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KIRBY CORP
Form POS AM
April 28, 2004

As filed with the Securities and Exchange Commission on April 28, 2004
Registration No. 333-72592

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

POST-EFFECTIVE AMENDMENT NO. 1
TO
FORM S-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

KIRBY CORPORATION
(Exact name of registrant as specified in its charter)

Nevada	74-1884980
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

55 Waugh Drive, Suite 1000
Houston, Texas 77007
(Address of principal executive offices, including zip code)

2000 NONEMPLOYEE DIRECTOR STOCK OPTION PLAN

(Full title of the plan)

Joseph H. Pyne
President and Chief Executive Officer
Kirby Corporation
55 Waugh Drive, Suite 1000
Houston, Texas 77007
(Name and address of agent for service)
(713) 435-1000
(Telephone number, including area code, of agent for service)

Copy to: Thomas G. Adler, Esq.
Jenkins & Gilchrist,
A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202

EXPLANATORY NOTE

On November 1, 2001, the registrant filed with the Securities and Exchange Commission ("SEC") a Registration Statement on Form S-8, No. 333-72592, pertaining to its 2000 Nonemployee Director Stock Option Plan (the "Plan"), which provided for the granting of stock options to eligible participants under the Plan. At its Annual Meeting of Stockholders held on April 27, 2004, the shareholders of the registrant approved an amendment to the Plan which permits

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the registrant to award restricted stock awards to eligible participants under the Plan in addition to stock options. The registrant is filing this Post-Effective Amendment to file the Plan, as amended, which is attached hereto as Exhibit 4.4. No additional securities are being registered.

PART I

INFORMATION REQUIRED IN THE SECTION 10(A) PROSPECTUS

- Item 1. Plan Information*
- Item 2. Registrant Information and Employee Plan Annual Information*

PART II

INFORMATION REQUIRED IN REGISTRATION STATEMENT

- Item 3. Incorporation of Documents by Reference

The Corporation hereby incorporates by reference in this registration statement the following documents previously filed by the Corporation with the Securities and Exchange Commission (the "Commission"):

(1) the Corporation's Annual Report on Form 10-K for the fiscal year ended December 31, 2003;

(2) the Corporation's Current Report on Form 8-K filed with the Commission on January 29, 2004; and

(3) the description of the Common Stock, par value \$0.10 per share, of the Corporation (the "Common Stock") set forth in the Registration Statement on Form 8-B, dated October 14, 1976, including any amendment or report filed for the purpose of updating such description.

*Information required by Part I to be contained in the Section 10(a) prospectus is omitted from this Registration Statement in accordance with Rule 428 under the Securities Act of 1933 and the Note to Part I of Form S-8.

All documents filed by the Corporation with the Commission pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), subsequent to the date of this registration statement, shall be deemed to be incorporated herein by reference and to be a part hereof from the date of the filing of such documents until such time as there shall have been filed a post-effective amendment that indicates that all securities offered hereby have been sold or that deregisters all securities remaining unsold at the time of such amendment.

- Item 5. Interests of Named Experts and Counsel

Certain matters with respect to the validity of the Common Stock to be offered hereby will be passed on for the Corporation by Jenkens & Gilchrist, a Professional Corporation. Thomas G. Adler, the Secretary of the Corporation, is a shareholder of Jenkens & Gilchrist, a Professional Corporation.

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Item 6. Indemnification of Directors and Officers

(a) The Restated Articles of Incorporation of the Corporation provide for indemnification as follows:

"TWELFTH: 1. The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, except an action by or in the right of the Corporation, by reason of the fact that he is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action, suit or proceeding if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, has no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Corporation, and that, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

2. The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses, including

amounts paid in settlement and attorneys' fees actually and reasonably incurred by him in connection with the defense or settlement of the action or suit if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Corporation. Indemnification shall not be made for any claim, issue or matter as to which such a person has been adjudged by a court of competent jurisdiction, after exhaustion of all appeals therefrom, to be liable to the Corporation or for amounts paid in settlement to the corporation unless and only to the extent that the court in which the action or suit was brought or other court of competent jurisdiction determines upon application that in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court deems proper.

