

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

PUBLIC COMMUNICATIONS BY ACQUIRERS  
AND TARGETS IN CONNECTION WITH  
NEGOTIATED STOCK-FOR-STOCK MERGERS

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AUGUST 2000



In January 2000, the US Securities and Exchange Commission adopted comprehensive revisions to the rules and regulations applicable to takeover transactions, including tender offers, mergers, acquisitions and similar extraordinary transactions. Adopted in Release No. 33-7760 (the “Release”), the revised rules are intended to permit significantly increased communications with security holders and the markets. In general, the new rules relax restrictions on oral and written communications with security holders by permitting more information to be furnished sooner in the process. Specifically, the new rules permit written and oral public communications from the initial public announcement of the transaction to the closing.

Prior to adoption of the new rules, public communications in the context of a negotiated stock-for-stock merger were technically highly restricted. These restrictions resulted primarily from the broad concepts of “offer” and “prospectus” under the Securities Act and “solicitation” under the Exchange Act proxy rules. On the other hand, substantial public communication was commonplace in connection with transactions involving public companies. The new rules in effect provide non-exclusive exemptions under the Securities Act and the proxy rules for much existing disclosure practice.

This memorandum addresses the application of the new rules to public communications by acquirers and publicly-traded US targets in connection with a typical negotiated stock-for-stock merger. The memorandum is based on the Release, conversations with the SEC Staff and the Third Supplement (dated July 2000 and amended July 2001) to the Manual of Publicly Available Telephone Interpretations of the SEC’s Division of Corporation Finance.

### **Rules 165, 425 and 14a-12**

The new approach is codified in Rules 165 and 425 under the Securities Act and Rule 14a-12 under the Exchange Act. The rules make no distinction based on the size or seasoned status of the parties. The exemptions are available to the parties to the transaction and to others acting on behalf of the parties, such as their affiliates and dealer-managers.

#### *Rule 165*

Under Rule 165, all public written communications in connection with or relating to a business combination transaction, commencing with and including the “first public announcement” of the transaction, must be filed under Rule 425 on or before the date of first use. In addition, all public written communications must include a prominent legend that:

- (1) urges investors to read the relevant documents filed or to be filed with the SEC because they contain important information;
- (2) explains that investors can get the documents for free at the SEC’s web site; and
- (3) describes which documents are available free from the acquirer.

These communications must be filed on EDGAR to the same extent that the related registration statement or proxy statement must be filed on EDGAR. (If the transaction relates to a foreign private issuer that does not file via EDGAR, a paper filing must be made.)

The filing requirement applies only to written communications that are made public or are otherwise provided to persons that are not a party to the transaction. According to the Release, written communications include “all information disseminated otherwise than orally, including electronic

communications and other future applications of changing technology,” including scripts used to communicate information and other written material that is shown to investors, such as slides. Videos, materials posted to a web site and CD-ROMs, for example, must be filed in the form of a transcript. Oral communications are covered by the exemptions, but need not be reduced to writing or filed.

The filing requirement applies only to communications that are publicly disseminated or otherwise furnished to persons not party to the transaction. Internal communications provided solely to parties to the transaction, legal counsel, financial advisors and others acting on behalf of the parties are not subject to the rules and need not be filed. Where a company sends a separate communication about the deal to its employees that includes information addressing concerns specific to them (and thus not covered in the information already on file), that additional information must also be filed. If the company simply attaches the previously filed communication to a cover letter whose tenor is simply “you may be interested in the attached,” the cover letter need not be filed.

The filing requirement applies only to communications that relate to the transaction. According to the Release, neither factual business information relating solely to ordinary business matters nor “ordinary or routine” business communications that refer to the transaction “in a non-substantive way” need be filed. In addition, the Exchange Act reports need not be filed under Rule 425 so long as the information in the report is responsive only to the requirements of the report. If the information in the report goes beyond such requirements and is intended to publicize the transaction, that information (and not the entire report) must be filed under Rule 425. Where the same information is later republished or disseminated or contains only minimal changes, such as corrections of minor typographical errors, updates regarding contact information or stylistic changes relating to format, type-size, letterhead, addressee and so forth, it need not be refiled. Where an earlier communication is supplemented or changed, however, the revised written communication must be filed.

Voluntary filings of merger agreements under Form 8-K or Form 6-K do not eliminate the need to provide information under Rule 425. Although Rule 425 does not generally permit incorporation by reference, the Staff will not require the merger agreement to be included in the Rule 425 filing if the Form 8-K or Form 6-K was filed via EDGAR and the Rule 425 filing contains a cross-reference. This Staff interpretation also applies to Rule 14a-12 filings.

