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SEC PROPOSES MANAGEMENT CERTIFICATION OF PERIODIC REPORTS AND NEW DISCLOSURE RULES FOR CURRENT REPORTS

The Securities and Exchange Commission (the “SEC”) has proposed changes in corporate governance rules that are designed to improve the financial reporting and disclosure system for U.S. companies that are subject to the reporting requirements of the Securities Exchange Act of 1934. The intended result of the proposals is increased investor confidence that is consistent with President Bush’s “Plan to Improve Corporate Responsibility and Protect America’s Shareholders.”

Specifically, the proposed rules would:

- require a domestic reporting company’s principal executive officer and principal financial officer to make certifications with respect to the contents of the company’s quarterly and annual reports and with respect to a mandated company evaluation of compliance procedures (see next item);
- amend Exchange Act Rule 13a-5 to require a domestic reporting company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required by the Exchange Act’s reporting requirements, and to review and evaluate the procedures periodically;
- add new items and events to be disclosed in Form 8-K reports; and
- require that Form 8-K reports be filed within two business days instead of the current five to 15 days.

The proposed rules are subject to a 60-day comment period. These requirements would not apply to foreign private issuers filing annual reports on Form 20-F.

I. Proposed Requirements for Certification of Quarterly and Annual Reports

The proposed change to Exchange Act Rule 13a-14 would require both the principal executive and principal financial officer of a domestic reporting company to certify, with respect to the company’s quarterly and annual reports, that:

- he or she has read the report;

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- to his or her knowledge, the information in the report is true in all important respects, as of the last day of the period covered by the report; and
- the report contains all information about the company of which he or she is aware that he or she believes is important to a reasonable investor as of the last day covered by the report.

The SEC considers information to be “important to a reasonable investor” if there is a substantial likelihood that a reasonable investor would view the information as significantly altering the total mix of information in the report and if the omission of such information would make the report misleading to a reasonable investor.

II. Internal Procedures

The proposed new Exchange Act Rule 13a-15 would require a domestic reporting company to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required to be included in annual, quarterly and current reports by the Exchange Act, and to review and evaluate periodically these procedures.

Additionally, the company’s principal executive and principal financial officer would have to review the annual evaluation and then certify in the company’s annual report that they have reviewed the results of the evaluation.

III. Proposed New Form 8-K Disclosure Requirements

The SEC’s proposed amendments would add 11 new items or events that must be disclosed in Form 8-K reports. They would include:

1. Entry into a material agreement not made in the ordinary course of business;
2. Termination of a material agreement not made in the ordinary course of business;
3. Termination or reduction of a business relationship with a customer that constitutes a specified amount of the company’s revenues;
4. Creation of a direct or contingent financial obligation that is material to the company;
5. Events triggering a direct or contingent financial obligation that is material to the company, including any default or acceleration of an obligation;
6. Exit activities including any material write-off or restructuring;
7. Any material impairment;
8. A change in a rating agency decision, issuance of a credit watch, or change in a company outlook;
9. Movement of the company’s securities from one national securities exchange or inter-dealer quotation system of a registered national securities association to

another, delisting of the company's securities from an exchange or quotation system, or a notice that a company does not comply with a listing standard;

10. Notice to the company from its currently or previously engaged independent accountant that the independent accountant is withdrawing a previously issued audit report or that the company may not rely on a previously issued audit report; and
11. Any material limitation, restriction, or prohibition, including the beginning and end of lock-out periods, regarding the company's employee benefit, retirement, and stock ownership plans.

The proposals would move two disclosure items from annual and quarterly reports to Form 8-K reports (and thereby accelerate reporting of):

- unregistered sales of equity securities; and
- material modifications to rights of holders of company securities.

Additionally, the proposals would amend the existing Form 8-K disclosure items to include:

- disclosure of the departure of a director for reasons other than a disagreement or removal for cause;
- the appointment or departure of a principal officer, and the election of new directors; and
- disclosure regarding any material amendment to a company's certificate of incorporation or bylaws.

IV. Proposed Filing Deadlines

The SEC's proposed filing deadlines would require current reports on Form 8-K to be filed within two business days. The present five business day deadline for disclosure about changes in a company's independent accountants and the resignations of directors, and fifteen calendar deadline for other required disclosures would be accelerated to two business days. This would make uniform the filing period for all of the mandated Form 8-K disclosure items.

In addition:

- Exchange Act Rule 13a-11 would be amended to create a safe harbor for a company's late filing of Form 8-K if the company satisfied all conditions for reliance on the safe harbor.
- Exchange Act Rule 12b-25 would be amended to grant a two-business day extension of the Form 8-K filing deadline to a company that provides proper notice on Form 12b-25 of its inability to file a Form 8-K.

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This memorandum provides only a general overview of the proposed disclosure rules. It is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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