



### *Here's the Deal:*

- Certain events or transactions are considered “reportable events” under Form 8-K and trigger a company’s obligation to publicly disclose their occurrence.
- Form 8-K is a current report filed by a U.S. reporting company with the SEC to disclose such recent material events or transactions.
- As a general rule, the Form 8-K must be filed with the Securities and Exchange Commission (the “SEC”) SEC within four business days after the occurrence of the reportable event.
- It is important for a public company to timely file reports required by the Securities Exchange Act of 1934 (the “Exchange Act”), including Form 8-K, as the failure to do so may result in liability under the antifraud provisions of the federal securities laws. A failure may also impact the company’s eligibility to use Form S-3, thus preventing or delaying the company from timely accessing the capital markets.

### What’s the Deal?

Form 8-K is a report public companies must file with the SEC to announce major corporate events on a current basis. All U.S. “reporting” companies are responsible for filing Forms 8-K to disclose recent material transactions or occurrences. Form 8-K lists the types of “reportable events” that trigger the requirement to file a Form 8-K and prescribes the related information to be included in the report. A reporting company may also voluntarily disclose certain other events on Form 8-K. Subject to certain exceptions described below, a Form 8-K must generally be filed within four business days of the triggering event.

### Overview of Reporting Obligations

The occurrence of certain events or transactions specified in the items under Sections 1 to 6 and Section 9 of the form triggers the requirement to file a Form 8-K. Below we describe a number of these reportable events and the related information required to be included in the report, along with the corresponding Section and Item references from Form 8-K.

#### **SECTION 1 - EVENTS RELATED TO THE COMPANY’S BUSINESS AND OPERATIONS**

Item 1.01 – Entry Into a Material Definitive Agreement. A Form 8-K is required to be filed if a registrant has entered into a material definitive agreement not made in the ordinary course of the registrant’s business, or into any amendment of such agreement that is material to the registrant. A “material definitive agreement” is an agreement that provides for 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. Any agreement that requires board or shareholder approval would likely

be filed under this item. Examples of material definitive agreements include merger agreements, stock purchase agreements, purchase agreements for all or substantially all of a company's assets and agreements to issue securities or to incur debt, such as credit agreements or trust indentures. Non-binding term sheets or letters of intent are not considered "definitive." The company is encouraged (but not required) to attach the material agreement as an exhibit to the Item 1.01 Form 8-K. If the company does not attach the agreement to Form 8-K, it will be required to file the agreement with its next periodic report (e.g., Form 10-K or 10-Q).

If an agreement was not material to the company at the time it was entered into but later becomes material, the company need not file a Form 8-K under this item, unless the agreement is material to the company at the time of an amendment. In any event, the company 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 company.

A company filing a Form 8-K under Item 1.01 must disclose the date on which the agreement was entered into or amended, the identity of the parties and a brief description of the terms and conditions of the agreement or amendment that are material to the company.

Item 1.02 – Termination of a Material Definitive Agreement. If a material definitive agreement is terminated, and if the termination is material to the company, the company must file a Form 8-K. An agreement that terminates on its stated termination date or as a result of all parties completing their contractual obligations does not trigger a reporting obligation under this item. If a material definitive agreement has an advance notice provision to terminate, and the counterparty delivers notice of termination to the company pursuant to the terms of the agreement, the company must file a Form 8-K.

A company filing a Form 8-K under this item must disclose the date of termination of the agreement, the identity of the parties, a brief description of the terms and conditions of the agreement or amendment that are material to the registrant, the material circumstances surrounding the termination and any material early termination penalties incurred by the company.

Item 1.03 – Bankruptcy or Receivership. The company must file a Form 8-K under Item 1.03 if it becomes the subject of a bankruptcy or receivership court filing. It must disclose the name or other identification of the proceeding, the identity of the court, the date jurisdiction was assumed and the identity of the receiver, fiscal agent or similar officer and the date of his or her appointment. If a court enters an order confirming a plan of reorganization or liquidation for the company, the company must also describe the material features of the plan and file and attach a copy of the confirmed plan as an exhibit to the Form 8-K.

Item 1.04 – Mine Safety – Reporting of Shutdowns and Patterns of Violations. A Form 8-K is required to be filed if a registrant or its subsidiary is an operator of a coal or other mine and has received an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act, or a written notice from the Mine Safety and Health Administration that the mine has a pattern of violations of mandatory health or safety standards that could have significantly and substantially contributed to coal or other mine health or safety hazards, or a written notice that the coal or other mine has the potential to have such a pattern. The company must disclose the date of its or its subsidiary's receipt of such order or notice, the category of such order or notice and the name and location of the mine involved.

