

FREQUENTLY ASKED QUESTIONS

ABOUT FORM 8-K

General Description and Summary of 8-K Items

What is Form 8-K?

Form 8-K is the form on which public companies report, on a current basis, the occurrence of significant corporate events. A reportable event is a transaction or occurrence of major significance. The Securities and Exchange Commission (the “SEC”) periodically expands the list of items requiring disclosure on Form 8-K and alters the time within which a Form 8-K must be filed.

Who must file Form 8-K?

All U.S. “reporting” companies are responsible for filing Forms 8-K. Foreign issuers that report in the United States use a Form 6-K, which has different requirements.

Under what circumstances must a Form 8-K be filed?

Form 8-K identifies events that require the filing of a Form 8-K and provides detailed instructions for filing. The following is a list of the events that trigger a filing, along with the corresponding section and Item references from Form 8-K:

Section 1 — Registrant’s Business and Operations

Item 1.01 Entry into a Material Definitive Agreement.

- “Material” agreements are those that provide obligations that are material to and enforceable against the Company, or rights that are material to the Company and enforceable by the Company against one or more parties to the agreement.
- It is likely that all agreements requiring board or shareholder approval would be filed under this Item.
- This includes “definitive” agreements but not non-binding term sheets or letters of intent.
- Filing the agreement itself as an exhibit is encouraged but not required. If the agreement is not filed as an exhibit to the Form 8-K, it will be required to be filed with the Company’s next periodic report (e.g., its Form 10-Q or Form 10-K, whichever comes first).
- Material employment agreements are usually reported under Item 5.02.

Item 1.02 Termination of a Material Definitive Agreement.

- No Form 8-K needs to be filed if the agreement, even if material, is terminated by its terms.

Item 1.03 Bankruptcy or Receivership.

Section 2 — Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets.

- See the related financial statement requirements under Regulation S-X (historical and/or pro forma financials may be required to be filed).

Item 2.02 Results of Operations and Financial Condition.

- An issuer typically provides its earnings press releases pursuant to this item.
- The material included under Item 2.02 should be “furnished,” rather than “filed” (see below for the significance of this distinction).

Item 2.03 Creation of a Direct Financial Obligation or an 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.

- This item would typically include instances where a company is no longer in compliance with a covenant under a loan facility or similar agreement.

Item 2.05 Costs Associated with Exit or Disposal Activities.

- This is the item a company would use to disclose material write-offs or restructuring costs.

- This item requires an estimate of the dollar amounts of (i) each major cost, (ii) total costs, and (iii) cash expenditures (the estimate portion of the disclosure can be delayed until four business days after estimates are known).

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.

- A company would use this item to disclose certain events related to its listing on a securities exchange (e.g., The New York Stock Exchange).
- Includes the receipt of a notice regarding material non-compliance.
- No filing is required if the delisting is the result of a conversion or redemption of a security.
- The issuer would file twice: first upon receipt of the first notice and again upon effectiveness of delisting.
- The filing date is calculated from receipt of notice.

Item 3.02 Unregistered Sales of Equity Securities.

Item 3.03 Material Modification to Rights of Security Holders.

- Includes amendments, changes or additions to preferred stock preferences, limitations on dividends, or the issuance of senior securities affecting junior securities.

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.

- Results when management reaches the conclusion that the company's previously issued financial statements should not be relied upon, or the company's receipt of a notice from its independent accountant that the independent accountant is withdrawing a previously issued audit report, or informing the company that it may not rely on a previously issued audit report.

Section 5 — Corporate Governance and Management

Item 5.01 Changes in Control of Registrant.

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

- Results from any of the following situations:
 - the resignation or refusal to stand for reelection by directors due to a disagreement;
 - the election or appointment of new directors (other than at an annual or special meeting of shareholders);
 - the departure of any director for any reason;
 - the retirement, resignation, or termination of a company's principal executive officer, president, principal

financial or accounting officer, principal operating officer, or person performing a similar function to any such officers ("Senior Executive Officers"); and

- the appointment of any Senior Executive Officer and the entry into (or amendment of) a compensatory arrangement with a principal executive officer, principal financial officer, or named executive officer.

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.

Item 5.06 Change in Shell Company Status.

Item 5.07 Submission of Matters to a Vote of Security Holders.

Section 6 — Asset-backed Securities

The items in this Section 6 apply only to asset-backed securities.

Item 6.01 ABS Informational and Computational Material.

