

Preparing Year-End Disclosure Documents

This memorandum identifies the new and revised disclosure requirements applicable to 2005 Form 10-K annual reports and proxy statements. It is based upon a review of relevant rules and interpretations issued by the Securities and Exchange Commission (“SEC”), the New York Stock Exchange (“NYSE”) and The Nasdaq Stock Market (“Nasdaq”).

Form 10-K Annual Reports

1. Filing Deadline. The SEC adopted rules that keep in place for 2005 the Form 10-K and Form 10-Q filing deadlines for “accelerated filers” that were in effect in 2004. As a result:
 - 2005 Form 10-Ks must be filed within 75 days after fiscal year-end (March 16, 2005 for companies with a December 31, 2004 fiscal year-end); and
 - 2005 Form 10-Qs must be filed within 40 days after fiscal quarter-end (May 10, 2005, August 9, 2005 and November 9, 2005).

The deferred shorter deadlines – 60 days after fiscal year-end for Form 10-Ks and 35 days after fiscal quarter-end for Form 10-Qs – will become effective for accelerated filers in 2006.

2. Form 10-K, Part II, Item 5. “Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.” This caption has been slightly revised and Item 5(a) has been changed to permit the omission of information previously included in a Current Report on Form 8-K. Also, Item 5(c) now requires the information under Item 703 of Regulation S-K regarding purchases of equity securities by the issuer. This disclosure, which includes a tabular presentation, became effective for filings made in periods ending on or after March 15, 2004 and thus was not required in the 2003 Form 10-Ks of issuers whose fiscal year ends on December 31.
3. Form 10-K, Part II, Item 9. “Changes in and Disagreements with Accountants on Accounting and Financial Disclosure.” This Item has been slightly revised to require the disclosure of information under Item 304(b) of Regulation S-K.
4. Form 10-K, Part II, Item 9A. “Controls and Procedures.” This Item now requires the disclosure of information under Item 308 of Regulation S-K (“Internal Control Over Financial Reporting”). Item 308 calls for, among other things, (a) management’s assessment of the effectiveness of the registrant’s internal control over financial reporting as of year-end and (b) an attestation report of the registrant’s independent public accountants on management’s assessment of the registrant’s internal control over financial reporting.

The SEC issued an exemptive order in November 2004 that allows certain accelerated filers with a public equity float of less than \$700 million a 45-day extension for including management’s assessment of its internal control over financial reporting and the related auditor’s attestation report in their Form 10-K annual reports.

5. Form 10-K, Part II, Item 9B. “Other Information.” This is a new Item, which requires registrants to disclose any information that should have been, but was not, disclosed in a report on Form 8-K during the fourth quarter of the year covered by the Form 10-K.
6. Form 10-K, Part IV, Item 15. “Exhibits and Financial Statement Schedules.” This caption has been slightly revised and former Item 15(b) “Reports on Forms 8-K” has been eliminated, with former paragraphs 15(c) and 15(d) renumbered as new paragraphs 15(b) and 15(c).
7. Form 10-K, Exhibit 3. Articles of Incorporation/By-laws. The exhibit filing under Item 601(b)(3) of Regulation S-K permits the filing of amendments to a registrant’s charter or by-laws, rather than the filing of a complete copy of the amended charter or by-laws, on a Form 8-K, provided that the complete copy is filed as an exhibit to the next 1933 Act registration statement or 1934 Act periodic report (*i.e.*, a Form 10-Q or 10-K).
8. Form 10-K, Exhibit 31. Rule 13a-14(a)/15d-14(a) Certification. The exhibit filing under Item 601(b)(31) of Regulation S-K must now include all certification paragraphs, including the language relating to internal control over financial reporting (which had been temporarily deferred).

Proxy Statements

1. NYSE Corporate Governance Rules. The NYSE previously adopted corporate governance rules requiring the disclosure in the proxy statement of a company's "independent directors," as defined by the NYSE rules. Effective November 3, 2004 the NYSE slightly modified its rules to provide that a director is not independent if:
 - The director or an immediate family member is a current partner of a firm that is the company's internal or external auditors;
 - The director is a current employee of such a firm;
 - The director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or
 - The director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.

The NYSE adopted other clarifying amendments of its corporate governance rules, including requiring proxy statement disclosure (or Form 10-K disclosure if the company does not file a proxy statement) that a company's corporate governance guidelines and code of business conduct and ethics are available on the company's website or in print for any shareholder upon request.

2. Shareholder Proposals. The SEC's Division of Corporation Finance issued Staff Legal Bulletin No. 14B on September 25, 2004. The bulletin contains guidance on the following topics under Rule 14a-8, the shareholder proposal rule:
 - The application of Rule 14a-8(i)(3), particularly with respect to false or misleading statements in a shareholder proposal or supporting statement;
 - Common issues regarding a company's notice of defects to a shareholder proponent under Rule 14a-8(f);
 - The application of the 80-day requirement in Rule 14a-8(j);
 - Opinions of counsel under Rule 14a-8(j)(2)(iii); and
 - Processing matters relating to the availability of submitted materials and the mailing and public availability of the SEC Staff's responses.

Any company faced with a shareholder proposal should review carefully the SEC Staff's new guidance to ensure that the company actions are in accord with Rule 14a-8.

3. Executive Compensation. CEO and executive officer compensation continues to receive high-level attention from the media, institutional investors and other shareholders and, increasingly, from the SEC. In an October 20, 2004 speech, Alan L. Beller, Director of the SEC's Division of Corporation Finance confirmed that the SEC Staff is reviewing the executive compensation rules under Items 402 of Regulation S-K for possible revision. In addition, Mr. Beller offered the following advice to companies in connection with their proxy statement disclosures relating to executive compensation:
 - The proxy rules require the disclosure of all plan and non-plan compensation for named executive officers and directors.
 - "A perk, by any other name, is still a perk, and therefore must be considered for disclosure." In determining whether an item is a perquisite, Mr. Beller suggested that one relevant question to ask is whether the item is available to employees generally on a non-discretionary basis, or whether it is a benefit for which only a chosen few are eligible.
 - Companies — and especially compensation committees — should take a fresh look at their compensation committee reports. Compensation committees have an obligation to consider total compensation as well as the individual compensation components, to be mindful of their role as independent directors and to ensure that compensation consultants understand that they work for the committee and not the executives whose pay is under consideration.

4. “Unbundling” in M&A Context. The SEC’s Division of Corporation Finance also issued guidance in a September 2004 telephone interpretation addressing Rule 14a-4(a)(3), the “unbundling” rule, in the context of mergers, acquisitions and similar transactions. The guidance outlines the circumstances where a form of proxy used in an M&A transaction must identify as separate proposals the charter or by-law amendments that will take effect as a result of the transaction. For example, if a company will have a classified board for the first time upon effectiveness of the merger, a classified board proposal must be set out as a separate proposal apart from the merger proposal.

For Further Information

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