Morgan Lewis
COUNSELORS AT LAW

COMPLYING WITH THE NEW FORM 8-K RULES

September 2004

www.morganlewis.com

Philadelphia ■ Washington ■ New York ■ Los Angeles ■ San Francisco ■ Miami ■ Pittsburgh ■ Princeton ■ Chicago ■ Palo Alto ■ Dallas ■ Harrisburg ■ Irvine ■ Boston ■ London ■ Paris ■ Brussels ■ Frankfurt ■ Tokyo

Complying with the New Form 8-K Rules

September 2004

The new Form 8-K rules are upon us. Public companies are now required to provide more categories of disclosure on a revised and renumbered Form 8-K, generally within four business days after the event triggering the reporting requirement. The new Form 8-K now requires disclosure of the following events:

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 Operations and Financial Condition
Item 2.03	Creation of a Direct Financial Obligation or 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

This White Paper is published to inform clients and friends of Morgan Lewis and should not be construed as providing legal advice on any particular matter.

© 2004 Morgan, Lewis & Bockius LLP

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 the 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

I. Introduction

The new Form 8-K rules require companies to make quick factual and legal judgments about several matters. Most reports must be submitted to the SEC within four business days, and no extension of the reporting deadline is allowed. Moreover, the difficulty of making a correct and timely determination of whether a Form 8-K is required is only slightly relieved by limited safe harbors relating to Rule 10b-5 and Forms S-3 and S-2 eligibility that extend to only some of the new Form 8-K items, as explained below in Part II.

To address the new Form 8-K reporting requirements, companies should have an "early warning system" built into their disclosure controls and procedures to help ensure that they do not miss a Form 8-K reporting deadline, as explained below in Parts II and III. Some current issues relating to the new Form 8-K items are addressed in Part IV. Part V identifies Form 8-K updating requirements.

The new Form 8-K must be used for all filings due on or after August 23, 2004. The SEC release adopting the new Form 8-K rules can be found at: http://www.sec.gov/rules/final/33-8400.htm. The new Form 8-K can be found at: http://www.sec.gov/about/forms/form8-k.pdf.

II. Limited Safe Harbors for Late Filings; Furnished Versus Filed Reports on Form 8-K; Late Reports on Form 8-K and Rule 144

A. Limited Safe Harbors

The new rules provide two safe harbors for failure to timely file a Form 8-K under Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a). Each of those items requires a company to make quick factual and legal judgments about the need for disclosure. The safe harbors are intended to alleviate some of the penalties for incorrect or late judgments concerning those items.

1. Anti-fraud Safe Harbor

Amended Exchange Act Rule 13a-11 provides that no failure to file a report on Form 8-K pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a) will be deemed a violation of Section 10(b) or Rule 10b-5. This anti-fraud safe harbor is strictly limited. It does not protect a company from liability under Section 10(b) or Rule 10b-5 for making a material misstatement or material omission in its Form 8-K, or for failing to make a disclosure that is required by another rule or form or by any other item of Form 8-K. Nor does the safe harbor provide any protection under Rule 13a-15 for failing to maintain adequate disclosure controls and procedures. Finally, the safe harbor does not provide any protection from violations of Rule 13a-11 for failing to timely file a Form 8-K.

The SEC's adopting release states that there are two conditions to the anti-fraud safe harbor. First, the safe harbor extends only until the "due date of the periodic report for the relevant period in which the Form 8-K was not timely filed." Second, the annual or quarterly report covering that period must include the disclosure prescribed by the pertinent item of the missed Form 8-K in a new disclosure item in Forms 10-K and 10-Q titled "Other Information." According to the adopting release, the failure to make such disclosure in the periodic report for the period in which the Form 8-K triggering event occurred will subject a company to potential liability under Section 10(b) and Rule 10b-5 and Section 13(a).