Item 6.02 Change of Servicer or Trustee.

Item 6.03 Change in Credit Enhancement or Other External Support.

Item 6.04 Failure to Make a Required Distribution.

Item 6.05 Securities Act Updating Disclosure.

Section 7 — Regulation FD

Item 7.01 Regulation FD Disclosure.

- The material included under Item 7.01 should be “furnished,” rather than “filed” (see below for the significance of this distinction).

Section 8 — Other Events

Item 8.01 Other Events.

- The item used for optional disclosure of any event that the issuer deems of importance to security-holders not otherwise called for by another Form 8-K Item.
- Unlike most Form 8-K filings, there is no requirement that an Item 8.01 8-K be filed within four business days of the triggering event (see below for a further discussion of the relevant timing requirements).
- Commonly used for new product or other press releases and other miscellaneous non-categorizable events.
- An issuer will often use an Item 8.01 filing to update its shelf registration statement with more current information.

Section 9 — Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits.

Filing Requirements

If an event is reportable under more than one Item of Form 8-K, must two Forms 8-K be filed?

No. The issuer may include multiple items in a single Form 8-K, and any exhibit may be cross-referenced within the same Form 8-K. Common instances when this is necessary include:

- Unregistered offerings of securities (Items 1.01 and 3.02)
- Acquisitions (Item 1.01 and Item 2.01)
- Changes to securities (Item 3.03 and Item 5.03)
- Appointments of officers (Item 5.02(c) and Item 1.01)
- Additions of directors (Item 5.02(d) and Item 5.03)

What are the time limits within which a Form 8-K must be filed?

Subject to certain exceptions described below, a Form 8-K must generally be filed within four business days of the triggering event.

What are the exceptions to the four-day time limit?

- Regulation FD filings must be (i) simultaneous with the release of the material that is the subject of the filing (if such material is intentionally released to the public) or (ii) the next trading day (if the release was unintentional);
- Voluntary disclosures (Item 8.01) have no deadline;
- Filing of earnings press releases (Item 2.02(b)) must be completed before any associated analyst conference call;
- It is permissible to delay the filing of a Form 8-K related to the announcement of new officers until another public announcement of the appointment (e.g., press release, trade conference, etc.);

- The filing of a Form 8-K related to an issuer's receipt of an auditor's restatement letter (Item 4.02) must be completed within two business days; and
- The financial statements of an acquired business (Item 9.01) must be filed no later than 71 calendar days after the date that the initial report on Form 8-K must be filed (four business days plus 71 calendar days).

What are the penalties for non-compliance with these requirements?

The penalties for non-compliance can be severe, and include the company's loss of the right to use Form S-3 for both primary and secondary offerings (however, failure to file within the required time period with respect to events subject to Items 1.01, 1.02, 2.03-2.06, 4.02(a), or 5.20(e) will not affect an issuer's right to use Form S-3).

No failure to file under the following Items shall be deemed a violation of Section 10 of the Exchange Act and Rule 10b-5: 1.01, 1.02, 2.03-2.06, 4.02(a), 5.02(e), or 6.03.

In addition, SEC guidance makes clear that the failure to properly file a Form 8-K may be considered prima facie evidence of a lack of sufficient disclosure controls under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

Should issuers interpret all Form 8-K Items as applying the triggering event to the issuer and its subsidiaries, other than Items that obviously apply only at the issuer level, such as changes in directors and principal officers?

Yes. Triggering events apply to issuers and subsidiaries. For example, entry by a subsidiary into a non-ordinary course definitive agreement that is material to the issuer is reportable under Item 1.01.

If an agreement that was not material at the time the issuer entered into it becomes material at a later date, must the issuer file a Form 8-K at the time the agreement becomes material?

No. If an agreement becomes material to the issuer but was not material to the issuer when it entered into, or amended, the agreement, the issuer need not file a Form 8-K under Item 1.01, unless the agreement is material to the issuer at the time of an amendment to that agreement. In any event, the issuer must file the agreement as an exhibit to the periodic report relating to the reporting period in which the agreement became material if, at any time during that period, the agreement was material to the issuer.

What if a material definitive agreement has an advance notice provision in order to terminate, and the counterparty delivers to the issuer written advance notice of termination. Is an Item 1.02 Form 8-K required?

Yes. Once notice of termination pursuant to the terms of the agreement has been received, the Form 8-K is required. See Instruction 2 to Item 1.02.

