

UPDATED
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The Disclosure Regime Under Sarbanes-Oxley and other SEC Initiatives: At-a-Glance

The passage and implementation of the Sarbanes-Oxley Act of 2002 (the "Act") have wrought sweeping changes in the disclosure regime applicable to issuers and their insiders. The Act introduced new concepts, such as disclosure controls and procedures and internal control over financial reporting, and imposed new affirmative obligations on issuers to establish these controls, evaluate them on a regular basis and publicly certify the results of those evaluations. Tighter conditions have been imposed on the disclosure of non-GAAP financial information, not only in an issuer's SEC filings, but also in any other public disclosure by the issuer or a person acting on its behalf. Additionally, the Act has established stricter standards for the financial expertise of members of an issuer's audit committee and for the independence of the independent auditor, with disclosure regarding these standards required to be included in the issuer's annual report and proxy statement. These are but a few of the new items of disclosure required under the Act.

Not only has the Act imposed greater disclosure obligations on issuers and insiders, it has also accelerated the required publication of this disclosure. For example, an issuer's annual and quarterly reports on Forms 10-K and 10-Q are now required to be filed earlier than previously mandated. The disclosure on Form 4 of transactions by an issuer's insiders in the issuer's securities has also been accelerated, and is now required no later than the second business day following the trade.

We have prepared this memorandum to provide U.S. reporting companies with a guide to complying with the new disclosure regime brought about by the Act and other recent SEC initiatives. This memorandum does not address, however, the changes in the disclosure regime for foreign private issuers, small business issuers, registered investment companies or issuers of asset-backed securities.

Overview

We begin in Section 1 by outlining the changes that will affect periodic reports and annual meeting proxy and information statements:

- Disclosure and certification requirements effective for periodic reports and annual meeting proxy and information statements that are required to be filed this year (i.e., in the current annual report and annual meeting season for calendar-year issuers):
 - Disclosure controls and procedures;
 - CEO and CFO certifications under Sections 302 and 906 of the Act;
 - Conditions on the use of non-GAAP financial measures in all SEC documents;
 - Disclosure regarding equity compensation plans;
 - Disclosure regarding availability of SEC filings made by accelerated filers;

- SEC guidance regarding MD&A;
- Code of ethics for senior management;
- Audit committee financial expert determination;
- Off-balance sheet arrangements and contractual obligations;
- Audit committee independence;
- Principal accountant fees and services; and
- Disclosure regarding nominating committee functions and communications between security holders and boards of directors.
- Disclosure requirements to be phased in commencing with periodic reports required to be filed this year:
 - Issuer repurchases of equity securities; and
 - Disclosures requirements for issuers listed on the NYSE or Nasdaq under their new corporate governance listing standards.
- Disclosure requirements to be phased in commencing with periodic reports required to be filed in the following year:
 - Additional disclosure regarding internal control over financial reporting.

Section 2 discusses Regulation G, which affects all public announcements that contain non-GAAP financial information.

In Section 3, we briefly outline the acceleration of filing deadlines for annual reports on Form 10-K and quarterly reports on Form 10-Q that will begin next year for most reporting companies.

Section 4 outlines the following recently adopted and proposed changes to Form 8-K:

- New triggering events:
 - Earnings releases;
 - Pension fund-related trading blackouts; and
 - Code of ethics amendments or waivers;
- SEC proposals that are not yet finalized:
 - Notice of attorney withdrawal; and
 - Additional triggering events and reformatting of Form 8-K itself.

Finally, Section 5 summarizes the Section 16 reporting requirements for corporate insider transactions.

Throughout this guide, we refer to various other memoranda that provide more detail on the subjects outlined in this guide. These memoranda are all available on our website, www.paulweiss.com. Click on "Practice," then "Securities" and "Publications" to find them.

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1) Changes Affecting Periodic Reports and Annual Meeting Proxy and Information Statements

Annex A provides a tabular summary of the changes to Form 10-K and Form 10-Q. Issuers should remember that any information that is required to be disclosed in Part III of Form 10-K may be disclosed in an annual meeting proxy or information statement and incorporated by reference into the annual report on Form 10-K if the issuer chooses to do so, provided that the proxy or information statement is filed with the SEC not later than 120 days after the end of the fiscal year.

a. Currently Effective Changes Affecting Periodic Reports and Annual Meeting Proxy and Information Statements Required to be Filed This Year

i) Disclosure Controls and Procedures

- Item 307 of Regulation S-K, which is referred to in Part II Item 9A of Form 10-K ("Controls and Procedures") and Part I Item 4 of Form 10-Q ("Controls and Procedures"), requires an issuer to disclose the conclusions of its principal executive officer (the "CEO") and principal financial officer (the "CFO") regarding the effectiveness of its disclosure controls and procedures as of the end of the period covered by the report, based on their evaluation of these controls and procedures.
- New Exchange Act Rules 13a-15 and 15d-15 define "disclosure controls and procedures" and require issuers to maintain them to ensure that information required to be disclosed by the issuer in its Exchange Act reports is timely recorded, processed, summarized and reported.
- New Item 308(c) of Regulation S-K requires an issuer to disclose any change in its internal control over financial reporting identified in connection with the evaluation that occurred during the issuer's last fiscal quarter that has materially affected, or is reasonably likely to materially affect these controls subsequent to the date of their evaluation.
- Additional disclosure requirements regarding internal control over financial reporting were adopted in June 2003 (see "Additional Disclosure Regarding Internal Control Over Financial Reporting" below). The SEC has indicated that until the effective date of these new disclosure requirements, it expects issuers to treat the references in new Item 308(c) of Regulation S-K to the issuer's currently existing internal controls maintained in accordance with the existing accounting literature. For more regarding internal control over financial reporting, see our memorandum dated June 18, 2003, "SEC Adopts Rules Regarding Internal Control Over Financial Reporting."

ii) Certification Required by Section 302 of the Act (the "302 Certification")

- New Exchange Act Rules 13a-14 and 15d-14 and amendments to Forms 10-K and 10-Q call for each of the issuer's CEO and CFO to certify the information contained in the report and the issuer's controls for the collection and reporting of financial and other information. **Annex B** contains the prescribed form of certification. The SEC staff has indicated that no changes should be made to the form of certification, although transition rules permit certain items to be omitted from the certification until such time as the issuer is required to comply with the final rules on internal control over financial reporting.
- The 302 Certification is required to be filed as an exhibit to each quarterly and annual report filed with or submitted to the SEC instead of being included in the body of the report immediately following the signature page, as required previously.
- For more regarding the 302 Certification, see our memorandum dated September 5, 2002, "SEC Issues Rules for CEO/CFO Certification of Quarterly and Annual Reports and Internal Disclosure Controls and Procedures."

iii) Certifications Required by Section 906 of the Act (the "906 Certification")

- Under Section 906 of the Act, the CEO and CFO must certify that each periodic report containing financial statements complies with the requirements of Section 13(a) and 15(d) of the Exchange Act and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.
- The 906 Certification is required to be furnished as an exhibit to all periodic reports that contain financial statements. Section 906 of the Act requires that 906 Certifications "accompany" the periodic report to which they relate, in contrast to 302 Certifications, which are required to be included "in" the periodic report. Accordingly, the SEC will permit issuers to "furnish," rather than "file," the 906 Certifications with the report. Thus, the 906 Certifications would not be subject to liability under Section 18 of the Exchange Act or automatic incorporation by reference into an issuer's Securities Act registration statements, which are subject to liability under Section 11 of the Securities Act.
- For more regarding the 906 Certifications, see our memorandum dated July 31, 2002, "CEO/CFO Certifications – An Update."

iv) Disclosure Containing Non-GAAP Financial Measures (Item 10 of Regulation S-K)

