>		
Item 9.01 – Financial Statements and Exhibits	Item 7	