## SECTION 2 - FINANCIAL INFORMATION

Item 2.01 – Completion of Acquisition or Disposition of Assets. A company must file a Form 8-K if it acquires or disposes of a significant amount of assets, other than in the ordinary course of business. An acquisition or disposition of assets is considered significant if (i) the company and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets exceeds 10% of the total assets of the company and its consolidated subsidiaries, or (ii) it involves a business that would be considered a significant business or subsidiary under Rule 11-01 of Regulation S-X. The registrant must disclose, among others, the date of completion of the transaction, a brief description of the transaction, the identity of the person from whom the assets were acquired or to whom they were sold and the nature and amount of consideration involved. In addition, the company must file, under Item 9.01, as exhibits to the Form 8-K, financial statements of the business acquired, any pro forma financial statements relating to the assets acquired or disposed of that are required by Regulation S-X and copies of the plans of acquisition or disposition.

Item 2.02 – Results of Operations and Financial Condition. If a company publicly announces or releases material, nonpublic information about its results of operations or financial condition for a completed quarterly or annual fiscal period, it must provide a Form 8-K to the SEC. The Form 8-K must disclose the date of the announcement or the release, briefly identify the same and include the text of the announcement or release as an exhibit to the Form 8-K. Companies usually attach an earnings press release as an exhibit to the Form 8-K. The materials included under Item 2.02 are considered "furnished" rather than "filed" unless the company specifically states that the information is to be considered "filed." This distinction is important because Section 18 of the Exchange Act imposes liability for material misstatements or omissions contained in reports and other information "filed" with the SEC. By contrast, reports and other information that are "furnished" to the 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, for example, the antifraud provisions under Section 10(b) of the Exchange Act and Rule 10b-5.

Item 2.03 – Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement. A company that becomes obligated on a direct financial obligation that is material to the company must file a Form 8-K under this item. A "direct financial obligation" includes a long-term debt obligation, finance lease obligation or operating lease obligation (each pursuant to the applicable FASB ASC accounting standard) and a short-term debt obligation that arises other than in the ordinary course of business. A company must report the date on which it becomes obligated on the direct financial obligation, a brief description of the transaction involved, the amount of the obligation, including the payment terms and, if applicable, the material terms for accelerating or increasing the obligation and other terms of the transaction agreement that are material to the company. The company must also file a Form 8-K under this item if it incurs a material obligation arising from an off-balance sheet arrangement. For this, it must also disclose the date on which it becomes directly or contingently liable, the material terms of the obligation and the maximum potential amount of future payments that it may be required to make. Note that for this item, a company has no obligation to disclose information until the company enters into an agreement that is enforceable against it.

Item 2.04 – Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement. A company must file a Form 8-K if a triggering event causes the increase or acceleration of a financial obligation and if the consequences of such triggering event are material to the company. A “triggering event” under this item includes an event of default, event of acceleration or other similar event. Hence, if the company defaults on its loan payment obligations, and that default constitutes an event of default under the loan agreement or otherwise triggers the acceleration or increase of a financial obligation that is material to the company, then disclosure under this item would be needed. The company must report the date and description of the triggering agreement, a brief description of the underlying agreement or transaction, the increase in the amount of the obligation, terms of payment and acceleration and other material obligations that may arise.

Item 2.05 – Costs Associated With Exit or Disposal Activities. This item requires a company to disclose material write-offs or restructuring charges. In the Form 8-K, the company must include 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. A company must file a Form 8-K if it takes a material impairment charge to one or more of its assets, including impairments of securities or goodwill. An impairment may occur when the company significantly lowers its estimate of the value of certain assets. The company must report, among other things, the date its board, board committee or officers concluded that the material charge is required and the surrounding facts and circumstances leading to such conclusion, a description of the impaired assets and the company’s estimates of the amount or range of amounts of the impairment charge. If the company determines that it is required to take a material impairment charge near the end of a fiscal quarter or year, the company can disclose this information in the corresponding Form 10-Q or 10-K instead of filing a Form 8-K.

### **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 must file a Form 8-K under this item if (a) the company receives a notice from a securities exchange on which it is listed that it is no longer in compliance with the rules of such exchange, (b) the company notifies the securities exchange that it is aware of any material noncompliance with the continued listing rules of the exchange, (c) the securities exchange issues a public reprimand letter to the effect that the company has violated a rule for continued listing or (d) the company’s board, board committee or officers voluntarily withdraw or terminate its listing. A company that receives a notice of delisting would file two Forms 8-K: when it receives the first notice and again once the delisting is effective. No filing is required, however, if the delisting is the result of a conversion or redemption of a security. Under this item, the filing date is calculated from receipt of the notice.