- Whenever a non-GAAP financial measure¹ is included in a filing with the SEC, the issuer must include the following in the filing:

¹ Under Regulation G, a "non-GAAP financial measure" is a numerical measure of an issuer's historical or future financial performance, financial position or cash flows that:

- a presentation, with equal or greater prominence, of the most directly comparable financial measures calculated and presented in accordance with GAAP;
 - a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measures calculated and presented in accordance with GAAP;
 - a statement disclosing the reasons why the issuer's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the issuer's financial condition and results of operations; and
 - to the extent material, a statement disclosing any additional purposes for which the issuer's management uses the non-GAAP financial measure.
- If the non-GAAP financial measure is included in a report on Form 10-Q, an issuer need not include the information described in the third and fourth bullet points above if that information was included in its most recent annual report on Form 10-K or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements in the third and fourth bullet points above at the time of the issuer's current SEC filing.
 - Whenever a non-GAAP financial measure is included in a filing with the SEC, the issuer must **NOT**:
 - exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures², other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

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- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or
 - includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

A non-GAAP financial measure does not include operating and other financial measures and ratios or statistical measures calculated using exclusively one or both of:

- financial measures calculated in accordance with GAAP; and
- operating measures or other measures that are not non-GAAP financial measures.

A non-GAAP financial measure does not include financial measures required to be disclosed by GAAP, SEC rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the issuer.

² A "non-GAAP liquidity measure" is a measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.

- adjust a non-GAAP performance measure³ to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;
 - present non-GAAP financial measures on the face of the issuer's financial statements prepared in accordance with GAAP or in the accompanying notes;
 - present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; or
 - use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures.
- Item 10 of Regulation S-K does not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to the SEC's communications rules applicable to business combination transactions (e.g., Rule 425 under the Securities Act and Rules 14a-12 and 14d-2(b)(2) under the Exchange Act).
 - For more regarding new Item 10 of Regulation S-K, see our memorandum dated July 10, 2003, "Use of Non-GAAP Financial Measures and Filing of Earnings Releases."

v) Disclosure Regarding Equity Compensation Plan Information

- Under amended Part III Item 12 of Form 10-K ("Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters"), an issuer must now furnish the information required under new Item 201(d) of Regulation S-K as well as under 403 of Regulation S-K. In addition, under new Item 10(c) of Schedule 14A ("Information Regarding Plans and Other Arrangements Not Subject to Security Holder Action"), an issuer must furnish the information required under new Item 201(d) of Regulation S-K whenever the issuer is seeking security holder action regarding an equity compensation plan.
- New Item 201(d) of Regulation S-K requires an issuer to provide information as of the end of the most recently completed fiscal year with respect to any compensation plan (including individual compensation arrangements) under which equity securities of the issuer are authorized for issuance.
- The disclosure must be in tabular format (see Annex C) and include the following information, subtotaled for shareholder approved plans and non-shareholder approved plans and totaled for all plans:

³ A "non-GAAP performance measure" is a measure of performance that is different from that presented in the financial statements, such as income or loss before taxes, or net income or loss as calculated in accordance with GAAP.

- the number of securities to be issued upon exercise of outstanding options, warrants and rights;
- the weighted-average exercise price of outstanding options, warrants and rights;
- the number of securities remaining available for future issuance (excluding securities subject to outstanding options, warrants and rights).
- In addition, for each compensation plan under which equity securities of the issuer are authorized for issuance that was adopted without the approval of security holders, the issuer must provide a brief description, in narrative form, of the material features of the plan and, unless immaterial in amount or significance, file the plan as an exhibit.
- For more regarding the disclosure of equity compensation plan information, see our memorandum dated January 2002, "SEC Amends Proxy and Form 10-K Rules Regarding Equity Compensation Plans."

vi) Disclosure Regarding Availability of Periodic Reports made by Accelerated Filers

- Must be included in annual reports on Form 10-K for accelerated filers.⁴
- Amended Item 101 of Regulation S-K, which is referred to in Part I Item 1 of Form 10-K ("Business"), requires disclosure of:
 - the accelerated filer's website address, if it has one; and
 - whether the accelerated filer makes available free of charge, on or through its website, its annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and all amendments to those reports filed or furnished with the SEC *as soon as practicable after such materials are delivered to the SEC* (the SEC interprets this standard to mean that the report would be available, barring unforeseen circumstances, on the same day as filing).
- If these reports are not made available in the above manner, the accelerated filer must explain why they are not available and must disclose whether it will provide electronic or paper copies of the reports available free of charge upon request.

⁴ Under amended Exchange Act Rule 12b-2, an issuer is considered an "accelerated filer" after it first meets the following conditions as of the end of its fiscal year:

- its common equity public float was \$75 million or more as of the last business day of its most recently completed second fiscal quarter;
- it has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- it has previously filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- it is not eligible to use Forms 10-KSB and 10-QSB.

The covers of Form 10-K and Form 10-Q have been amended to add a checkbox indicating whether or not the filer is an accelerated filer.

- The SEC staff takes the “makes available” language to mean that the accelerated filer has made the specified filings available during the period covered by the report. Accelerated filers should therefore make sure that their periodic reports are available generally through their websites prior to making the required disclosure.
- While the amendments do not cover how long an accelerated filer’s report must be made available on or through its website, the SEC suggests that, at a minimum, accelerated filers provide website access to their previous reports for at least a 12 month period. The SEC has also indicated that it would be desirable for accelerated filers to provide access to their previous reports on an appropriately archived portion of their website over an even longer timeframe. Finally, the SEC encourages accelerated filers to provide website access to all of their SEC filings, including their filings under the proxy rules and their Securities Act filings.

vii) SEC Guidance Regarding MD&A

- In December 2003 the SEC published an interpretive release to provide additional guidance on the preparation of Management’s Discussion and Analysis of Financial Condition and Results of Operations contained in periodic reports and registration statements filed with the SEC. The goal of the SEC’s guidance is not simply to increase the volume of MD&A disclosure; it is to improve the quality of this disclosure by expanding the discussion of the factors most relevant to investors while de-emphasizing (or eliminating) out-of-date or immaterial information.
- The SEC’s guidance called for an improvement in the presentation of MD&A and suggested that companies:
 - should present their disclosure so that the most important information is most prominent, using tabular presentation and informative headings where appropriate; and
 - would benefit from starting their MD&A with a section that provides an executive-level overview that provides context for the remainder of the discussion.
- As to focus and content, the SEC’s guidance stated that companies:
 - should focus on known material events and uncertainties that would cause reported financial information not to be necessarily indicative of future operating performance or of future financial condition and eliminate immaterial information that does not promote understanding of the companies’ financial condition;
 - should identify and discuss key performance indicators, including non-financial performance indicators, that their management uses to manage the business and that would be material to investors; and

- must identify and disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on financial condition or operating performance.
- In their MD&A discussion of liquidity and capital resources, companies should:
 - identify known material cash requirements, using, where appropriate, tabular disclosure of contractual obligations, supplemented with additional information material to an understanding of the company's cash requirements;
 - explain the reasons for the incurrence of any material indebtedness and the use of the proceeds, and analyze how the incurrence of that debt fits into the overall business plan;
 - focus the MD&A on the primary drivers of and other material factors necessary to an understanding of the company's cash flows and the indicative value of historical cash flows, and describe the resources available to satisfy the company's cash requirements;
 - describe known material trends or uncertainties relating to material determinations as to how they use cash resources and make other capital expenditures; and
 - disclose material information about any, or any reasonably likely, breach of material debt covenants and analyze the impact on the company, if material. Companies should also discuss the impact of debt covenants on their ability to undertake additional debt or equity financing.
- The SEC proposed rules in May 2002 requiring specific disclosure concerning critical accounting estimates (see our May 2002 memorandum referred to below). While these proposals remain under consideration, companies should consider whether they have made accounting estimates or assumptions where:
 - the nature of the estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change; and
 - the impact of the estimates and assumptions on financial condition or operating performance is material.