Media articles that merely quote company officials discussing a transaction, even if based on company press releases, would not have to be filed. However, where a party to the transaction arranges or pays for an article, or disseminates the article (for example, by posting it on its web site or providing a hyperlink to the article), the article must be filed as a written communication.

Written communications made in reliance on Rules 135 or 134 need not be filed under Rule 425. Communications that are part of a mandated prospectus (or registration statement, in this case, the S-4 or F-4) would be filed under Rule 424 or as post-effective amendments to the registration statement. If the acquirer is raising capital to finance the business combination, Rule 165 would still be available for communications relating to the business combination and the financing transaction, provided that the financing and the acquisition are contemporaneous and the acquisition is conditioned on the closing of the financing. An issuer that effects a capital raising transaction to finance the business combination that occurs after the business combination has been completed could not rely on Rule 165.

### *Rule 14a-12*

Under Rule 14a-12, both written and oral communications before the filing of a proxy statement are permitted so long as all written communications related to the solicitation are filed on the date of first use. To qualify for the exemption, three conditions must be met:

- (1) each public written communication must include the identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A) and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend in clear, plain language advising security holders where they can obtain that information;
- (2) each public written communication must include a prominent legend that:
  - (a) advises security holders to read the proxy statement when it is available because it contains important information,
  - (b) explains to investors that they can get the proxy statement, and any other relevant documents, for free at the SEC's web site, and
  - (c) describes which documents are available free from the participants; and
- (3) a definitive proxy statement meeting the requirements of Rule 14a-3(a) must be sent or given to security holders solicited in reliance on Rule 14a-12 before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from security holders.

Any soliciting material published, sent or given to security holders must also be filed with the SEC no later than the date the material is first published, sent or given to security holders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A and the appropriate box on the cover page must be marked. Soliciting material in connection with a registered offering filed under Rule 424 or Rule 425 will be deemed filed under Rule 14a-12, and duplicative filings under Rule 14a-2 are not necessary.

### *Liability for Communications*

Oral and written communications made in reliance upon Rule 165 and Rule 14a-12 are not exempt from liability with respect to fraudulent statements under the Securities Act or the Exchange Act. Such communications are subject to liability under Section 12(a)(2) of the Securities Act, in the case of a prospectus, Sections 14a-9 of the Exchange Act, in the case of a proxy statement, and Section 10b-5 of the Exchange Act.

### **Disclosure and Filing Procedures**

The parties to a negotiated stock-for-stock merger usually publicly announce their transaction immediately after reaching a definitive agreement. This announcement generally takes the form of a written joint press release followed by joint press conference and analyst presentations given by officials of the acquirer and the target. In the usual case, an announcement is made and a press conference held long before any registration statement or proxy statement is ready for filing with the SEC. In this type of transaction, the acquirer will generally prepare and file a registration statement on Form S-4 (in the case

of a domestic US acquirer) or Form F-4 (in the case of a non-US acquirer) under the Securities Act. This registration statement serves to register the securities to be issued to the stockholders of the target in the merger. On the other side, the target will generally prepare and file a proxy statement under the Exchange Act. This proxy statement covers the solicitation of proxies by the target from its stockholders to vote to approve the merger. In a negotiated transaction the registration statement and the proxy statement are generally prepared together in the form of a combined proxy statement/prospectus.

*Prior to First Public Announcement*

Under the terms of the exemptions, written communications must be filed beginning with the first public announcement of the merger transaction. Rule 165 includes a definition of “public announcement” that encompasses all communications that put the market on notice of a proposed transaction. For purposes of determining when a filing obligation is incurred under the exemptions, “public announcement” means any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction. The exemptions provided by Rule 165 and Rule 14a-12 become available only following the first public announcement of the transaction.

*Following First Public Announcement*

Where the acquirer and the target make the first public announcement of the transaction in a joint press release followed by the customary joint press conference and analyst presentations, what are the filing obligations for each party under Rules 165, 425 and 14a-12?

*Acquirer*

Generally, to take advantage of the exemptions each party must make its own filings. With respect to its offer of securities to the stockholders of the target in the merger, the acquirer must file all of its public written communications relating to the merger under Rule 425 from the date of first public announcement to the closing. Each communication filed must identify the filer, the target and the SEC file number for the related registration statement or, if that file number is unknown (for example, where the acquirer is becoming a US reporting company concurrently with the acquisition), the target’s Exchange Act file number, in the upper right corner of the cover page.

Each time the acquirer publicly disseminates or otherwise furnishes to persons not party to the transaction new written material that relates to the merger, or supplements or changes previously released material, the acquirer must make an additional filing under Rule 425.