3. To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or

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otherwise in defense of any action, suit or proceeding referred to in sections 1 and 2 of this Article Twelfth, or in defense of any claim, issue or matter therein, he must be indemnified by the corporation against expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense.

4. Any indemnification under section 1 and 2 of this Article Twelfth, unless ordered by a court or advanced pursuant to section 5 of this Article Twelfth, must be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances. The determination must be made:

(a) By the stockholders;

(b) By the board of directors by majority vote of a quorum consisting of directors who were not parties to the act, suit or proceeding;

(c) If a majority vote of a quorum consisting of directors who were not parties to the act, suit or proceeding so orders, by independent legal counsel in a written opinion; or

(d) If a quorum consisting of directors who were not parties to the act, suit or proceeding cannot be obtained, by independent legal counsel in a written opinion.

5. The expenses of officers and directors incurred in defending a civil or criminal action, suit or proceeding must be paid by the Corporation as they are incurred and in advance of the final disposition of the action, suit or proceeding upon receipt of an undertaking by or on behalf of the director or officer to repay the amount if it is ultimately determined by a court of competent jurisdiction that he is not entitled to be indemnified by the Corporation. The provisions of this

section 5 of this Article Twelfth do no affect any rights to advancement of expenses to which corporate personnel other than directors or officers may be entitled under any contract or otherwise by law.

6. The indemnification and advancement of expenses provided by this Article Twelfth:

(a) Does not exclude any other rights to which a person seeking indemnification or advancement of expenses may be entitled under these articles of incorporation or any bylaws, agreement, vote of stockholders or disinterested directors or otherwise, for either an action in his official capacity or an action in another capacity while holding his office, except that indemnification, unless ordered by a court pursuant to section 2 of this Article Twelfth or for the advancement of expenses of any director or officer, if a final adjudication establishes that his acts or omissions involved intentional misconduct,

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fraud or a knowing violation of the law and was material to the cause of action.

(b) Continues for a person who has ceased to be a director, officer, employee or agent and inures to the benefit of the heirs, executors and administrators of such person.

7. The Corporation may purchase and maintain insurance or make other financial arrangements on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise for any liability asserted against him and liability and expenses incurred by him in his capacity as a director, officer, employee or agent, or arising out of his status as such, whether or not the corporation has the authority to indemnify him against such liability and expenses.

8. The other financial arrangements made by the corporation pursuant to section 7 of this Article Twelfth may include the following:

(a) The creation of a trust fund.

(b) The establishment of a program of self-insurance.

(c) The securing of its obligation of indemnification by granting a security interest or other lien on any assets of the Corporation.

(d) The establishment of a letter of credit, guaranty or surety.

No financial arrangement made pursuant to this section may provide protection for a person adjudged by a court of competent jurisdiction, after exhaustion of all appeals therefrom, to be liable for intentional misconduct, fraud or a

knowing violation of law, except with respect to the advancement of expenses or indemnification ordered by a court.

9. Any insurance or other financial arrangement made on behalf of a person pursuant to this Article Twelfth may be provided by the Corporation or any other person approved by the board of directors, even if all or part of the other person's stock or other securities is owned by the Corporation.

10. In the absence of fraud:

(a) The decision of the board of directors as to the propriety of the terms and conditions of any insurance or other financial arrangement made pursuant to this Article Twelfth and the choice of the person to provide the insurance or other financial arrangement shall be conclusive; and

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(b) The insurance or other financial arrangement:

(1) is not void or voidable; and

(2) does not subject any director approving it to personal liability for his action, even if a director approving the insurance or other financial arrangement is a beneficiary of the insurance or other financial arrangement."

(b) The Corporation's Bylaws provide that the Corporation shall indemnify each and every present and former director and officer of the Corporation, and each and every person who may have served at the Corporation's request as a director or officer of another corporation in which the Corporation owns shares of capital stock or of which the Corporation is a creditor (each of which other corporation is individually referred to herein as an "Other Enterprise"), against any and all expenses (including attorneys' fees) actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he was or is a party by reason of being or having been a director or officer of the Corporation or Other Enterprise to the fullest extent permitted by law. The rights of indemnification provided in the Bylaws are in addition to any other rights to which a person may otherwise be entitled by any other provisions of the Corporation's Restated Articles of Incorporation, statute, agreement, vote of stockholders or otherwise.