If so, companies should provide disclosure about those critical accounting estimates or assumptions. This disclosure should supplement, not duplicate, the descriptions of accounting policies that are already disclosed in the notes to the financial statements.

Disclosure should address specifically why a company's accounting estimates or assumptions bear the risk of change. Since critical accounting estimates and assumptions are based on matters that are highly uncertain, a company

should analyze their specific sensitivity to change, based on other outcomes that are reasonably likely to occur and would have a material effect. Companies should provide quantitative as well as qualitative disclosure when quantitative information is reasonably available and will provide material information for investors.

- As described below, the SEC has adopted final rules requiring disclosure about an issuer's off-balance sheet transactions and contractual obligations, which will be phased in during this year (see "Disclosure Regarding Off-Balance Sheet Transactions and Contractual Obligations" below). To the extent that the SEC statement regarding MD&A disclosure and the proposal regarding the disclosure of critical accounting policies overlap with the new disclosure requirements that have been adopted but are not mandated immediately, issuers may either comply with the new rules early or abide by the existing pronouncements.
- For more regarding the SEC statements and proposals regarding MD&A disclosure, see our memorandum dated December 17, 2001, "SEC Cautions on Selection and Disclosure of Critical Accounting Policies," our memorandum dated January 31, 2002, "SEC Issues Statement Regarding MD&A Disclosure," our memorandum dated May 14, 2002, "SEC Proposes Requirements for Disclosure of Critical Accounting Policies in MD&A" and our memorandum dated December 24, 2003, "SEC Issues Further Guidance on MD&A."

viii) Disclosure Regarding Code of Ethics for Senior Management

- New Item 406 of Regulation S-K requires an issuer to disclose whether it has adopted a code of ethics⁵ that applies to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions (a "Code of Ethics"). An issuer may have separate Codes of Ethics for different types of officers. Furthermore, a Code of Ethics may be a portion of a broader document that addresses additional topics or that applies to more persons than those specified in new Item 406.
- Under amended Part III Item 10 of Form 10-K ("Directors and Executive Officers of the Registrant"), an issuer must disclose the information required by new Item 406 of Regulation S-K.
- If an issuer has not adopted a Code of Ethics, it must explain why it has not done so.

⁵ New Item 406 of Regulation S-K defines the term "code of ethics" to mean written standards that are reasonably designed to deter wrongdoing and to promote:

- honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
- full, fair, accurate, timely and understandable disclosure in reports and documents that an issuer files with, or submits to, the SEC and in other public communications made by the issuer;
- compliance with applicable governmental laws, rules and regulations;
- the prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
- accountability for adherence to the code.

- An issuer must make a copy of its Code of Ethics publicly available by:
 - filing a copy of the Code of Ethics as an exhibit to its annual report on Form 10-K under new Item 601(b)(14) of Regulation S-K;
 - posting a copy of the Code of Ethics on its website and disclosing in its annual report on Form 10-K its website address and the fact that the Code of Ethics is posted on its website (in which case, it must remain accessible on its website for so long as the issuer remains subject to the Code of Ethics disclosure requirement and chooses to comply with the public availability requirement by this method); or
 - undertaking in its annual report on Form 10-K to provide a copy of its Code of Ethics, without charge, to any person who requests one and explain the manner in which such request may be made.
- If the Code of Ethics is contained in a broader document that addresses additional topics or that applies to more persons than those specified in new Item 406, an issuer need only file, post or provide the portions of the broader document that constitutes the Code of Ethics in order to satisfy this requirement.
- Waivers and amendments to a Code of Ethics must also be disclosed either by filing a new Item 10 Form 8-K or posting the required information on its website. If an issuer intends to satisfy this disclosure requirement by posting such information on its website, the intention to do so and the issuer's website address must be disclosed in the issuer's annual report on Form 10-K. See "Code of Ethics Amendments or Waivers" below.
- For more regarding the Code of Ethics disclosure requirements, see our memorandum dated January 31, 2003, "SEC Adopts Rules for Disclosure Regarding Codes of Ethics and Audit Committee Financial Experts."

ix) Disclosure Regarding Audit Committee Financial Expert Determination

- Under amended Part III Item 10 of Form 10-K ("Directors and Executive Officers of the Registrant") and new Item 401(h) of Regulation S-K, issuers must disclose the determination of its board of directors as to whether or not the issuer has at least one audit committee financial expert⁶ serving on its audit committee.

⁶ New Item 401(h) of Regulation S-K defines the term "audit committee financial expert" to mean a person who has the following attributes:

- an understanding of generally accepted accounting principles ("GAAP") and financial statements;
- the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;
- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;
- an understanding of internal control over financial reporting; and
- an understanding of audit committee functions.

- An issuer must disclose the name of the audit committee financial expert and whether that person is independent.⁷
- If there is more than one audit committee financial expert, an issuer may, but is not required to, disclose the name of the additional person or persons and, if so, disclose whether or not they are independent.
- If an issuer discloses that it does not have an audit committee financial expert, it must explain why it does not have one.
- For more regarding the audit committee financial expert disclosure requirements, see our memorandum dated January 31, 2003, "SEC Adopts Rules for Disclosure Regarding Codes of Ethics and Audit Committee Financial Experts."

x) Disclosure Regarding Auditor Independence

- Each national securities exchange and association has provided to the SEC proposed rules or rule amendments that comply with the requirements of new Exchange Act Rule 10A-3, with final rules or rule amendments to be approved by the SEC no later than December 1, 2003. Listed issuers, other than foreign private issuers and small business issuers, must be in compliance with the new listing standards by the earlier of their first annual shareholders meeting after January 15, 2004 and October 31, 2004. Listed foreign private issuers and small business issuers must be in compliance with the new listing standards by July 31, 2005.
- Subject to certain time-limited exceptions for first-time issuers, the Act requires that each member of the audit committee of a listed company be "independent." To be considered independent, an audit committee member:
 - may not accept any consulting, advisory or other compensatory fee from the issuer or any subsidiary of the issuer, other than in the member's capacity as a director and board committee member; and
 - may not be an affiliate of the issuer or any subsidiary of the issuer, other than in his or her capacity as a director and board committee member.

In addition, new Item 401(h) states that a person shall have gathered such attributes through:

- education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant or auditor or person performing similar functions;
- experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- other relevant experience (in which case, the issuer must provide a brief listing of that person's experience).

⁷ "Independent" is defined as used in Item 7(d)(3)(iv) of Schedule 14A under the Exchange Act. Issuers whose securities are not listed on the NYSE or AMEX or quoted on Nasdaq may choose among the various definitions of independence set out in the listing standards of the NYSE, AMEX and Nasdaq. Such an issuer must state in its annual meeting proxies which of these definitions it chose and, having chosen, it must apply the definition consistently to all members of its audit committee.