Item 3.02 – Unregistered Sales of Equity Securities. A company is required to file a Form 8-K if its private sales of equity securities exceed 1% of the company’s outstanding shares of that class. For a smaller reporting company, the reporting duty is triggered when the sales exceed 5% of the company’s outstanding shares in the class of securities sold. The company must disclose the date of sale, the title and amount of securities sold, the aggregate offering price and commission for securities that were sold for cash, the nature and amount of consideration for securities sold other than cash, the rule or law upon

which the company claims an exemption from registration, the facts relied upon for the exemption and the terms of conversion or exercise for securities that are convertible or exchangeable into equity.

Item 3.03 – Material Modification to Rights of Security Holders. Companies must disclose any material changes to the instruments that define the rights of holders of any class of registered securities of the company (e.g., the company's governing documents) or any material limitations on the rights of such holders that result from the issuance or modification of another class of securities. The company must disclose the date of the modification, the title of the class securities involved and a brief description of the effect of such modification on the rights of holders of such securities. Note that working capital restrictions and other limitations upon the payment of dividends must be reported under this item. Other modifications that may be captured by this item include amendments, changes or additions to preferred stock preferences 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. A company must file a Form 8-K if (a) its auditors resign, are dismissed or decline reappointment or (b) it hires a new auditor. Departure of the auditor and the company's engagement of new auditors are separate reportable events and may require separate Forms 8-K.

When auditors leave, the company must include in its report whether the auditors were dismissed or resigned, whether their departure was approved by the board of directors, whether the auditors issued an adverse or qualified opinion on the company's financial statements in the past two years and whether the auditors had disagreements with any company personnel responsible for preparing the financial statements.

When the company engages new auditors before it files the Form 8-K related to the former auditors' departure, the Form 8-K must also include the name of the new auditors and their hire date and whether the company previously consulted with the new auditors before their engagement. Otherwise, that information must be included in a separate Form 8-K. The obligation to file a Form 8-K under this item cannot be avoided by reporting it in a Form 10-K or 10-Q.

Item 4.02 – Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review. If management or an auditor concludes that the company's previously issued financial statements should not be relied upon, or the company receives notice from its independent accountant that the independent accountant is withdrawing a previously issued audit report or the independent accountant informs the company that it may not rely on a previously issued audit report, then a Form 8-K under this item must be filed. The obligation to file a Form 8-K under this item cannot be avoided by reporting it in a Form 10-K or 10-Q.

#### **SECTION 5 - CORPORATE GOVERNANCE AND MANAGEMENT**

Item 5.01 – Changes in Control of Registrant. If the company's board of directors, board committee or authorized officers become aware that a change in control of the company has occurred, the company must file a Form 8-K identifying who has acquired control, the date and description of the transaction that resulted in the change in control, the amount of consideration used, the percentage of voting securities of the company beneficially owned by the persons who acquired control and any arrangements between the old and new control groups regarding the election of directors or other matters.

Item 5.02 – Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers. An obligation to file a report under this item may arise from any of the following occurrences:

- a director's resignation or refusal to stand for reelection 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 (including demotion to a non-executive position) 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.

A company is not required to file a Form 8-K if it decides not to nominate a director for reelection at its annual meeting. If, however, the director receives notice from the company that it does not intend to nominate him or her for reelection, then resigns from his or her position as director, reporting requirements under this item will be triggered. Similarly, if the director tells the company 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."

Departure, arrival and election of board members and Senior Executive Officers from the company's subsidiaries do not trigger the reporting requirement under this item.

Item 5.03 – Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year. Under this item, companies with securities registered under Section 12 of the Exchange Act are generally required to disclose any amendment to their articles of incorporation or bylaws or changes in its fiscal year, unless the company previously disclosed the amendment or fiscal year change in a proxy statement or an information statement. Companies that only issue debt securities are typically not required to comply with this item. A Form 8-K is not required when the company restates its articles without any substantive amendments; however, it is recommended that companies refile their complete articles of incorporation, if restated, with their next periodic report for ease of reference by investors.

Item 5.04 – Temporary Suspension of Trading under Registrant's Employee Benefit Plans. A company must file a Form 8-K if there is a prohibition on trading its securities under one of its employee benefit plans. The Form 8-K must be filed if the company receives a notice of the blackout period from the administrator of the employee benefit plan, or if no such notice is received, the company notifies its directors and officers of such blackout period. The company must report, among other things, the reason for, and the length of, the blackout period, the securities subject to and the transactions suspended during the blackout period and contact information for a designated person to respond to questions.