If the acquirer is also a participant in the solicitation of the target’s stockholders with respect to the merger, the acquirer must also make its own filings under Rule 14a-12, and furnish the required information relating to its participants in the solicitation. This obligation may be satisfied by filings made by the acquirer under Rule 425, which are deemed filed under the other applicable rules. It is not satisfied by filings made by the target. However, the Rule 425 filing would have to comply with the disclosure requirements of Rule 14a-12 as well.

In the usual case, the acquirer will be required to file the following communications under Rules 165 and 425:

- (1) the text of the initial joint press release;
- (2) any scripts prepared for any initial press conference, provided the script is distributed at the press conference or is otherwise to be disseminated (for example among employees);
- (3) transcripts of any financial presentations distributed to securities analysts; and
- (4) texts or transcripts of any subsequent new or amended public written communication until the closing of the merger.

Each of these communications should include the appropriate legends both when publicly released and when filed under Rule 425. Incidentally, the legends are not required to be included in any live presentation (though the acquirer may wish to do so as a matter of practice); the legends would have to be inserted when the material is subsequently made available.

Attached as Exhibit A to this memorandum is a form for an initial filing by the acquirer under Rule 425 in a negotiated stock-for-stock merger.

#### *Target*

If the target has an independent filing obligation, it must make its own filings under Rules 165, 425 and 14a-12. Where the target's stockholders are voting on the merger, public written communications by the target to its stockholders are likely to be deemed soliciting material under the proxy rules. In this case, the target must make a filing under Rule 14a-12. The soliciting material must include a cover page in the form set forth in Schedule 14A and the appropriate box on the cover page must be marked. Alternatively, the target could make the filing under Rule 425. If the target is also joining in the offer of securities by the acquirer, it will need to make its own filings under Rule 165.

In the usual case, the target will be required to file the following communications under Rule 14a-12 on a Schedule 14A:

- (1) the text of the initial joint press release;
- (2) any scripts prepared for any initial joint press conference provided the script is distributed at the press conference or is otherwise to be disseminated (for example among employees);
- (3) transcripts of any financial presentations distributed to securities analysts;
- (4) disclosure relating to the identity of the participants in the solicitation and a description of their interests, or a prominent legend in clear, plain language advising security holders where they can obtain that information; and
- (5) texts or transcripts of any subsequent new or amended public written communication until the definitive proxy materials are sent or given to stockholders of the target.

Each of these communications should include the appropriate legends both when publicly released and when filed under Rule 14a-12.

Attached as Exhibit B to this memorandum is a form of Schedule 14a-12 for an initial filing by the Target in a negotiated stock-for-stock merger.

\* \* \*

**This memorandum is intended solely for general informational purposes and should not be construed as, or used as a substitute for, legal advice with respect to specific transactions, since such advice requires an evaluation of precise factual circumstances. U.S. counsel should be consulted as to all questions that arise with respect to the laws, rules, regulations and other legal requirements discussed herein.** For further information concerning the subject matter of this memorandum, please contact any member of the Paul Weiss Securities Group, including:

<u>Office</u>	<u>Name</u>	<u>Telephone</u>	<u>E-Mail Address</u>
<b>New York</b>	Andrew J. Foley	1-212-373-3078	afoley@paulweiss.com
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NEW YORK, NEW YORK 10019-6064

**Exhibit A**

Filing under Rule 425 under  
the Securities Act of 1933  
and deemed filed under Rule 14a-12  
of the Securities Exchange Act of 1934  
Filing by: [Acquirer]  
Subject Company: [Target]  
SEC File No. of [Target]: 000-[XXXXXX]

**[TEXT OF WRITTEN COMMUNICATION]**

**Filings with the US SEC**

[Acquirer] plans to file a Registration Statement on Form [S/F]-4 with the US SEC in connection with the [Target] transaction. The Form [S/F]-4 will contain an exchange offer prospectus, a proxy statement for [Target]'s special meeting and other documents. [Target] plans to mail the proxy statement/prospectus contained in the Form [S/F]-4 to its stockholders. The Form [S/F]-4 and proxy statement/prospectus will contain important information about [Acquirer], [Target], the merger and related matters. Investors and stockholders should read the proxy statement/prospectus and the other documents filed with the US SEC in connection with the merger carefully before they make any decision with respect to the merger. A copy of the merger agreement with respect to the merger has been filed by [Target] as an exhibit to its Form 8-K dated [Date]. The Form [S/F]-4, the proxy statement/prospectus, the Form 8-K and all other documents filed with the US SEC in connection with the transaction will be available when filed free of charge at the US SEC's web site at [www.sec.gov](http://www.sec.gov). In addition, the proxy statement/prospectus, the Form 8-K and all other documents filed with the US SEC in connection with the merger will be made available to investors free of charge by calling or writing to:

**[ACQUIRER] CONTACT:**

[NAME]  
[ADDRESS]

[TELEPHONE NUMBER]  
[EMAIL ADDRESS]

**[TARGET] CONTACT:**

[NAME]  
[ADDRESS]  
[TELEPHONE NUMBER]  
[EMAIL ADDRESS]

In addition to the Form [S/F]-4, the proxy statement/prospectus and the other documents filed with the US SEC in connection with the merger, [Target] is obligated to file annual, quarterly and special reports, proxy statements and other information with the US SEC. You may read and copy any reports, statements and other information filed with the US SEC at the US SEC's public reference rooms at 450 Fifth Street, N.W., Washington, D.C. 20549 or at the other public reference rooms in New York, New York and Chicago, Illinois. Please call the US SEC at 1-800-SEC-0330 for further information on public reference rooms. Filings with the US SEC also are available to the public from commercial document-retrieval services and at the web site maintained by the US SEC at <http://www.sec.gov>.

### **Solicitation of Proxies; Interests of Certain Persons in the Transaction**

The identity of the people who, under SEC rules, may be considered "participants in the solicitation" of [Target] stockholders in connection with the proposed merger, and a description of their interests, is available in an SEC filing on Schedule 14A made by [Target] dated [Date].

### **Forward-Looking Statements**

This release contains statements that constitute forward looking statements within the meaning of the U.S. Private Securities Litigation Reform Act of 1995. Forward looking statements are statements other than historical information or statements of current condition. These statements appear in a number of places in this release and include statements concerning the parties' intent, belief or current expectations regarding future events, including: [insert as appropriate]. Forward looking statements are not guarantees of future performance and involve risks and uncertainties, and actual results may differ materially from those in the forward looking statements as a result of various factors. Although managements of the parties believe that their expectations reflected in the forward looking statements are reasonable based on information currently available to them, they cannot assure you that the expectations will prove to have been correct. Accordingly, you should not place undue reliance on these forward looking statements. In any event, these statements speak only as of the date of this release. The parties undertake no obligation to revise or update any of them to reflect events or circumstances after the date of this release, or to reflect new information or the occurrence of unanticipated events. Readers are referred to [Target]'s Annual Report to Stockholders and [Acquirer]'s and [Target]'s other filings with the US SEC for a discussion of these and other important risk factors concerning the parties and their respective operations.

**SCHEDULE 14A  
(RULE 14A-101)**

**SCHEDULE 14A INFORMATION**

**PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES  
EXCHANGE ACT OF 1934  
(AMENDMENT NO. )**

Filed by the Registrant

Check the appropriate box

- Preliminary Proxy Statement  
 Confidential, For Use of the Commission Only (as permitted by  
Rule 14a-6(e)(2))  
 Definitive Proxy Statement  
 Definitive Additional Materials  
 Soliciting Material Pursuant Rule 14a-11(c) or Rule 14a-12

**[TARGET]**

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

n/a

Payment of Filing Fee (Check the appropriate box):

No fee required.

Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11.

- (1) Title of each class of securities to which transaction applies:
- (2) Aggregate number of securities to which transaction applies:
- (3) Per unit price other underlying value of transaction computed pursuant to Exchange Act Rule 0-11:
- (4) Proposed maximum aggregate value of transactions:
- (5) Total fee paid:

Fee paid previously with preliminary materials.

Check box of any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

- (1) Amount Previously Paid:
- (2) Form, Schedule or Registration Statement No.:
- (3) Filing Party:
- (4) Date Filed:

Description of Transaction

[Insert]

[Reference to exhibits incorporated by reference]

[Target] will be, and certain other persons named below may be, soliciting proxies from [Target] stockholders in favor of the transaction. The directors and executive officers of [Target] and the directors and executive officers of [Acquirer] may be deemed to be participants in [Target]'s solicitation of proxies.

The following are the directors and executive officers of [Target]:

<u>Name</u>	<u>Position</u>
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[Names].....	[Titles]
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- 
- (1) Member of the Audit Committee
  - (2) Member of the Compensation Committee

The directors and executive officers of [Target] have interests in the transactions, some of which may differ from, or may be in addition to, those of [Target]'s stockholders generally. Those interests include:

[description of interests]

The following are the directors and executive officers of [Acquirer]:

<u>Name</u>	<u>Position</u>
-------------	-----------------

[Names].....	[Titles]
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- 
- (1) Member of the Audit Committee
  - (2) Member of the Compensation Committee

Index to Exhibits

Exhibit Number	<u>Description of Document</u>
99.1	Press Release dated [Date].
99.2	Script of press conference given on [Date].
99.3	Transcript of presentation to analysts given on [Date].