2. Short-Form Registration Statement Eligibility "Safe Harbor"

Amended instructions to Forms S-3 and S-2 allow a company to use those forms despite the failure to timely file a report on Form 8-K pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a). This expanded eligibility requirement, which we refer to in this White Paper as the "short-form registration statement safe harbor," is also strictly limited. A company that fails to timely file a Form 8-K required by any other item of Form 8-K will lose eligibility to use those short-form registration statements for the 12-month period following the Form 8-K due date. In addition, the short-form registration statement safe harbor provides no protection from liability for the registration statements or under Rules 13a-11 and 13a-15.

The adopting release, but not amended Forms S-3 and S-2 themselves, states that the short-form registration statement safe harbor is available only if a company discloses the information required in the delinquent Form 8-K in its periodic report for the period in which the Form 8-K triggering event occurred. According to footnote 135 of the adopting release, a company can rely on the short-form registration statement safe harbor even if it fails to include the "Other Information" disclosure in its periodic report for the period in which the Form 8-K triggering event occurred, so long as it includes that information in an amendment to that periodic report prior to filing the short-form registration statement. This aspect of the short-form registration statement safe harbor thus offers longer relief than the anti-fraud safe harbor, which is available only until the due date of the periodic report for the period in which the Form 8-K triggering event occurred.

B. Safe-Harbor Issues: When and How Must a Company Remedy a Failure to Timely File a Required Form 8-K?

The rules and the text of the adopting release relating to the safe harbors are inconsistent as to how a company can cure a failure to timely file a required Form 8-K.

1. File a Late Form 8-K.

Nowhere does the SEC state that a company may file a late Form 8-K to remedy the failure to timely file a Form 8-K. In fact, the release text (including at footnote 135), but not amended Rule 13a-11 or amended Forms S-3 and S-2, states that a company must remedy a late Form 8-K, and may rely on the safe harbors only, by making the "Other Information" disclosure in its periodic report. That requirement, however, could result in unnecessarily late disclosure when a company discovers the missed Form 8-K prior to the due date of the periodic report for the period in which the triggering event occurred. It could also mean that a company would be ineligible to use Form S-3 or Form S-2 for several months if, for example, a Form 8-K triggering event occurred on the first day of the company's fourth quarter, because its Form 10-K would not be due until 75 days (under proposed rules for accelerated filers) or 60 days (under current rules for accelerated filers) after the end of that quarter.

Since the rules implementing the safe harbors do not contain any provisions conditioning the availability of the safe harbors on providing the "Other Information" disclosure in a periodic report, we believe that a company that files a late Form 8-K before the due date of the periodic report that would otherwise require the "Other Information" disclosure will be able to cure a missed Form 8-K deadline and rely on both of the safe harbors. This approach would result in earlier disclosure than disclosure in a periodic report for the period in which the triggering event occurred. Indeed, the "Other Information" disclosure item, by its terms, does not mandate disclosure in the periodic report when the required information has already been reported; thus, the item itself seems to contemplate the possibility of curing the Form 8-K delinquency with a late Form 8-K submission.

Another reason to make a late Form 8-K submission rather than provide the "Other Information" disclosure is to preserve the furnished status of reports made under Items 2.02 and 7.01 of Form 8-K, as discussed below in Part II.C.

2. Include the "Other Information" Disclosure in the Periodic Report for the Period During Which the Form 8-K Triggering Event Occurred.

If a company does not submit a late Form 8-K to cure a delinquent Form 8-K, there is a subtlety in complying with the "Other Information" disclosure item that must be addressed. The rules and the text of the adopting release are inconsistent as to whether the periodic report that must contain the missed Form 8-K disclosure is the one for the period in which the Form 8-K was due or the one for the period in which the event occurred. The new "Other Information" item in Forms 10-K and 10-Q calls for disclosure of the information required to be "disclosed in a [delinquent] report on Form 8-K during" the period covered by the report. On the other hand, the adopting release states that the relevant date is the date of the event triggering the Form 8-K disclosure requirement.