- Rule 10A-3 requires that the audit committee be directly responsible for the appointment, compensation, retention and oversight of the work of the independent auditor. The independent auditor must report directly to the audit committee.
- Rule 10A-3 also requires audit committees to establish procedures for handling complaints received by the issuer regarding accounting, internal accounting controls or auditing matters, and the confidential and anonymous submission by employees of concerns regarding questionable accounting or auditing matters.
- Domestic issuers are currently required to disclose in their annual proxy statements whether the issuer has a standing audit committee, the names of the committee's members, the number of meetings held by the committee in the previous fiscal year and the functions performed by the committee. Rule 10A-3 requires a listed issuer to additionally disclose in its annual proxy statement whether the audit committee members are independent (using the definition of independence from the listing standards applicable to the listed issuer). If the listed issuer that has not separately designated an audit committee, it will be required to disclose that the entire board of directors is acting as the issuer's audit committee.
- Rule 10A-3 also requires this disclosure to be included or incorporated by reference in each listed issuer's annual report on Form 10-K, 20-F or 40-F, as applicable.
- Foreign private issuers may avail themselves of certain exceptions from the independence requirements for audit committee members. In addition, a foreign private issuer will be exempt from all of the audit committee independence requirements if it has a board of auditors (or similar body), established under local law expressly requiring or permitting such a board, that is required to be independent from the issuer and its management and that is responsible for the appointment, retention and oversight of the issuer's auditors;
- Issuers taking advantage of one of the exemptions from the audit committee rules are required to disclose in, or incorporate by reference into, their annual report and, in the case of domestic issuers, their annual proxy statements, their reliance on the exemption and their assessment whether such reliance would materially adversely affect the ability of their audit committee to act independently and to satisfy the other requirements of the rules.
- For more regarding new Rule 10A-3, see our memorandum dated April 15, 2003, "SEC Adopts New Requirements to Strengthen Independence of Audit Committees."

xi) Disclosure Regarding Off-Balance Sheet Transactions and Contractual Obligations

- Amended Item 303 of Regulation S-K, which is referred to in Part II Item 7 of Form 10-K ("Management's Discussion and Analysis of Financial Condition and Results of Operation") and Part I Item 2 of Form 10-Q ("Management's

Discussion and Analysis of Financial Condition and Results of Operation”), requires a separately-captioned section of the MD&A in which an issuer must discuss any off-balance sheet arrangements⁸ that have or are reasonably likely to have a current or future effect on the issuer’s financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors.

- Amended Item 303 of Regulation S-K also requires an issuer to disclose, in a tabular format, its known contractual obligations as of the latest fiscal year end balance sheet date, in substantially the form set forth in **Annex D**. An issuer need not update the table for interim periods. Instead, it should update the table from its annual report by disclosing material changes outside the ordinary course of its business.
- Issuers should remain mindful of other SEC pronouncements regarding MD&A disclosure. See “SEC Guidance Regarding MD&A” above, as well as our memorandum dated December 24, 2003, “SEC Issues Further Guidance on MD&A,” our memorandum dated January 31, 2002, “SEC Issues Statement Regarding MD&A Disclosure,” our memorandum dated December 17, 2001, “SEC Cautions on Selection and Disclosure of Critical Accounting Policies” and our memorandum dated May 14, 2002, “SEC Proposes Requirements for Disclosure of Critical Accounting Policies in MD&A.” To the extent that these pronouncements overlap with the off-balance sheet arrangement and contractual obligations disclosure requirements that have been adopted but are not mandated immediately, issuers may either comply with the new rules early or abide by the existing pronouncements.
- For more regarding disclosure of off-balance sheet arrangements and contractual obligations, including specific items that may need to be disclosed in order to satisfy the requirements of amended Item 303 of Regulation S-K, see our memorandum dated February 5, 2003, “SEC Adopts New Rules on Disclosure of Off-Balance Sheet Arrangements and Contractual Obligations.”

xii) Disclosure Regarding Principal Accountant Fees and Services

- Under new Part III Item 15 of Form 10-K (“Principal Accountant Fees and Services”) and Item 9(e) of Schedule 14A (“Independent Public Accountants”), an issuer must disclose:
 - the aggregate amount (per category) of “audit fees,” “audit-related fees,” “tax fees,” and “all other fees” paid by the issuer for each of the last two fiscal years for professional services rendered by its principal accountant;

⁸ Amended Item 303 of Regulation S-K defines the term “off-balance sheet arrangements” to mean any transaction, agreement or other contractual arrangement to which an unconsolidated entity is a party, under which an issuer has:

- an obligation under certain guarantee contracts;
- a retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;
- any obligation under certain derivative instruments; or
- any obligation under a material variable interest in an unconsolidated entity, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the issuer.

- the nature of the services comprising “audit-related fees,” “tax fees” and “all other fees;”
 - the audit committee’s pre-approval policies and procedures;
 - the percentage of services described in each of “audit-related fees,” “tax fees” and “all other fees” that were approved by the audit committee; and
 - if greater than 50 percent, the percentage of hours expended on the principal accountant's engagement to audit the issuer’s financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.
- For more regarding the disclosure of auditor fees and other new rules regarding auditor independence, see our memorandum dated February 18, 2003, “SEC Adopts Rules Strengthening Its Requirements Regarding Auditor Independence.”

xiii) Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors

- In November 2003, the SEC released final rules adopting amendments to existing disclosure requirements regarding the operations of board nominating committees and a new disclosure requirement concerning the means, if any, by which security holders may communicate with directors.
- Amended Item 7(d)(2) of Schedule 14A (“Directors and Executive Officers”) requires an issuer to disclose whether or not it has a standing nominating committee and, if it does not, why the board believes it is appropriate for the issuer not to have such a committee and the names of those directors who participate in the consideration of director nominees. In addition, amended Item 7(d)(2) of Schedule 14A requires an issuer to disclose specified details regarding the nomination process.
- New Item 7(h) of Schedule 14A (“Directors and Executive Officers”) requires an issuer to provide specified disclosure with regard to their processes for security holder communications with board members.
- In addition, under new Item 401(j) of Regulation S-K, which is referred to in new Part II Item 5(b) of Form 10-Q and Part III Item 10 of Form 10-K, an issuer must report any material changes to the procedures for security holder nominations in the periodic report filed for the period in which the material change occurs.
- For more regarding the new disclosure requirements regarding nominating committee functions and communications between security holders and boards of directors, see our memorandum dated January 2004, “SEC Adopts New Disclosure Requirements Regarding Nominating Committee Functions and Shareholder Communications with Boards of Directors.”

b. Changes to be Phased In Over This Year Affecting Subsequent Quarterly, Semi-Annual and Annual Reports

i) Disclosure Regarding Issuer Repurchases

- In November 2003, the SEC released final rules amending Rule 10b-18 under the Exchange Act, which provides a safe harbor from claims of market manipulation for qualifying repurchases of equity securities.
- Amendments to Part II Item 5 of Form 10-K (“Market for Registrant’s Common Equity and Related Stockholder Matters”) and Part II Item 2 of 10-Q (“Changes in Securities and Use of Proceeds”) will require issuers to furnish the information required under new Item 703 of Regulation S-K. For most domestic issuers, this additional disclosure will need to appear in reports filed on Forms 10-K and 10-Q for periods ending on or after March 31, 2004.
- New Item 703 of Regulation S-K requires issuers making repurchases to disclose in tabular format all repurchases of registered equity securities in the preceding fiscal quarter, whether private or open market and whether or not within the Rule 10b-18 safe harbor. The disclosure must include the number of shares repurchased (broken down by month), the average price paid per share, the total number of shares repurchased as part of a publicly announced repurchase plan or program and the maximum number of shares that may yet be purchased under the plan. Issuers will also be required to furnish certain information about each publicly announced share repurchase program.
- For more regarding the new disclosure requirements regarding issuer repurchases, see our memorandum dated January 5, 2004, “SEC Adopts Amendments to Rule 10b-18 and New Rules Governing Disclosure of Issuer Repurchases of their Equity Securities.”

ii) Disclosure Required by NYSE and Nasdaq Corporate Governance Listing Standards

- The SEC has approved board and committee independence rule changes as part of the amendments to the NYSE’s corporate governance listing standards. These rule changes require several new items of disclosure by issuers listed on NYSE. The new disclosure requirements become effective for documents furnished after the earlier to occur of (i) the listed issuer’s first annual meeting after January 15, 2004 and (ii) October 31, 2004. The new requirements are summarized in **Annex E**.
- The SEC has approved board and committee independence rule changes as part of the amendments to Nasdaq’s corporate governance listing standards. These rule changes require several new items of disclosure by issuers quoted on Nasdaq. The new disclosure requirements become effective for documents furnished after the earlier to occur of (i) the listed issuer’s first annual meeting after January 15, 2004 and (ii) October 31, 2004. The new requirements are summarized in **Annex F**.

