

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 249

[Release Nos. 33-8400A; 34-49424A; File No. S7-22-02]

RIN 3235-A147

Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendments.

SUMMARY: We are making technical corrections to rules adopted in Release No. 33-8400 (March 16, 2004), which were published in the *Federal Register* on March 25, 2004 (69 FR 15593). The rules adopt amendments that increase the number of events requiring disclosure on Form 8-K and accelerate the filing deadline for that form. This document corrects certain errors in the regulatory text of the adopting release.

DATES: Effective August 23, 2004.

FOR FURTHER INFORMATION CONTACT: Ray Be, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 942-2910, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Discussion

On November 24, 2003 in Release No. 33-8340,¹ we added paragraph (b) to Item 5 of Form 10-Q² and Item 5 of Form 10-QSB,³ which requires companies to disclose information regarding changes to the procedures by which security holders may recommend nominees to the company's board of directors. In Release 33-8400 (the "Adopting Release"),⁴ we adopted amendments to these items that inadvertently deleted paragraph (b). These amendments clarify that paragraph (b) is not deleted from Item 5 of Forms 10-Q and 10-QSB.

Also, the regulatory text in the Adopting Release states that, with regard to disclosures under Item 2.01 of Form 8-K, *Completion of Acquisition or Disposition of Assets*, disclosure of the identity of the source of funding need only be made when a material relationship exists between the

company and the person from whom the assets were acquired. However, the release discussion is inconsistent with the regulatory text inasmuch as the release discussion indicates that disclosure of the source of funding must be made if a material relationship exists between the company and the source of funding. We are revising the regulatory text to be consistent with the release discussion, which was our original intent and consistent with commenters' remarks.

In addition, in the Adopting Release, we adopted amendments to add three checkboxes to the cover of Form 8-K to allow companies to satisfy specified overlapping Form 8-K and Regulation M-A disclosure obligations in a single filing on Form 8-K. These amendments add a fourth checkbox to allow a company to satisfy the disclosure requirements of Rule 13e-4(c),⁵ the Regulation M-A provision for issuer tender offers, by including that disclosure in a Form 8-K. Also, to clarify that a Form 8-K report that satisfies the filing requirements of Rule 14a-12(b)⁶ must contain all of the information required by Rule 14a-12, we are revising the reference in the newly adopted second checkbox to remove the paragraph (b) designation.

These amendments also redesignate paragraphs (a)(5)(1) and (2) of Item 5.01 of Form 8-K, *Changes in Control of Registrant*, as paragraphs (a)(5)(i) and (ii). A further correction pertains to Item 5.05(c) (formerly Item 10) of Form 8-K, *Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics*, which provides that a company need not file a Form 8-K report regarding a waiver from, or amendment to, its code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions if it posts the required disclosure on its Web site.⁷ We are correcting this item to state that a company disclosing an amendment to, or waiver from, such code of ethics on its Web site must do so within four business days after the date on which the code is amended or the waiver is granted in order to comply with paragraph (c) of the item, rather than within five business days of such date.⁸ We intended the deadline to parallel the general Form 8-K four business day filing deadline.

In Item 1.03 of Form 8-K, *Bankruptcy or Receivership*, we are revising the reference to the Bankruptcy Act to refer instead to the U.S. Bankruptcy Code⁹ to acknowledge the revisions made by the Bankruptcy Reform Act of 1978. Also, in the instructions to Forms S-2 and S-3, we are changing incorrect references to Section 12¹⁰ of the Exchange Act to refer to Section 13¹¹ instead.

Finally, we are correcting revisions to Item 5(a) of Form 10-K which erroneously included previously deleted regulatory text permitting the exclusion of sales made under Regulation S.¹²

II. Certain Findings

Under the Administrative Procedure Act ("APA"), notice of proposed rulemaking is not required when an agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹³ The correcting amendments to Form 8-K are technical changes that correct cross-references, correct paragraph numbering, conform the text to the stated intent of the Commission, replace text accidentally removed, and delete text previously removed. For these reasons, the Commission finds that there is no need to publish notice of these amendments.¹⁴ The APA also requires publication of a rule at least 30 days before its effective date unless the agency finds otherwise for good cause.¹⁵ For the same reasons described with respect to opportunity for notice and comment, the Commission finds there is good cause for the amendments to take effect on August 23, 2004.

III. Need for Correction

As published, the final regulations contain errors which are in need of clarification.

