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Advisory

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SECURITIES LAW

Update on the Sarbanes-Oxley Act (Tenth in a Series): SEC Issues Final Rules on Form 8-K Furnishing of Earnings Press Releases

Pursuant to Section 409 of the Sarbanes-Oxley Act of 2002 (the "Act"), the Securities and Exchange Commission (SEC) recently issued final rules¹ that will require companies, beginning March 28, 2003, to furnish to the SEC, under cover of a Form 8-K, any public announcements or releases containing material nonpublic financial information regarding their results of operations or financial condition for *completed* annual or quarterly fiscal periods. The new rules would *not require* companies to issue earnings releases or other, similar reports, but would require companies who voluntarily issue such releases to furnish them to the SEC. The Form 8-K would have to be furnished within five business days after the announcement or release, under new Item 12, "Disclosure of Results of Operations and Financial Condition."² The new rules also would not require issuers to furnish releases that solely contain material financial information regarding *ongoing* or *future* fiscal periods.

On March 27, 2003, the SEC issued a notice that, because it has not yet completed the necessary programming adjustments to its EDGAR filing system to reflect this new 8-K item, companies should file information required by new Item 12 under Item 9 ("Regulation FD Disclosure") until further notice from the SEC. Companies should indicate in their filings that the information is being provided in response to Item 12 or both Items 12 and 9 (if the filing is also being made to satisfy the requirements of Regulation FD), as the case may be.

¹ These final rules are available on the SEC's website at <http://www.sec.gov/rules/final/33-8176.htm>. The final rules also address the SEC's new requirements concerning the use by companies of non-GAAP financial measures, as described further in our Advisory dated March 27, 2003, entitled "Update on the Sarbanes-Oxley Act (Ninth in a Series): SEC Issues Final Rules on Use of Non-GAAP Financial Measures," available at <http://www.mintz.com/images/dyn/publications/SECAdv032703.pdf>. The rules relating to the furnishing of earnings press releases on a Form 8-K apply regardless of whether the earnings press releases contain non-GAAP financial information. In addition, we understand that the SEC intends to issue a series of frequently asked questions and answers on these rules and the rules relating to non-GAAP financial measures.

² The SEC notes in the adopting release that it may ultimately accelerate the deadline for these Forms 8-K to two business days after the announcement or release, pursuant to a proposed overall revision of the Form 8-K filing structure.

A company that issues a press release or other public report that merely repeats information that was previously publicly disclosed, or that releases the same information in a different format (such as in an interim or annual report to shareholders) would not be required to refurnish that information. However, the release by a company of additional or updated material nonpublic information regarding the company's results of operations or financial condition for a completed fiscal year or quarter would trigger an additional obligation to furnish the information to the SEC on Form 8-K.

What is the purpose of the new rules?

According to the SEC, the amendments to Form 8-K are intended to create a central depository where investors and other market participants can look to find the latest earnings announcements and releases by public companies, and to provide enhanced attention to those announcements and releases.

What if we include this information in our annual or quarterly report?

Companies that do not issue separate earnings releases and that only include material information regarding completed fiscal years or quarters in their quarterly reports on Form 10-Q or annual reports on Form 10-K would not have to furnish the

information separately on a Form 8-K. However, if a company first includes the information in an interim or annual report to shareholders that is not filed with the SEC (e.g., in "glossy" quarterly or annual reports), and the information was not previously furnished to the SEC on a Form 8-K, the company would have to furnish the information (although the SEC notes that issuers would be permitted to specify which portion of the report contains the information that is required to be furnished under Item 12).

What if we make the disclosure orally?

Companies will not have to furnish information on a Form 8-K with respect to public disclosure of material nonpublic financial information regarding a completed fiscal period that is made in a face-to-face meeting, over the telephone, or by webcast, broadcast, or similar means, *if* (1) the presentation occurs within 48 hours after a related release or announcement that is furnished on Form 8-K *prior* to the presentation; (2) the presentation is broadly accessible to the public; (3) the financial and statistical information contained in the presentation is posted on the company's website; and (4) information on how to access the presentation and the information on the company's website was announced by a widely disseminated press release.

See the section entitled "*Practically speaking, what steps should we take now when issuing an earnings press release?*" below for a suggested timeline for earnings releases in order to comply with these various requirements.

Is this information required to be "filed" on a Form 8-K or "furnished"?

In the final rules, the SEC changed its original proposal with respect to this question, which would have required issuers to "file" the information with the SEC. Companies will now be permitted to "furnish" this information to the SEC, in a manner that is similar to the existing provisions of Form 8-K that allow companies to furnish to the SEC information that they make public for purposes of compliance with Regulation FD. "Furnishing," as opposed to "filing," information with the SEC has the following consequences:

- the information will not be subject to the liability provisions of Section 18 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"),³ unless the company specifically states that the information is to be considered "filed";
- the information will not be incorporated by reference into a registration statement, proxy statement or other report, unless the company specifically incorporates that

³ Section 18 generally provides that "any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation thereunder..., which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading."

information into those documents by reference; and

- the information will not be subject to other newly adopted SEC requirements relating to the presentation by companies of non-GAAP financial measures,⁴ under amended Item 10 of Regulation S-K or Item 10 of Regulation S-B, whereas “filed” information would be subject to those requirements.