- For more regarding the NYSE corporate governance reforms, see our memorandum dated November 12, 2003, "SEC Approves New York Stock Exchange Corporate Governance Rules;" and for more regarding the Nasdaq corporate governance reforms, see our memorandum dated November 12, 2003, "SEC Approves Nasdaq Corporate Governance Rules."

c. Changes to be Phased In Over the Following Year Affecting Subsequent Quarterly, Semi-Annual and Annual Reports

i) Additional Disclosure Regarding Internal Control Over Financial Reporting

- As a result of new rules adopted by the SEC in June 2003, reporting companies will be subject to a new regime governing internal control over financial reporting and new reporting requirements. These rules require:
 - each reporting company, other than a registered investment company, to include a report by management on the company's "internal control over financial reporting" (a new term intended to avoid confusion with pre-existing concepts of internal controls) in its annual report;
 - each reporting company's independent auditor to attest to management's assessment of the company's internal control over financial reporting;
 - each reporting company to file the independent auditor's attestation report as part of the company's annual report; and
 - management to evaluate any change in the company's internal control over financial reporting that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.
- Accelerated filers are required to comply with the new disclosure requirements relating to internal control over financial reporting beginning with the first fiscal year ending on or after November 15, 2004. All other reporting companies, including foreign private issuers, are required to comply with the new disclosure requirements beginning with the first fiscal year ending on or after July 15, 2005. See "Disclosure Regarding Controls and Procedures" above for more on the disclosure required by new Items 307 and 308 of Regulation S-K.
- The SEC has defined the term "internal control over financial reporting" to mean:
 - a process designed by, or under the supervision of, the registrant's principal executive and principal financial officers, or persons performing similar functions, and effected by the registrant's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the registrant;
 - provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and receipts and expenditures of the registrant are being made only in accordance with authorizations of management and directors of the registrant; and
 - provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the registrant's assets that could have a material effect on the financial statements.
- New Item 308 of Regulation S-K requires management's internal control report to contain:
 - a statement of management's responsibilities for establishing and maintaining adequate internal control over financial reporting for the issuer;
 - a statement identifying the framework used by management to conduct the required evaluation of the effectiveness of the issuer's internal control over financial reporting;
 - management's assessment of the effectiveness of the issuer's internal control over financial reporting as of the end of the issuer's most recent fiscal year, including a statement as to whether or not the company's internal control over financial reporting is effective. The assessment must include disclosure of any "material weaknesses" in the company's internal control over financial reporting identified by management;
 - a statement that the registered public accounting firm that audited the financial statements included in the annual report has issued an attestation report on management's evaluation of the issuer's internal control over financial reporting. The attestation report of the issuer's auditor must also be filed as part of the issuer's annual report.
 - Management is required to base its evaluation of the effectiveness of the company's internal control over financial reporting on a suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment. A suitable framework must:
 - be free from bias;
 - permit reasonably consistent qualitative and quantitative measurements of a company's internal control;

- be sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of a company's internal controls are not omitted; and
- be relevant to an evaluation of internal control over financial reporting.
- The rules do not specify where management's internal control report is to appear within the annual report. However, in the adopting release, the SEC stated that the report should be in close proximity to the corresponding attestation report issued by the independent auditor. The SEC expects that many companies will choose to place the internal control report and attestation report near the MD&A or immediately preceding the companies' financial statements.
- In conducting its evaluation and developing its assessment of the effectiveness of internal control over financial reporting, a company must maintain evidentiary matter, including documentation, regarding both the design of internal controls and the testing processes to provide reasonable support for management's assessment of the effectiveness of internal control over financial reporting. This evidentiary matter should provide reasonable support:
 - for the evaluation of whether the control is designed to prevent or detect material misstatements or omissions;
 - for the conclusion that the tests were appropriately planned and performed; and
 - that the results of the tests were appropriately considered.
- A company's independent auditor, which is required to attest to, and report on, management's assessment of the effectiveness of the company's internal control over financial reporting, also will require that the company develop and maintain such evidentiary matter to support management's assessment.
- Item 308 of Regulation S-K, as amended, requires management to evaluate any changes in the company's internal control over financial reporting that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting. The company will also have to disclose any such changes in its quarterly report.
- Because foreign private issuers are not required to file quarterly reports, the final rules clarify that management of a foreign private issuer need only disclose in the issuer's annual report any change to its internal control over financial reporting that occurred in the period covered by the annual report that materially affected, or is reasonably likely to materially affect, internal control over financial reporting.

- For more regarding the proposed amendments regarding internal control over financial reporting see our memorandum dated June 18, 2003, "SEC Adopts Rules Regarding Internal Control Over Financial Reporting."

2) Disclosure Containing Non-GAAP Financial Measures (Regulation G)

- Whenever an issuer, or a person acting on its behalf, publicly discloses material information that includes a non-GAAP financial measure, the issuer must accompany that non-GAAP financial measure with:
 - a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP; and
 - a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released and the most comparable financial measures calculated and presented in accordance with GAAP.
- If a non-GAAP financial measure is made public orally, telephonically, by webcast, by broadcast or by similar means, the requirements above will be satisfied if:
 - the required information in those paragraphs is provided on the issuer's website at the time the non-GAAP financial measure is made public; and
 - the location of the website is made public in the same presentation in which the non-GAAP financial measure is made public.
- An issuer, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading.
- Regulation G does not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to the SEC's communications rules applicable to business combination transactions (e.g., Rule 425 under the Securities Act and Rules 14a-12 and 14d-2(b)(2) under the Exchange Act).

- For more regarding Regulation G, see our memorandum dated July 10, 2003, "Use of Non-GAAP Financial Measures and Filing of Earnings Releases."

3) Accelerated Periodic Report Filing Deadlines

- The SEC is phasing in the accelerated report filing deadlines for annual reports on Form 10-K and quarterly reports on Form 10-Q over the next two years.
- The phase-in period will begin for accelerated filers as follows:

| For Fiscal Years Ending On or After | Form 10-K Deadline | Form 10-Q Deadline |
|--|-------------------------------|----------------------------------|
| December 15, 2003 | 75 days after fiscal year end | 45 days after fiscal quarter end |
| December 15, 2004 | 60 days after fiscal year end | 40 days after fiscal quarter end |
| December 15, 2005 | 60 days after fiscal year end | 35 days after fiscal quarter end |

- For more regarding accelerated filing deadlines for periodic reports, see our memorandum dated September 2002, "SEC Adopts Rules that Accelerate Filing Deadlines for Periodic Reports of Large U.S. Issuers."

4) Changes to Current Report on Form 8-K

a. New Form 8-K Triggering Events

i) Earnings Releases or Similar Announcements

- If an issuer, or any person acting on its behalf, makes any public announcement or release (including oral public statements) disclosing material non-public information regarding the issuer's results of operations or financial condition for a completed quarterly or annual fiscal period, the issuer shall under new Item 12 of Form 8-K ("Results of Operations and Financial Condition") briefly identify the announcement or release and include the text of that announcement or release as an exhibit.
- Release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 12 Form 8-K disclosure requirement.
- Item 12 information is "furnished" not "filed." As a result, an Item 12 Form 8-K would not be subject to civil liability under Section 18 of the Exchange Act (unless it is specified as "filed") and would not be incorporated by reference into a registration statement, proxy statement or other report (unless it is specifically incorporated by reference).