The Corporation's Bylaws further provide that the Corporation shall indemnify officers and directors of the Corporation, as well as other persons who serve as agents and employees of the Corporation, to the extent set forth in the Corporation's Restated Articles of Incorporation.

Additionally, the Corporation's Bylaws provide that the Corporation may purchase and maintain insurance on behalf of, and contractually agree to indemnify, any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint

venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify him against such liability under the provisions of the Bylaws.

(c) The Corporation has entered into agreements with each Director and certain key officers, including C. Berdon Lawrence, Joseph H. Pyne, Norman W. Nolen, Mark R. Buese, Jack M. Sims, Howard G. Runser, G. Stephen Holcomb and Thomas G. Adler, and certain officers of subsidiaries of the Corporation, including Steven P. Valerius and Dorman L. Strahan, that provide for the indemnification of such individuals for certain liabilities incurred in such capacity.

Item 8. Exhibits.

(a) Exhibits.

The following documents are filed as a part of this registration statement.

Exhibit	Description of Exhibit
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- 4.1 Restated Articles of Incorporation of Kirby Exploration Company, Inc., as amended (incorporated by reference from Exhibit 3.1 to the Corporation's Registration Statement on Form S-3, Reg. No. 33-30832, filed with the Commission on August 30, 1989).
- 4.2 Certificate of Amendment of Restated Articles of Incorporation of the Corporation (incorporated by reference from Exhibit 3.2 to the Corporation's Annual Report on Form 10-K for the year ended December 31, 1990).
- 4.3 Rights Agreement, dated as of July 18, 2000, between Kirby Corporation and Fleet National Bank, a national banking association, which includes the Form of Resolutions Establishing Designations, Preferences and Rights of Series A Junior Participating Preferred Stock of Kirby Corporation as Exhibit A, the form of Rights Certificate as Exhibit B, and the Summary of Rights as Exhibit C (incorporated by reference from Exhibit 4.1 to the Corporation's Current Report on Form 8-K filed with the Commission on July 20, 2000).
- 4.4* 2000 Nonemployee Director Stock Option Plan for Kirby Corporation
- 5.1* Opinion of Jenkins & Gilchrist, a Professional Corporation
- 23.1* Consent of Jenkins & Gilchrist, a Professional Corporation (included in their opinion filed as Exhibit 5.1)
- 23.2* Consent of KPMG LLP

- 24 Power of Attorney (included with signature page of the Company's Registration Statement on Form S-8 (No. 333-72592))

* Filed herewith.

Item 9. Undertakings.

A. The undersigned registrant hereby undertakes:

(1) to file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement to include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

(2) that, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof; and

(3) to remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

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B. The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933 (the "Securities Act"), each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

C. Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question of whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this post-effective amendment no. 1 to registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Houston, State of Texas, on April 27, 2004.

KIRBY CORPORATION

By: /s/ Joseph H. Pyne

Joseph H. Pyne
President and Chief Executive
Officer

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated:

Signature

Capacity

/s/ *

Chairman of the Board and Director

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----- C. Berdon Lawrence	of the Company
 /s/ Joseph H. Pyne ----- Joseph H. Pyne	 President, Director and Chief Executive Officer of the Company (principal executive officer)
 /s/ * ----- Norman W. Nolen	 Executive Vice President, Treasurer and Chief Financial Officer of the Company (principal financial officer)
 /s/ Ronald A. Dragg ----- Ronald A. Dragg	 Controller (principal accounting officer)
 /s/ * ----- C. Sean Day	 Director of the Company
 /s/ * ----- Bob G. Gower	 Director of the Company
 ----- Walter E. Johnson	 Director of the Company
 /s/ * ----- William M. Lamont, Jr.	 Director of the Company
 /s/ * ----- George A. Peterkin, Jr.	 Director of the Company
 /s/ * ----- Robert G. Stone, Jr.	 Director of the Company
 /s/ * ----- Richard C. Webb	 Director of the Company
 *By: /s/ Joseph H. Pyne ----- Joseph H. Pyne Attorney-in-fact	

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EXHIBIT INDEX

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