In our view, when a company fails to timely submit a report on Form 8-K and does not cure that delinquency by submitting a late Form 8-K, it should provide the disclosure required by the new "Other Information" item in its periodic report for the period during which the triggering event occurred.

C. Furnished Versus Filed Reports on Form 8-K

The new rules retain a company's ability to furnish rather than file a Form 8-K to report earnings press releases and similar public announcements (Item 2.02, Results of Operations and Financial Condition) and Regulation FD information (Item 7.01, Regulation FD Disclosure). By furnishing rather than filing a Form 8-K, a company avoids liability under Section 18 of the Exchange Act, and the Form 8-K is not automatically incorporated by reference into Securities Act or Exchange Act filings.

To ensure that press releases and other exhibits furnished pursuant to Items 2.02 and 7.01 are treated as furnished, new Item 9.01(c) clarifies that the exhibits included in a Form 8-K are "deemed to be filed or furnished, depending on the relevant item requiring such exhibit." This clarification and the elimination of the requirement in Forms 10-K and 10-Q that companies list all reports *filed* on Form 8-K during the period being reported on resolve the concern that the Form 8-K listing requirement blurred the distinction between furnished and filed reports on Form 8-K. However, a company is still required to list all reports *filed* on Form 8-K in registration statements filed on Forms S-2, S-3 and S-8. Therefore, when preparing those registration statements, a company must continue to take care not to list, and unintentionally incorporate by reference, any reports on Form 8-K *furnished* under Items 2.02 and 7.01.

The "Other Information" disclosure item in Forms 10-K and 10-Q mandates the disclosure of any information "required to be disclosed" in a report on Form 8-K during the period "but not reported." If the information required by Item 2.02 or 7.01 is provided in answer to the "Other Information" disclosure item in a periodic report, we believe that it would be deemed to be filed and not furnished. For that reason also, a company should always cure any missed Item 2.02 or 7.01 Form 8-K only by furnishing a late Form 8-K.

Items 2.02 and 7.01 are not covered by either the anti-fraud or the short-form registration statement safe harbor. Neither item requires the benefit of these safe harbors, however. The failure to file an Item 2.02 Form 8-K would not be a violation under Section 10(b) or Rule 10b-5 because a failure to file on Form 8-K an earnings press release (or similar public announcement) that has already been publicly disclosed would not result in a failure to disclose material information. Accordingly, there would be no basis for a Rule 10b-5 claim. Item 7.01 does not need to be covered by the anti-fraud safe harbor because Rule 102 of Regulation FD provides its own safe harbor from liability under Rule 10b-5 for failure to make a public disclosure required solely by Rule 100 of Regulation FD. In addition, neither item 2.02 nor 7.01 requires the benefit of the short-form registration statement safe harbor because Forms S-3 and S-2 require timely 12-month reporting only of reports required to be *filed* with the SEC. Therefore, the failure to timely submit a Form 8-K that is furnished rather than filed will not affect a company's ability to use Form S-3 or S-2.

Notwithstanding these existing safe harbors, a company that fails to timely submit an Item 2.02 or 7.01 Form 8-K may be liable under Rules 13a-11 and 13a-15. A company may also be liable under Section 10(b) or Rule 10b-5 for a material misstatement or omission in the furnished Form 8-K (as with all other items of Form 8-K).

D. Late Reports on Form 8-K and Rule 144

The new rules amend Rule 144 to clarify that reliance on Rule 144 is not impacted in any way by the failure of a company to timely submit any Form 8-K, including reports on Form 8-K for items that are not covered by the anti-fraud and short-form registration statement safe harbors.

III. Importance of Disclosure Controls and Procedures for New Form 8-K

A company should adopt procedures to ensure that it does not miss a Form 8-K reporting deadline. The failure to file or furnish a required Form 8-K could result in an SEC action for failure to comply with Rule 13a-11 and/or for failure to maintain adequate disclosure controls and procedures as required by Rule 13a-15.