- New Item 12 requires issuers who include non-GAAP financial measures in their earnings release to disclose the following in the Form 8-K or in the release or announcement that is included as an exhibit:
 - a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
 - a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
 - the reasons why the issuer's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the issuer's financial condition and results of operations; and
 - to the extent material, the additional purposes, if any, for which the issuer's management uses the non-GAAP financial measure that are not otherwise disclosed.
- A current report on Form 8-K is not required to be furnished to the SEC under new Item 12 in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast or by similar means if:
 - the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished pursuant to new Item 12 of Form 8-K prior to the presentation;
 - the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;
 - the financial and other statistical information contained in the presentation is provided on the issuer's website, together with any information that would be required under Regulation G; and
 - the presentation was announced by a widely disseminated press release, that included instructions as to when and how to access the presentation and the location on the issuer's website where the information would be available.
- As a result, although the new Item 12 Form 8-K is technically due within five business days of the issuance of the earnings release, issuers following the typical pattern of earnings release followed by conference call will need to submit the current report on Form 8-K prior to the call to ensure that the call itself does not give rise to a separate Form 8-K obligation.

- New Item 12 does not apply in the case of a disclosure that is made in a quarterly report on Form 10-Q or an annual report on Form 10-K.
- For more regarding the furnishing of earnings releases to the SEC and Regulation G, see our memorandum dated July 10, 2003, "Use of Non-GAAP Financial Measures and Filing of Earnings Releases."

ii) Notice of Pension Fund Blackout Periods

- Under new Item 11 of Form 8-K ("Temporary Suspension of Trading Under Registrant's Employee Benefit Plans"), an issuer must provide with respect to each covered blackout period the information specified in Rule 104(b) of Regulation BTR and the date the issuer received the notice required by Section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974.
- A report on Form 8-K pursuant to new Item 11 must be filed not later than the date prescribed for transmission of the notice to directors and executive officers required by Rule 104(b)(2) of Regulation BTR.
- If there is a subsequent change in the beginning or ending dates of the blackout period, an issuer must file an additional Form 8-K containing the updated dates, explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in the prior notice. The updated notice is required to be provided as soon as reasonably practicable.
- For more on notices of pension fund blackout periods, see our memorandum dated February 10, 2003, "SEC Adopts Rules Regarding Insider Trades During Pension Fund Blackout Periods."

iii) Code of Ethics Amendments or Waivers

- Issuers must disclose in a current report on Form 8-K or by website posting any amendments to or waivers from a Code of Ethics occurring on or after the date on which they file their first annual report in which the Code of Ethics disclosure is required.
- Any amendments to or waivers from an issuer's Code of Ethics must be disclosed within five business days of the amendment or waiver.
- Under new Item 10 of Form 8-K ("Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics"), an issuer must describe the nature of any amendment to a provision of its Code of Ethics.⁹ The issuer is not required to disclose technical, administrative or other non-substantive amendments.

⁹ See Footnote 5, above.

- If an issuer has granted a waiver, including an implicit waiver, from a provision of the Code of Ethics, the issuer must briefly describe the nature of the waiver, the name of the person to whom the waiver was granted and the date of the waiver. Immaterial departures from a provision of the issuer's Code of Ethics do not constitute waivers or implicit waivers.
- Only amendments and waivers relating to the issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and to any element of the Code of Ethics definition enumerated in new Item 406(b) of Regulation S-K need be reported.
- Any amendment may also require an update to the written Code of Ethics filed as an exhibit under new Regulation S-K Item 601(b)(14) or posted on the issuer's website.
- If an issuer intends to satisfy the disclosure requirement regarding an amendment to, or waiver from, a provision of its Code of Ethics by posting such information on its website, the issuer must disclose its website address and such intention in its annual report prior to the amendment or waiver.
- Website disclosure must be available on the website for at least 12 months and issuers must then retain the information for an additional period of not less than five years.
- For more regarding amendments and waivers to Codes of Ethics, see our memorandum dated January 31, 2003, "SEC Adopts Rules for Disclosure Regarding Codes of Ethics and Audit Committee Financial Experts."

b. Proposed Changes to Form 8-K

i) Proposed Notice of Attorney Withdrawal¹⁰

- Under proposed Item 13 of Form 8-K ("Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3)"), an issuer must file a current report on Form 8-K within two business days after receipt of an attorney's written notice to withdraw reporting such notice and the circumstances related thereto.
- For more regarding notices of attorney withdrawal, see our memorandum dated February 12, 2003, "SEC Adopts Standards of Professional Conduct for Attorneys."

ii) Other Proposed Changes to Form 8-K

- The SEC has proposed to add 11 new items that would require an issuer to file a Form 8-K, modify existing items and move two items from Forms 10-K and 10-Q to Form 8-K. The item numbers would be rearranged into a new format.

¹⁰ This change has been proposed as an alternative to the noisy withdrawal provisions under the Act.

- A complete list of the proposed items under Form 8-K is outlined in **Annex G**.
- The proposed amendments would shorten the filing deadline for most reports on Form 8-K to two business days after a triggering event. The filing deadline for disclosures under Regulation FD and voluntary disclosures would not change.
- For more regarding the proposed changes to Form 8-K, see our memorandum dated June 25, 2002, "SEC Proposes New Disclosure Rules for Current Reports on Form 8-K."

iii) Proposed Application of Rule 12b-25 to Form 8-K

- The SEC has also proposed that an issuer will be required to file a Form 12b-25 if the issuer will not be able to file a current report on Form 8-K in accordance with the proposed shorter deadlines. Rule 12b-25 is currently not applicable to Form 8-K.
- Under the proposal, an issuer would have to file the Form 12b-25 one business day after the Form 8-K is due and file the Form 8-K within two business days after the original due date. If the issuer makes the appropriate representations that it was not able to file in a timely manner without unreasonable effort or expense and files the 8-K within the extended time period, then the report would be deemed to be filed on the prescribed due date. As a result, the issuer would not lose its eligibility to use short form registration statements.
- For more regarding the proposed changes to Rule 12b-25 and Form 12b-25, see our memorandum dated June 25, 2002, "SEC Proposes New Disclosure Rules for Current Reports on Form 8-K."

5) Acceleration of Section 16 Reporting of Corporate Insider Transactions

- Section 403 of the Act amended Section 16 of the Exchange Act to provide that all reportable transactions must be reported by insiders on Form 4 by the end of the second business day after the reportable transaction occurs, except where SEC rules provide otherwise.
- The filing deadline for Form 3 (up to ten calendar days after the event that causes an insider to be subject to Section 16) was not changed. If a Form 4 is due prior to the due date of the Form 3, the SEC encourages insiders to file the Form 3 together with the Form 4 at the time the Form 4 is due.
- All insider transactions exempt from the short-swing profit disgorgement provisions of Section 16(b) under Rule 16b-3(d), (e) and (f) (which were previously reportable on Form 5) are required to be reported on Form 4 (within the two-business day deadline).
- Limited exceptions to the two-business day deadline are available for transactions under 10b5-1 plans, where the insider does not select the date of

execution, and discretionary transactions by an employee benefit plan, where the insider does not select the date of execution.