If an issuer decides not to nominate a director for reelection at its next annual meeting, is a Form 8-K required?

No. That situation is not covered under the phrase “is removed.” However, if the director, upon receiving notice from the issuer that it does not intend to nominate him or her for reelection, then resigns his or her position as a director, then a Form 8-K would be required pursuant to Item 5.02. If the director tells the issuer that he or she refuses to stand for reelection, a Form 8-K is required because the director has communicated a “refusal to stand for reelection,” whether or not in response to an offer by the issuer to be nominated.

If the company removes all of the duties and responsibilities of its principal operating officer and reassigns them to other personnel in the organization, but the person remains employed by the issuer and retains the title, is the issuer required to file a Form 8-K under Item 5.02 to report the principal operating officer’s termination?

Yes. The term “termination” includes situations where an officer identified in Item 5.02 has been demoted or has had his or her duties and responsibilities removed such that he or she no longer functions in the position of that officer.

Does the restatement of an issuer’s articles of incorporation, without any substantive amendments to those articles, trigger a Form 8-K filing requirement?

No. A Form 8-K is not required to be filed when the issuer is merely restating its articles of incorporation, without making any substantive changes. However, we recommend that issuers refile their complete articles of

incorporation, if restated, in their next periodic report for ease of reference by investors.

What is the difference between Items that are “filed” and those that are “furnished”?

Section 18 of the Exchange Act imposes liability for material misstatements or omissions contained in reports and other information filed with SEC. By contrast, reports and other information that are “furnished” to SEC (to the extent expressly permitted under applicable SEC rules) do not attract liability under Section 18. Note, however, that other liability provisions under the Exchange Act may apply that are not dependent on the filing of documents with the SEC but may otherwise be triggered by disclosure made by the company to the public. See, e.g., Section 10(b) of the Exchange Act and Rule 10b-5.

Are the company’s chief executive officer and/or the chief financial officer required to provide a certification with respect to the Form 8-K’s accuracy?

No. Sections 302 and 906 of Sarbanes Oxley require an issuer’s principal executive and financial officers each to certify the financial and other information contained in the issuer’s periodic reports, which are its quarterly and annual reports. No such certification is required even if the Form 8-K contains financial statements.

What is the purpose of the four checkboxes on the cover of Form 8-K?

The cover page of Form 8-K allows the company to “check” one or more boxes on the front cover of Form 8-K to indicate that the Form 8-K is being used to satisfy other specified filing requirements.

If the company checks the first box, it is indicating that the 8-K is being used to file “written communications pursuant to Rule 425 under the Securities Act.” This rule governs communications made with respect to a business combination (e.g. a merger of two public companies). For example, if Company A agrees to purchase the common stock of Company B with shares of its own (Company A) stock, then any communication it transmits (a letter to employee shareholders of Company B, for instance) would be considered a prospectus (under Rule 165 under the Securities Act) and must be filed with the SEC. Form 8-K may be used for this purpose. Company A would file the shareholder letter as an exhibit to a Form 8-K, and check the appropriate box on the cover.

The second box indicates that the Form 8-K contains “soliciting material pursuant to Rule 14a-12 under the Exchange Act.” Under the proxy rules, a person may not solicit proxies from a shareholder without providing a preliminary or definitive proxy statement prior to or concurrently with the solicitation. Rule 14a-12 is one of the most prevalent exceptions to these rules. Rule 14a-12 provides that solicitations are allowed as long as any written solicitation contains specified information and is filed with the SEC on the first day on which it is used. So Form 8-K can be used to satisfy this requirement as well.

The third or fourth boxes would be checked if the Form 8-K contains “pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act” or “pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act.” Under certain circumstances, a tender offeror may communicate with offerees prior to the commencement of a tender offer.

One requirement is that the communication be filed with the SEC, including on Form 8-K.

How does a company that has undergone a transformative transaction such as a reverse merger use Form 8-K to inform investors of the changes?

Sometimes, as in a reverse merger, a public company goes through a transformative transaction such that its prior public disclosure no longer reflect the company’s circumstances. In such a case, the company would prepare a Form 8-K that provides investors with comprehensive information about the company’s new business, risks, management, beneficial owners, etc. The information typically provided is the information called for by SEC Form 10, which is the disclosure form used by companies that are required to register under the Exchange Act without a related public offering under the Securities Act of 1933.

By Edward M. Welch, Of Counsel,
Morrison & Foerster LLP

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