In a recent enforcement action, the SEC charged Siebel Systems, Inc. with violating Section 13(a), Regulation FD and Rule 13a-15 (SEC Litigation Release No. 18766). The basis for the charge was that Siebel failed to submit a Form 8-K or make some other public disclosure of the material nonpublic information disclosed in violation of

Regulation FD and that such failure evidenced ineffective disclosure controls and procedures. That case demonstrates the willingness of the SEC to enforce disclosure requirements by charging violations of Rule 13a-15.

To help ensure timely disclosure of all Form 8-K items and avoid the risk of a Rule 13a-15 violation, we recommend that companies update their disclosure controls and procedures to include an early warning system. An early warning system should identify persons responsible for monitoring the specific types of events that could give rise to a Form 8-K disclosure requirement. In documenting its internal controls over financial reporting, a company is required to identify those persons who have authority to cause the company to enter into various types and sizes of transactions, including those transactions that could give rise to a Form 8-K reporting requirement. The persons identified in a company's early warning system in its disclosure controls and procedures should be the same as those identified in the company's delegation of authority included in its internal controls over financial reporting.

IV. Current Issues Regarding Some of the New Form 8-K Items

Some of the interpretive questions that have arisen concerning the new Form 8-K items are discussed below.

A. Mini MD&A

Although the new rules do not include the proposed requirement for a mini MD&A discussion about an event triggering disclosure under the new Form 8-K, the adopting release points out that Exchange Act Rules 12b-20 and 10b-5 might require a company to discuss in the Form 8-K more than what is required by the applicable Form 8-K item. Therefore, a company may have to discuss the effects of an event on the company's results of operations, financial condition and cash flows.

B. One Event May Trigger Multiple Item Form 8-K Disclosure Requirements

A company should note that one event might require it to provide disclosure under multiple items of the new Form 8-K. For example, if a company enters into a material contract requiring disclosure under new Item 1.01, that event may also trigger disclosure under other Form 8-K items, such as Items 2.01, 2.03 and 5.02. If an event is required to be reported under more than one item, the Form 8-K reporting the event should clearly identify each item being addressed and include the disclosure required by all applicable items.

C. Item 1.01: Entry Into a Material Definitive Agreement

The SEC has described Item 1.01 as requiring disclosure about the same material definitive agreements that a company has always been required to file as exhibits to a periodic report in accordance with S-K Item 601(b)(10). Notwithstanding this

description, the adopting release notes that a more careful consideration of qualitative factors concerning the materiality of an agreement may be necessary to comply with Item 1.01, and this item has already generated many questions.

Materiality assessments must be made more quickly than when the quarterly exhibit filing was the only requirement. Now, the assessment must be made at least by the time the company is finalizing a contract or agreement. Ideally, the company will implement an early warning system within its disclosure controls and procedures so that determinations about materiality will be made before the agreement is executed or amended and any reporting requirement will be known well in advance of the deadline.

One subject of debate about Item 1.01 has been whether it requires a company to file a Form 8-K to report the grant of any stock option or other award to a named executive officer whose compensation is detailed in the company's proxy statement (NEO). The SEC staff has confirmed in telephone conversations, citing Instruction 1 to S-K Item 601(b)(10)(iii), that a company can avoid filing a Form 8-K to report the grant of an option or other award to a NEO where the kinds of provisions included in the grant are described in the employee benefit plan under which the grant is made, the plan has already been filed as an exhibit to a Form 10-Q or Form 10-K and the disclosure of particular provisions of the grant is not required to enable investors to understand the NEO's compensation under the plan.

While the issue has been the subject of much debate, we have concluded that a company does not need to have previously filed a form of option or other award agreement governing a NEO's individual grant in order to rely on Instruction 1 to S-K Item 601(b)(10)(iii), so long as the plan under which the option or other award was granted has been filed and describes in sufficient detail the kinds of provisions contained in the NEO's award. We have confirmed this view with the SEC staff.