- Forms 3, 4 and 5 may no longer be filed with the SEC on paper and must instead be filed electronically. In addition, Section 16 reports may no longer be filed via the standard EDGAR filing system used for filing other reports, although users will still be able to use EDGAR to retrieve copies of Forms 3, 4 and 5. Insiders may file their Section 16 reports directly using the SEC's own, free web-based platform that has been designed specifically to accept Section 16 reports. Alternatively, they may engage third-party service providers to file their reports on their behalf.
- Issuers are required to post copies of their insiders' Forms 3, 4 and 5 on their websites no later than the end of the day after the reports are filed with the SEC. Issuers may satisfy this requirement by hyperlinking to reports via a third-party service, such as the EDGAR database on the SEC website. Insiders are also required to send or deliver copies of their Section 16 reports to the issuer not later than the time the statements are transmitted for filing with the SEC.
- For more regarding the proposed changes to Section 16 reporting under the Act and SEC rules, see our memoranda dated August 28, 2002, "SEC Issues Rules Regarding Two-Business Day Filing Deadline for Reports of Trading by Corporate Insiders," and July 3, 2003, "Frequently Asked Questions: Complying With Rules Regarding Mandatory Electronic Filing and Website Posting for Forms 3, 4 and 5."

* * *

This memorandum provides only a general overview of the new disclosure regime brought about by the Act and other recent SEC initiatives. It is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul Weiss Securities Group, including:

| | | | |
|---------------------|-------------------|------------------|----------------|
| Mark S. Bergman | (44 20) 7367-1601 | John C. Kennedy | (212) 373-3025 |
| Richard S. Borisoff | (212) 373-3153 | Edwin S. Maynard | (212) 373-3024 |
| Andrew J. Foley | (212) 373-3078 | Raphael M. Russo | (212) 373-3309 |
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Annex A

Summary of Changes to Forms 10-K and 10-Q

| Description | Form 10-K Location | Form 10-Q Location | Regulation S-K Item No. | SOA/Exch. Act Reference | Effective for Filings |
|--|--------------------------------|-------------------------------|--------------------------------|--------------------------------|--|
| SOA Section 906 certification | Exhibit 32 | Exhibit 32 | — | 906 | For fiscal periods ending after 7/30/02 |
| SOA Section 302 certification | Exhibit 31 | Exhibit 31 | | 302 / Rules 13a-14, 15d-14 | For fiscal periods ending after 8/29/02 |
| Disclosure controls and procedures | Part II Item 8A | Part I Item 4 | 307 | — / Rules 13a-15, 15d-15 | For fiscal periods ending after 8/29/02 |
| Equity compensation plan information | Part III Item 12 ¹¹ | — | 201(d) 403 | — | For fiscal years ending after 3/15/02 |
| Availability of periodic reports | Part I Item 1 | — | 101(e) | — | For fiscal years ending after 12/15/02 |
| Use of non-GAAP measures | "Equal or greater prominence" | "Equal or greater prominence" | 10 | 401(b) | For fiscal periods ending after 3/28/03 |
| Off-balance sheet arrangements | Part II Item 7 | Part I Item 2 | 303(a)(4) | 401(a) / 13(j) | For fiscal years ending on or after 6/15/03 |
| Code of ethics for senior management | Part III Item 10 | — | 406 601(b)(14) | 406 | For fiscal years ending on or after 7/15/03 |
| Audit committee financial expert | Part III Item 10 | — | 401(h) | 407 | For fiscal years ending on or after 7/15/03 |
| Summary of contractual obligations | Part II Item 7 | Part I Item 2 | 303(a)(5) | — | For fiscal years ending on or after 12/15/03 |
| Principal accountant fees and services | Part III Item 15 ¹² | — | — | 202 | For fiscal years ending on or after 12/15/03 |

¹¹ Also called for in Schedule 14A, Item 10(c).

¹² Also called for in Schedule 14A, Item 9(e).

| Description | Form 10-K Location | Form 10-Q Location | Regulation S-K Item No. | SOA /Exch. Act Reference | Effective for Filings |
|---|--------------------------|-----------------------------------|-------------------------|--|---|
| Internal control over financial reporting | Part II Item 9A | Part I Item 4 | 308(c) | 404/Rules 13a-14, 13a-15, 15d-14, 15d-15 | For accelerated filers for fiscal years ending after 11/15/04 and for all other issuers for fiscal years ending after 07/15/05 |
| Changes to director nomination procedures | Part III Item 10 | Part II Item 5 | 401(j) | | For reporting periods ending after 01/01/04 |
| Audit committee independence | Part III Item 10 | — | 401 | 301 | For listed issuers, by the earlier of the first annual meeting after 1/15/04 and 10/31/04; for foreign private issuers and small business issuers, by 7/31/05 |
| Issuer repurchases | Part II Item 5 | Part II Item 2 | 703 | — | For domestic issuers, for periods ending on or after March 15, 2004; for foreign private issuers, for fiscal years ending on or after December 15, 2004 |
| Proposed to be moved to Form 8-K | Part II Item 5 (partial) | Part II Item 2 and Part II Item 3 | — | — | [Not specified] |

Annex B

Form 302 Certification

(portions in bold may be omitted until such time as the registrant is required to comply with the final rules on internal control over financial reporting)

CERTIFICATIONS

I, [identify the certifying individual], certify that:

1. I have reviewed this [specify report] of [identify registrant];
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) **and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrants** and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting;

5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
- a) All significant deficiencies in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date:

[Signature]
[Title]

* Provide a separate certification for each principal executive officer and principal financial officer of the registrant. See Rules 13a-14(a) and 15d-14(a).

Annex C

Form of Equity Compensation Plan Information Table

Equity Compensation Plan Information

| | (a) | (b) | (c) |
|--|---|---|---|
| Plan category | Number of securities to be issued upon exercise of outstanding options, warrants and rights | Weighted-average exercise price of outstanding options, warrants and rights | Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a)) |
| Equity compensation plans approved by security holders | | | |
| Equity compensation plans not approved by security holders | | | |
| Total | | | |

Annex D

Form of Tabular Disclosure of Contractual Obligations

| Contractual Obligations | Payments due by period | | | | |
|---|------------------------|---------------------|-----------|-----------|----------------------|
| | Total | Less than 1 year | 1-3 years | 3-5 years | More than 5 years |
| [Long-Term Debt] | | | | | |
| [Capital Lease Obligations] | | | | | |
| [Operating Leases] | | | | | |
| [Purchase Obligations] | | | | | |
| [Other Long-Term Liabilities Reflected on the Registrant's Balance Sheet under GAAP] | | | | | |
| Total | | | | | |

Annex E

**Summary of Disclosure Requirements Under
NYSE Corporate Governance Listing Standards**

| Topic | Disclosure Requirement | Location of Disclosure |
|--|---|--|
| Director independence | Identify each independent director, specify that the board has determined that these directors are independent and discuss the basis for the board's determination | In the listed company's annual proxy statement or, if the listed company does not file one, in the listed company's annual report on Form 10-K |
| | The basis for a board determination that a relationship between a director and the listed company is not material [303A(2)(a)] | In the listed company's annual proxy statement or, if the listed company does not file one, in the listed company's annual report on Form 10-K |
| | Any categorical standards of independence that the board has adopted [303A(2)(a)] | Not specified |
| | Any charitable contributions made by the listed company to any charitable organization in which an independent director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year exceeded the greater of \$1 million, or 2% of such charitable organization's consolidated gross revenues [303A(2)(b)(v)] | In the listed company's annual proxy statement or, if the listed company does not file one, in the listed company's annual report on Form 10-K |
| Executive sessions of non-management directors | If one director is chosen to preside at executive sessions of non-management directors, the name of such director; alternatively, the procedure by which a presiding director is selected for each executive session [303A(3)] | In the listed company's annual proxy statement or, if the listed company does not file one, in the listed company's annual report on Form 10-K |
| | The method for interested parties to communicate directly with the presiding officer of executive sessions of non-management directors or with the non-management directors as a group | Not specified |
| Audit committee composition | If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, then in | In the listed company's annual proxy statement or, if the listed company does not file one, in the listed company's annual report on Form 10-K |