Item 5.05 – Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics. Companies are generally required to report any amendments to their codes of ethics that apply to the

Senior Executive Officers. In addition, a company must file a Form 8-K if it waives any provision of its code of ethics for a Senior Executive Officer. The company does not need to file a Form 8-K under this item if the company stated in its most recent annual report or Form 10-K that it would disclose any such amendment or waiver on its website and provided the website address. Also, note that the company need not disclose technical, administrative or other non-substantive amendments to its code of ethics.

Item 5.06 – Change in Shell Company Status. If a shell company completes a transaction that results in it no longer being a shell company, the company must file a Form 8-K describing the material terms of the transaction. Companies created solely for the purpose of completing business combinations, such as SPACs, are not required to comply with this item.

Item 5.07 – Submission of Matters to a Vote of Security Holders. Companies must report the results of shareholder votes in director elections and all other matters put to a vote within four business days of the end of an annual or special meeting. If the final voting results are not available by the time the Form 8-K is due, the company must file preliminary results, then amend the original Form 8-K within four days after the final results have been determined.

Item 5.08 – Shareholder Director Nominations. If the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the company will be required to disclose the date by which a nominating shareholder must submit notice on Schedule 14N of director nominations.

## **SECTION 6 - ASSET-BACKED SECURITIES**

A company that has issued asset-backed securities must report the following events related to those securities:

Item 6.01 – ABS Informational and Computational Material. (as defined in Item 1101 of Regulation AB).

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. Companies must disclose updates to the description of the asset pool in an offering of asset-backed securities.

Item 6.06 – Static Pool.

## **SECTION 7 - REGULATION FD**

Item 7.01 – Regulation FD Disclosure. Companies may submit a Form 8-K under this item in order to comply with the public disclosure requirement of Regulation FD. Information provided under this item is considered to be furnished rather than filed, as discussed in Item 2.02 above.

## **SECTION 8 - OTHER EVENTS**

Item 8.01 – Other Events. If a company deems an event to be of importance to securityholders, but the event does not fall under any of the items described above, the company may disclose the event under this item. This item is commonly used to report new products, press releases and other miscellaneous non-categorizable events. Companies may also use an Item 8.01 filing to update its shelf registration with

more current information. Unlike most Form 8-K filings, there is no requirement that an Item 8.01 Form 8-K be filed within four business days of the triggering event (see below for a further discussion of the relevant timing requirements).

## **SECTION 9 – FINANCIAL STATEMENTS AND EXHIBITS**

Item 9.01 – Financial Statements and Exhibits. Companies use this item to file certain financial statements and to list exhibits that were appended to the Form 8-K, such as the material definitive agreements discussed in Item 1.01.

### **COMPLETING FORM 8-K**

Events will commonly be reportable under more than one item, but, except in the case of departing and newly engaged auditors (see Item 4.01), companies may include multiple items in a single Form 8-K, and any exhibits may be cross-referenced in the same Form 8-K. Common instances when this is necessary include:

- unregistered offerings of securities (Items 1.01 and 3.02);
- acquisitions (Items 1.01 and 2.01);
- changes to securities (Items 3.03 and 5.03);
- appointments of officers (Items 1.01 and 5.02(c)); and
- additions of directors (Items 5.02(d) and 5.03).

Similarly, the cover page of the 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 Form 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 it is used. 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.



## FILING REQUIREMENTS

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

- Regulation FD filings must be (a) simultaneous with the release of the material that is the subject of the filing (if such material is intentionally released to the public) or (b) 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).

Note also that if the triggering event occurs on a Saturday, Sunday or holiday on which the SEC is not open for business, then the four-business-day period shall begin to run on, and include, the first business day thereafter.

## PENALTIES FOR NON-COMPLIANCE AND IMPACT ON SHELF ELIGIBILITY

The penalties for failing to comply with these requirements 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.

Nevertheless, a company's Senior Executive Officers are not required to provide a certification with respect to the Form 8-K's accuracy, even if the Form includes financial statements.

### *Checklist of Key Questions*

- ✓ Has the company experienced a material event or transaction that is a reportable event under Form 8-K, thus triggering public disclosure?
- ✓ Have the material terms or circumstances of the agreement, transaction or occurrence been set forth fully and accurately as required by Form 8-K?
- ✓ Is the company "filing" or "furnishing" the information under the relevant item under Form 8-K?
- ✓ Are all required exhibits attached? Are there other exhibits that will enhance the quality of the disclosures?
- ✓ What is the deadline for filing the Form 8-K? Is the information required to be reported within the usual four-business-day period or does a different filing deadline apply?
- ✓ Has the company provided enough information about the occurrence to allow shareholders to make an informed decision about their investment?
- ✓ Can the reporting obligation be satisfied by disclosing the necessary information in the company's next Form 10-Q or 10-K?
- ✓ Is there any confidential information that ought to be redacted prior to filing?