The SEC staff has also confirmed in telephone conversations that, where the adoption of a plan or remuneration agreement is subject to shareholder approval, a company may defer describing the plan or agreement under Item 1.01 until such shareholder approval is obtained.

The new rules do not require a company to file a material definitive agreement with an Item 1.01 Form 8-K. While the SEC encourages companies to do that when practicable, the rules only require that the agreement be filed as an exhibit to the company's periodic report for the period in which the agreement was executed.

D. Item 2.03: Direct Financial Obligation or Obligation Under an Off-Balance Sheet Arrangement

When a company becomes obligated on a material direct financial obligation or directly or contingently liable for a material obligation arising out of an off-balance sheet arrangement, and that obligation is enforceable against the company, disclosure is required within four business days under new Item 2.03 of Form 8-K. A direct financial

obligation is an obligation that the company would have to disclose in the contractual obligations table required in the company's MD&A under S-K Item 303(a)(5), as well as any short-term obligation that arises other than in the ordinary course of business of the company.

Although Instruction 1 to Item 2.03 provides that no disclosure is required until a company enters into a material obligation that is enforceable against the company, we believe that the SEC intended to require disclosure also of an agreement that is enforceable by the company, similar to the approach in Item 1.01. Accordingly, we believe that the SEC intended the disclosure requirement to be triggered by the execution of an agreement by all the parties. Therefore, when a company executes a material credit agreement, other than one considered to be a short-term obligation that arises in the ordinary course of business, the company must file an Item 2.03 Form 8-K even if it has complete discretion as to whether it will ever borrow any funds under the facility and does not borrow any funds at the time of execution. Additional reports on Form 8-K under Item 2.03 would have to be filed when the amount of funds borrowed under the facility, individually or in the aggregate, are or become material.

We believe that this item raises other questions, particularly with respect to credit agreements. A company will have to determine whether borrowings under a credit agreement are short- or long-term, whether any short-term obligations arise in the ordinary course of the company's business and whether an individual borrowing must be disclosed because of either the materiality of its size alone or in combination with other borrowings that have not yet been reported, or the materiality of the use or purpose of the borrowing.

A company's determination of whether its borrowings under a new credit facility will be short- or long-term obligations should be consistent with the way in which the company expects to classify the borrowings on its balance sheet and in its contractual obligations table in the MD&A. If a company determines that borrowings under the credit agreement are expected to be classified as short-term obligations, it must next determine if those borrowings are expected to arise in the ordinary course of business in order to rely on the exception from the need for Item 2.03 disclosure about short-term obligations. If a company describes a credit agreement on a Form 8-K either because the company has concluded that borrowings under the credit agreement will be long-term or because the short-term obligations are not expected to be in the ordinary course of its business, it will have to assess the materiality of individual borrowings to determine whether they must be disclosed. This assessment will have to take into account qualitative as well as quantitative factors. Even if a company does not report the execution of a credit agreement on a Form 8-K on the basis that borrowings will be classified as short-term and are expected to be incurred in the ordinary course of business, the company may have to report on Form 8-K borrowings that it determines do not arise in the ordinary course of business.

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

When an event of default or other event occurs that triggers an acceleration of or increase in a direct financial obligation or obligation under an off-balance sheet arrangement, or causes a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation, the company has four business days to report that event under Item 2.04 of Form 8-K where the consequences are material to the company. Pursuant to Instruction 2 to Item 2.04, disclosure on Form 8-K would be required only if the event of default or other triggering event occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including the sending of any required notice and satisfaction of other conditions except the "passage of time."

We believe that the term "passage of time" should not be interpreted to refer to a cure period because, in the usual case, an increase in or acceleration of a direct financial obligation would not take place until after the expiration of the cure period. Accordingly, it is our view that, when a company breaches a covenant of a debt agreement, but there is no increase in or acceleration of the debt until the expiration of a cure period, no disclosure under Item 2.04 is required if the company cures the breach within that period. If a company fails to cure, however, it must file the Item 2.04 Form 8-K within four business days after the expiration of the cure period.