| Topic | Disclosure Requirement | Location of Disclosure |
|--|---|---|
| | each case, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and disclose such determination [303A(7)(a)] | |
| Corporate governance guidelines and key committee charters | A copy of the listed company's corporate governance guidelines and the charters of its most important committees (including at least the audit, and if applicable, compensation and nominating committees) [303A(9)] | On the listed company's website |
| | Statement that a copy of the listed company's corporate governance guidelines and the charters of its most important committees (including at least the audit, and if applicable, compensation and nominating committees) is available on its website, and that the information is available in print to any shareholder who requests it [303A(9)] | In the listed company's annual report on Form 10-K |
| Code of business conduct and ethics | A copy of the listed company's code of business conduct and ethics for directors, officers and employees [303A(10)] | On the listed company's website |
| | A statement that the listed company's code of business conduct and ethics for directors, officers and employees is available on its website and that the information is available in print to any shareholder who requests it [303A(10)] | In the listed company's annual report on Form 10-K |
| | Any waiver of the code of business conduct and ethics for executive officers or directors [303A(10)] | Not specified, although three means are suggested: (i) by press release within 2-3 business days of a board's determination, (ii) by website disclosure, or (iii) by filing on Form 8-K |
| CEO Certification | The CEO's annual certification to the NYSE that he or she is not aware of any violation by the listed company of NYSE corporate governance listing standards, together with the CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure pursuant to Section 302 of the Sarbanes-Oxley Act [303A(12)(a)] | In the listed company's annual report to shareholders or, if the listed company does not prepare one, in the listed company's annual report on Form 10-K If a company chooses to distribute a glossy annual report to shareholders rather than a "wrapped" Form 10-K that already includes the Section 302 certification as an exhibit, the listed company may disclose that it has filed the Section 302 certification as |

| Topic | Disclosure Requirement | Location of Disclosure |
|-------|------------------------|---|
| | | an exhibit to its Form 10-K instead of including that certification in the glossy annual report |

Annex F

**Summary of Disclosure Requirements Under
Nasdaq Corporate Governance Listing Standards**

| Topic | Disclosure Requirement | Location of Disclosure |
|---|---|--|
| Going concern qualification in an audit opinion | Disclosure of the receipt of an audit opinion that contains a going concern qualification [4350(b)(1)(B)] | In a public announcement through the news media. Prior to its release, the issuer must provide the text of the public announcement to Nasdaq StockWatch. The public announcement must be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the SEC |
| Director independence | Disclose the names of the directors that the board has determined to be independent [4350(c)(1)] | In the issuer's annual proxy statement or, if the issuer does not file one, in the issuer's annual report on Form 10-K |
| Compensation committee composition | Disclosure of the nature of the relationship between the issuer and any director who has been appointed to the compensation committee under "exceptional and limited circumstances," and the reasons for such determination [4350(c)(3)(C)] | In the issuer's annual proxy statement or, if the issuer does not file one, in the issuer's annual report on Form 10-K |
| Nominations committee composition | Disclosure of the nature of the relationship between the issuer and any director who has been appointed to the nominations committee under "exceptional and limited circumstances," and the reasons for such determination [4350(c)(4)(C)] | In the issuer's annual proxy statement or, if the issuer does not file one, in the issuer's annual report on Form 10-K |
| Controlled company exception | An issuer relying on the controlled company exception is required to disclose that it is a controlled company and the basis for that determination | In the issuer's annual proxy statement or, if the issuer does not file one, in the issuer's annual report on Form 10-K |
| Audit committee composition | Disclosure of the nature of the relationship between the issuer and any director who has been appointed to the audit committee under "exceptional and limited circumstances," and the reasons for such determination [4350(d)(2)(B)(i)] | In the issuer's annual proxy statement or, if the issuer does not file one, in the issuer's annual report on Form 10-K |
| Code of Conduct | A copy of the issuer's code of conduct/"code of ethics" [4350(n)] | Not specified |
| | Disclosure of any waivers of the code of conduct for directors or executive officers [4350(n)] | In a current report on Form 8-K within five business days |

Annex G

Proposed New Format of Form 8-K

| Corresponding Current Location (in Form 8-K unless specified) | Proposed New Format | | Comment |
|---|--|--|-------------------------------------|
| | Section 1 - Registrant's Business and Operations | | |
| | Item 1.01 | Entry into a Material Agreement | Proposed new item |
| | Item 1.02 | Termination of a Material Agreement | Proposed new item |
| | Item 1.03 | Termination or Reduction of a Business Relationship with a Customer | Proposed new item |
| | Section 2 - Financial Information | | |
| 2 | Item 2.01 | Completion of Acquisition or Disposition of Assets | |
| 3 | Item 2.02 | Bankruptcy or Receivership | |
| | Item 2.03 | Creation of a Direct or Contingent Financial Obligation That Is Material to the Registrant | Proposed new item |
| 10-Q Pt. II Item 3 | Item 2.04 | Events Triggering a Direct or Contingent Financial Obligation That Is Material to the Registrant | Subsumes and expands existing item |
| | Item 2.05 | Exit Activities Including Material Write-Offs and Restructuring Charges | Proposed new item |
| | Item 2.06 | Material Impairments | Proposed new item |
| 12 | [unspecified] | Results of Operations and Financial Condition [i.e. Earnings Releases] | Recently added item to current form |
| | Section 3 - Securities and Trading Market | | |
| | Item 3.01 | Rating Agency Decisions | Proposed new item |
| | Item 3.02 | Notice of Delisting or Failure to Satisfy Listing Standards; Transfer of Listing | Proposed new item |

| Corresponding Current Location (in Form 8-K unless specified) | Proposed New Format | | Comment |
|---|---------------------|--|--|
| 10-Q Pt. II Item 2; 10-K Item 5 | Item 3.03 | Unregistered Sales of Equity Securities | Proposed to be moved from 10-Q and 10-K |
| 10-Q Pt. II Item 2 | Item 3.04 | Material Modifications to Rights of Security Holders | Proposed to be moved from 10-Q |
| Section 4 - Matters Related to Accountants | | | |
| 4 | Item 4.01 | Changes in Registrant's Certifying Accountant | |
| | Item 4.02 | Non-Reliance on Previously Issued Financial Statements or a Related Audit Report | Proposed new item |
| Section 5 - Corporate Governance and Management | | | |
| 1 | Item 5.01 | Changes in Control of Registrant | |
| 6 | Item 5.02 | Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers | Proposed new item would modify existing item |
| 8 | Item 5.03 | Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year | Proposed new item would modify existing item |
| 11 | Item 5.04 | Temporary Suspension of Trading under Registrant's Employee Benefit Plan | Recently added item to current form |
| 10 | Item 5.05 | Amendments to the Registrant's Code of Ethics or Waiver of a Provision of the Code or Ethics | Recently added item to current form |
| Section 6 - Regulation FD | | | |
| 9 | Item 6.01 | Regulation FD Disclosure | |
| Section 7 - Other Events | | | |
| 5 | Item 7.01 | Other Events | |
| Section 8 - Financial Statements and Exhibits | | | |

| Corresponding Current Location (in Form 8-K unless specified) | Proposed New Format | | Comment |
|---|--|-----------------------------------|--|
| 7 | Item 8.01 | Financial Statements and Exhibits | |
| 13 | [Unspecified] Receipt of Notice of Attorney Withdrawal | | Proposed as alternative to new attorney conduct rules |