

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 228, 229 and 249

[Release Nos. 33–8182; 34–47264; FR–67 International Series Release No. 1266 File No. S7–42–02]

RIN 3235–A170

### Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** As directed by new section 13(j) of the Securities Exchange Act of 1934, added by section 401(a) of the Sarbanes-Oxley Act of 2002, we are adopting amendments to our rules to require disclosure of off-balance sheet arrangements. The amendments require a registrant to provide an explanation of its off-balance sheet arrangements in a separately captioned subsection of the "Management's Discussion and Analysis" ("MD&A") section of a registrant's disclosure documents. The amendments also require registrants (other than small business issuers) to provide an overview of certain known contractual obligations in a tabular format.

**DATES:** *Effective Date:* April 7, 2003. *Compliance Date:* Registrants must comply with the off-balance sheet arrangement disclosure requirements in registration statements, annual reports and proxy or information statements that are required to include financial statements for their fiscal years ending on or after June 15, 2003. Registrants (other than small business issuers) must include the table of contractual obligations in registration statements, annual reports, and proxy or information statements that are required to include financial statements for the fiscal years ending on or after December 15, 2003. Registrants may voluntarily comply with the new disclosure requirements before the compliance dates.

#### FOR FURTHER INFORMATION CONTACT:

Questions about this release should be referred to Andrew Thorpe, Special Counsel, Division of Corporation Finance ((202) 942–2910), Jenifer Minke-Girard, Associate Chief Accountant, or Eric Schuppenhauer, Professional Accounting Fellow, Office of the Chief Accountant ((202) 942–4400), Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to Item 303<sup>1</sup> of Regulation S–K,<sup>2</sup> Item 303<sup>3</sup> of Regulation S–B,<sup>4</sup> Item 5 of Form 20–F<sup>5</sup> and General Instruction B of Form 40–F<sup>6</sup> under the Securities Exchange Act of 1934.<sup>7</sup>

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#### I. Background

On July 30, 2002, the Sarbanes-Oxley Act of 2002 was enacted.<sup>8</sup> section 401(a) of the Sarbanes-Oxley Act added section 13(j) to the Securities Exchange Act of 1934,<sup>9</sup> which requires the Commission to adopt final rules by January 26, 2003 (180 days after the date of enactment) to require each annual and quarterly financial report required to be filed with the Commission, to disclose "all material off-balance sheet transactions, arrangements, obligations (including

contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses."<sup>10</sup> In November 2002, we published for comment a proposed rulemaking to implement Section 401(a)<sup>11</sup> and to codify interpretive guidance set forth in our January 2002 Commission Statement.<sup>12</sup>

The Commission has long recognized the need for a narrative explanation of financial statements and accompanying footnotes and has developed MD&A over the years to fulfill this need.<sup>13</sup> The disclosure in MD&A is of paramount importance in increasing the transparency of a company's financial performance and providing investors with the disclosure necessary to evaluate a company and to make informed investment decisions. MD&A also provides a unique opportunity for management to provide investors with an understanding of its view of the financial performance and condition of the company, an appreciation of what the financial statements show and do not show, as well as important trends and risks that have shaped the past or are reasonably likely to shape the future.

The MD&A rules already require disclosure regarding off-balance sheet arrangements and other contingencies. They are designed to cover a wide range of corporate events, including events, variables and uncertainties not otherwise required to be disclosed under U.S. generally accepted accounting principles ("GAAP").<sup>14</sup> For

<sup>10</sup> Pub. L. 107–204 Sec. 401(a).

<sup>11</sup> See Release No. 33–8144 (Nov. 4, 2002) [67 FR 68054] (the "Proposing Release").

<sup>12</sup> See Release No. 33–8056, FR–61 (Jan. 22, 2002) [67 FR 3746] (the "Commission Statement"). That statement was issued in response to a petition from Arthur Andersen LLP, Deloitte and Touche LLP, Ernst & Young LLP, KPMG LLP, and PricewaterhouseCoopers LLP, with the endorsement of the American Institute of Certified Public Accountants, for an interpretive release to facilitate enhanced MD&A disclosures. See Rulemaking Petition No. 4–450 (Dec. 31, 2001).

<sup>13</sup> See, e.g., Release No. 33–5443 (Dec. 12, 1973) [39 FR 829].

<sup>14</sup> In *In the Matter of Caterpillar Inc.*, Release No. 34–30532 (March 31, 1992), the Commission found that Caterpillar had violated section 13(a) of the Exchange Act [15 U.S.C. 78m(a)] by failing to have disclosed the magnitude of its Brazilian subsidiary's contribution to Caterpillar's overall earnings. Disclosure of the extent of that contribution was required under the MD&A disclosure requirements, even though disclosure was not required under GAAP, because the subsidiary's earnings materially affected Caterpillar's reported income from continuing operations. See Item 303(a)(3)(i) of Regulation S–K [17 CFR 229.303(a)(3)(i)].

<sup>1</sup> 17 CFR 229.303.

<sup>2</sup> 17 CFR 229.10 *et seq.*

<sup>3</sup> 17 CFR 228.303.

<sup>4</sup> 17 CFR 228.10 *et seq.*

<sup>5</sup> 17 CFR 249.220f.

<sup>6</sup> 17 CFR 249.240f.

<sup>7</sup> 15 U.S.C. § 78a *et seq.*

<sup>8</sup> Pub. L. 107–204, 116 Stat. 745 (2002).

<sup>9</sup> 15 U.S.C. 78m(j).