F. Item 2.06: Material Impairments

Under Item 2.06, the conclusion by a board of directors, any committee of the board, or any authorized officers that a material charge for impairment of one or more of the company's assets is required under generally accepted accounting principles, will require disclosure within four business days after that conclusion is reached. Although events triggering the disclosure requirement could happen at any time, a company should not have to file many, if any, reports on Form 8-K under Item 2.06. This is because a company will usually reach conclusions about impairments in connection with the preparation of financial statements included in their periodic reports. The new rules provide that no Item 2.06 impairment disclosure is required when the conclusion is made in connection with the preparation, review or audit of financial statements required to be filed in the company's periodic report for the period, and the report is filed on time and discloses the conclusion.

G. Item 3.03: Material Modification to Rights of Security Holders

This new item moves into Form 8-K the disclosure requirements of old Items 2(a) and (b) of Part II of Form 10-Q. There is a quirk in the way the SEC rewrote old Item 2(b) for the new Form 8-K, however.

Item 3.03(b) of Form 8-K requires disclosure where the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or

modification of any other class of securities "by the registrant." Old Item 2(b) of Form 10-Q did not contain the qualification "by the registrant," and it was clear that disclosure was required if registered securities of the company were limited or qualified by the issuance or modification of any other class of securities – whether or not issued by the company. Thus, one could read new Item 3.03(b) as not requiring disclosure if a subsidiary issues debt securities that limit the payment of dividends by the subsidiary to a holding company parent.

It is our understanding, however, that the qualification in Item 3.03(b) is a drafting error. Accordingly, companies should read the new item to require disclosure whenever any securities are issued that materially limit or qualify the rights of holders of any of their registered securities.

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

When a company's board of directors, any committee of the board, or any authorized officer concludes that the company needs to restate its financial statements, or when the company is notified by its outside auditors that it may no longer rely on a previously issued audit report or interim review or needs to restate its financial statements, disclosure is required under Item 4.02 of Form 8-K within four business days after that conclusion or notification. If compliance with this item requires disclosure before the restated numbers are known, companies will have to be very careful in drafting the disclosures to avoid, if possible, any erroneous reaction by the market.

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

This new item expands in significant ways the disclosure requirements that were contained in old Item 6 of Form 8-K. First, new Item 5.02 requires disclosure of all director departures, including as a result of a retirement, refusal to stand for reelection, resignation or removal, whether or not due to a disagreement about the company's operations. Second, the new item requires disclosure of the election of a director that occurs without shareholder approval. Third, the new item requires disclosure of all "principal officer" departures and appointments. "Principal officers" include a company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer and any persons performing similar functions.

The events that trigger disclosure under this item are somewhat unclear. In our view, the actual date of retirement, resignation or removal is the event that triggers the reporting requirement for a retirement, resignation or removal of a director or principal officer – even if prior informal or written notice is given by the director or principal officer, or by the company, in the case of a removal. This is because Item 5.02 does not contain or imply any requirement that the giving or receipt of notice triggers the disclosure requirement.

The events that trigger disclosure about the refusal of a director to stand for reelection are less clear, however, because neither the rules nor the adopting release explains the meaning of a "refusal" to stand for reelection. Would the triggering event be the date the director advises the nominating committee that he or she does not accept the committee's decision to nominate him or her for reelection, or is it the earlier date the director advises any executive officer or director of the company that he or she does not want to even be considered by the committee for nomination? The text of the adopting release further complicates this issue by using the words "declines to stand for reelection" instead of "refuses to stand for reelection" to describe the disclosure requirement of Item 5.02(b). In our view, the word "refusal" connotes a disagreement or falling-out that is not implied by the word "decline."