IV. Correction of Publication

Accordingly, the publication on March 25, 2004 of the final rules

⁹ 11 U.S.C.

¹⁰ 15 U.S.C. 78l.

¹¹ 15 U.S.C. 77m.

¹² See Release No. 33-7505 (Feb. 17, 1998) [63FR 9632].

¹³ 5 U.S.C. 553(b)(3)(B).

¹⁴ For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking); 5 U.S.C. 804(3)(C) (for purposes of congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

¹⁵ See 5 U.S.C. 553(d)(3).

¹ Release No. 33-8340 (Nov. 24, 2003) [68 FR 66992].

² 17 CFR 249.308a.

³ 17 CFR 249.308b.

⁴ 69 FR 15593.

⁵ 17 CFR 240.13e-4(c).

⁶ 17 CFR 240.14a-12(b).

⁷ A company may do so if it has indicated in its most recent annual report that it intends to make such disclosures in this manner.

⁸ See General Instruction B.1 to Form 8-K.

(Release No. 33-8400) relating to the addition of new Form 8-K disclosure requirements and acceleration of the filing date for that form, which was the subject of FR Doc. 04-6332, is corrected as follows.

Note: These corrections to Form S-2 (17 CFR 239.12), Form S-3 (17 CFR 239.13), Form 8-K (17 CFR 249.308), Form 10-Q (17 CFR 249.308a), Form 10-QSB (17 CFR 249.308b) and Form 10-K (17 CFR 249.310) do not appear in the Code of Federal Regulations.

1. On page 15618, first column, eleventh line, revise the reference "Section 12" to read "Section 13".

2. On page 15618, second column, fifth line of paragraph I.A.3.(a) under *General Instructions*, revise the reference "Section 12" to read "Section 13".

3. On page 15619, first column, second line of the second checkbox, revise the reference to "14a-12(b)" to read "14a-12".

4. On page 15619, first column, third line of the second checkbox, revise the reference to "(17 CFR 240.14a-12(b))" to read "(17 CFR 240.14a-12)".

5. On page 15619, first column, add the following checkbox above the *General Instructions*.

"[] Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))"

6. On page 15620, second column, fourth line of paragraph (a) under Item 1.03 Bankruptcy or Receivership, revise the reference "Bankruptcy Act" to read "U.S. Bankruptcy Code".

7. On page 15620, third column, revise paragraph (e) under Item 2.01 Completion of Acquisition or Disposition of Assets to read as follows:

"(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:"

8. On page 15625, third column, redesignate paragraphs (a)(5)(1) and (a)(5)(2) of Item 5.01 as paragraphs (a)(5)(i) and (a)(5)(ii).

9. On page 15627, first column, fifth line of paragraph (c) of Item 5.05, revise the word "five" to read "four".

10. On page 15628, first column, revise amendatory instruction 20.f. to read:

"f. Revising Item 5(a);".

11. On page 15628, first column, first line under "Item 5. Other Information," designate the paragraph as paragraph (a).

12. On page 15628, in the second column, revise amendatory instruction 21.f. to read:

"f. Revising Item 5(a);".

13. On page 15628, second column, first line under "Item 5. Other Information," designate the paragraph as paragraph (a).

14. On page 15628, third column, eighth through eleventh lines in paragraph (a) under "*Item 5. Market for Registrant's Common Equity and Related Stockholder Matters*," remove the phrase "other than unregistered sales made in reliance on Regulation S (17 CFR 230.901 through 230.905)".

By the Commission.

Dated: August 4, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04-18118 Filed 8-9-04; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket Number RM01-10-002; Order No. 2004-B]

Standards of Conduct for Transmission Providers

Issued August 2, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing of Order No. 2004-A.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order Nos. 2004 and 2004-A and grants rehearing and clarifies certain provisions. Order No. 2004 requires all natural gas and public utility Transmission Providers to comply with Standards of Conduct that govern the relationship between the natural gas and public utility Transmission Providers and all of their Energy Affiliates.

In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004-A. The Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004-A.

EFFECTIVE DATE: Revisions in this order on rehearing will be effective September 9, 2004.

FOR FURTHER INFORMATION CONTACT:

Demetra Anas, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8178.

SUPPLEMENTARY INFORMATION:

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Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Sudeen G. Kelly.

1. On November 25, 2003, the Federal Energy Regulatory Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004 or Final Rule)¹ which added Part 358 and revised Parts 37 and 161 of the Commission's regulations. The Commission adopted Standards of Conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers) that were

¹ Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003).