What additional information would we have to provide if we disclose non-GAAP financial measures in our earnings press releases?

A company that includes non-GAAP financial measures in its earnings press releases will also be required to disclose, either in the Form 8-K relating to the press release or in the press release itself:

- a presentation of the most directly comparable financial measure that is calculated and presented in accordance with GAAP;
- a reconciliation, by schedule or other clearly understandable method, of the differences

between the non-GAAP financial measure presented and the most directly comparable financial measure or measures that are calculated and presented in accordance with GAAP;

- why the company’s management believes that the non-GAAP financial measure provides useful information to investors regarding the company’s financial condition and results of operations;⁵ and
- if material, any additional purposes for which the company’s management uses the non-GAAP financial measure.⁶

Practically speaking, what steps should we take now when issuing an earnings press release?

- Have the members of your Audit Committee (or at least the Chair of the Audit Committee) review and approve the earnings press release before it is issued.
- Consult with your independent public accountants regarding the presentation of financial information in the press release, including in particular the

presentation of any non-GAAP financial measures.

- If non-GAAP financial measures are included, ensure that the additional disclosure required regarding those measures is included either in the Form 8-K, the press release, or, as applicable, in the company’s most recent annual report filed with the SEC.
- Confer with your investor relations staff to coordinate the specific timing of investor conference calls, in light of the timing requirements of the new rules. As noted above, a separate Form 8-K including material information regarding results of operations or financial condition for a completed fiscal period that is disclosed in a conference call would have to be furnished to the SEC unless the call occurs within 48 hours after the issuance of the press release announcing the call. A potential timeline in light of these rules is as follows:

Two to seven days prior to the earnings conference call: Issue press release announcing time, date, and instructions on means of access to

⁴ A “non-GAAP financial measure” is a numerical measure of a company’s historical or future financial performance, financial position or cash flows that:

- 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 company’s statement of income, balance sheet or statement of cash flows (or equivalent statements); 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.

Examples of non-GAAP financial measures are EBITDA, EBIT, and measures of operating income that exclude one or more expense or revenue items that are identified as “non-recurring.” Please see the March 27 Advisory for a further description of the requirements relating to the use of non-GAAP financial measures.

⁵ If desired, the information required by this and the next bullet point may be included in the company’s most recent annual report on Form 10-K filed with the SEC, or in a more recent SEC filing.

⁶ The SEC has determined that, even though the information included in the Form 8-K for an earnings release is required to be furnished to the SEC, not all of the restrictions that are applicable to the inclusion of non-GAAP financial measures in SEC filings, as described in the March 27 Advisory, will be imposed on earnings releases.

conference call; include notice that earnings information will also be posted in a specifically identified section of the company's website (most likely, the section that includes SEC filings).

No more than 48 hours prior to the earnings conference call: Issue press release containing earnings for the completed quarter or year.

Immediately after release of the earnings press release and prior to the earnings conference call: Furnish Form 8-K to the SEC under Item 12, including the press release as an exhibit; simultaneously post Form 8-K on the company's website, either through third party posting service or internal website staff.

Within 48 hours after release of the earnings press release: Conduct investor conference call. After the call, review a transcript of the call to ensure that all financial and statistical information discussed in the call has been provided on the company's website, together with any information that would be required by Regulation G. If the conference call is held or other oral disclosure is

made *more than* 48 hours after the release of the related earnings press release, a separate Form 8-K containing the material financial information about a completed annual or quarterly fiscal period would have to be furnished to the SEC.

As noted above, companies are not required by these rules to issue earnings press releases. However, most companies already do so, and therefore they should carefully script their timing for release of the information and the disclosures made in conference calls in light of the new requirements.

Which companies are subject to these rules?

These rules apply to all entities that are required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, other than registered investment companies, and including small business issuers. Although the SEC did not make this explicit in the adopting release, it appears that foreign private issuers are not subject to this requirement, because they are not required to file (or

furnish) current reports on Form 8-K. Further, the SEC did not revise the corresponding form for current reports by foreign private issuers, the Form 6-K, to include this requirement. However, foreign private issuers may want to consider complying with these rules as a "best practice" in light of current market conditions and expectations in the United States.

When do companies need to comply with these rules?

These rules will become effective on March 28, 2003. Any earnings press releases issued after that date that include material nonpublic financial information for a completed fiscal period will need to comply with these new rules.

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Please contact the Mintz Levin attorney who handles your corporate or securities law matters if you have any questions regarding this information.