If a director has a disagreement with the company, refuses to stand for reelection, and states that the refusal was because of the disagreement, the company must submit a Form 8-K containing the disclosure required by Item 5.02(a). On the other hand, we do not see a need for disclosure on a Form 8-K when a director decides to not stand for reelection for some reason not relating to a disagreement, so long as the director continues in office until the annual meeting and the proxy statement for the annual meeting discloses that the director is not standing for reelection. Nevertheless, we believe that Item 5.02(b) may require a Form 8-K filing in that situation. Perhaps the SEC will clarify this issue.

Item 5.02(a) is also not very clear as to whether it requires disclosure when a director does not state a reason for refusing to stand for reelection, but an executive officer knows that the director has a disagreement with the company. Fortunately, the SEC addresses this issue in the text of the adopting release by acknowledging that commenters on the proposing release were concerned that the company may not be aware that the director departed because of a disagreement. To address that concern, the SEC states its belief that "the phrase 'known to an executive officer of the company' means that the company must be aware of the disagreement." We believe that this statement means that disclosure is required under Item 5.02(a) only when an executive officer (or the company) knows that a director is refusing to stand for reelection *because* of the disagreement. In light of the SEC's acknowledgment of the commenters' specific concern, we do not believe that disclosure under Item 5.02(a) is required when a director refuses to stand for reelection, but does not explain that the refusal is because of the disagreement – even if an executive officer or the company knows that the departing director has a disagreement with the company about its operations.

V. Form 8-K Updating Requirements

Some of the new Form 8-K items require a company to disclose information that may not be known or available at the time the Form 8-K is due. The following table identifies those items and the information that must be provided either in an amendment to the Form 8-K or the periodic report for the period in which the Form 8-K triggering event occurred.

Form 8-K Item	Updating Requirement
1.01: Entry into a Material Definitive Agreement	File material definitive agreement as an exhibit to the applicable periodic report unless filed voluntarily with the Form 8-K.
2.01: Completion of Acquisition or Disposition of Assets	File Form 8-K/A to include required financial statements no later than 75 days after the triggering event resulting in the filing of the initial Form 8-K.
2.05: Costs Associated with Exit or Disposal Activities	File Form 8-K/A to disclose the estimate or range of costs expected to be incurred within four business days after their determination.
2.06: Material Impairments	File Form 8-K/A to disclose the estimate or range of costs expected to be incurred within four business days after their determination.
3.02: Unregistered Sales of Equity Securities	Disclose any sales not required to be reported in the Form 8-K due to the "de minimis" exception in the applicable periodic report.
4.02: Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	File Form 8-K/A to include the outside auditors' letter within two business days after receipt (see S-K Item 601(b)(7)).
5.02(a): Departure of Directors	File Form 8-K/A to include departing director's letter describing a disagreement within two business days after receipt (see S-K Item 601(b)(17)).
5.02(c): Election of Directors; Appointment of Principal Officers	File Form 8-K/A to disclose any required information about a new principal executive officer or director within four business days after it becomes available or is determined (remember to coordinate disclosure under Item 1.01).
5.03: Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	File complete copy of amended articles or bylaws as an exhibit to the applicable periodic report unless voluntarily filed with the Form 8-K (see S-K Items 601(b)(3)(i) and (ii)).

Morgan Lewis has the experience and knowledge to help any company review and implement the new Form 8-K requirements and develop responsive disclosure controls

and procedures. If you have any questions about the new requirements, please contact your primary Morgan Lewis attorney or one of the attorneys listed below:

Linda L. Griggs	202.739.5245	lgriggs@morganlewis.com
David A. Sirignano	202.739.5420	dsirignano@morganlewis.com
George G. Yearsich	202.739.5255	gyearsich@morganlewis.com
Frank G. Zarb, Jr.	202.739.5741	fzarb@morganlewis.com
Rani Doyle	202.739.5838	rdoyle@morganlewis.com