

E. Agency Action To Minimize Effect on Small Entities

Because section 401(a) of the Sarbanes-Oxley Act does not distinguish between small entities and other companies, we interpret Congress' directive to the Commission to adopt rules requiring expanded disclosure about off-balance sheet transactions to apply equally to small entities and to other public companies. However, we were able to further ease the regulatory burden on small entities by excluding small business issuers from the tabular disclosure requirement about contractual obligations. Tabular disclosure of contractual obligations was not mandated by the Sarbanes-Oxley Act. That information is currently required to be disclosed in various locations in filings. While it would be useful to investors if this information were disclosed in a single location, we believe that excluding small business issuers from this requirement would reduce their regulatory burden.

As required by the Regulatory Flexibility Act, we have considered alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

(a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) The clarification, consolidation, or simplification of disclosure for small entities;

(c) The use of performance rather than design standards; and

(d) An exemption for small entities from all or part of the amendments.

We have drafted the amendments to require clear and straightforward disclosure of off-balance sheet arrangements in MD&A. Separate disclosure requirements regarding off-balance sheet arrangements for small entities will not yield the disclosure that we believe is necessary to achieve our objectives. In addition, the informational needs of investors in small entities are typically as great as the needs of investors in larger companies. Therefore, it does not seem appropriate to develop separate requirements with regard to off-balance sheet arrangements for small entities that clarify, consolidate or simplify the amendments. We have, however, excluded small business issuers from the requirement to provide tabular disclosure of contractual obligations.

We have used design rather than performance standards in connection

with the amendments for three reasons. First, we believe the disclosure will be easier to implement and more useful to investors with enumerated informational requirements. The required disclosures may be likely to result in a more focused and comprehensive discussion of the company's off-balance sheet arrangements. Second, mandated disclosures regarding off-balance sheet arrangements may benefit investors in small entities because the enumerated disclosure under the amendments likely will be more comparable across all firms and consistent over time. Third, a mandated discussion of a company's off-balance sheet arrangements is uniquely suited to the MD&A disclosure in light of MD&A's emphasis on the identification of significant uncertainties and events and favorable or unfavorable trends. Therefore, adding a disclosure requirement to the existing MD&A appears to be the most effective method of eliciting the disclosure.

Because section 401(a) of the Sarbanes-Oxley Act does not distinguish between small entities and other companies, we do not believe it is appropriate to exempt small entities from the requirement to discuss off-balance sheet arrangements. We have, however, excluded small business issuers from the requirement to provide tabular disclosure of contractual obligations.

VIII. Statutory Authority and Text of Rule Amendments

The amendments contained in this release are being adopted under the authority set forth in sections 7, 10, 19, 27A and 28 of the Securities Act, sections 12, 13, 14, 21E, 23 and 36 of the Exchange Act and sections 3(a) and 401(a) of the Sarbanes-Oxley Act of 2002.

List of Subjects in 17 CFR Parts 228, 229 and 249

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–29, 80a–30, 80a–37 and 80b–11.

Section 228.303 is also issued under secs. 3(a) and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

* * * * *

2. Section 228.303 is amended by:
 - a. Removing the phrase “paragraph (a)” and adding, in its place, the phrase “paragraphs (a) and (c)” in the first sentence of the introductory text;
 - b. Removing the phrase “paragraph (b)” and adding, in its place, the phrase “paragraphs (b) and (c)” in the second sentence of the introductory text;
 - c. Adding paragraph (c);
 - d. Adding Instructions 1 through 5 to paragraph (c) of Item 303; and
 - e. Adding paragraph (d).

The additions read as follows:

§ 228.303 (Item 303) Management's discussion and analysis or plan of operation.

* * * * *

(c) *Off-balance sheet arrangements.*
(1) In a separately-captioned section, discuss the small business issuer's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the small business 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. The disclosure shall include the items specified in paragraphs (c)(1)(i), (ii), (iii) and (iv) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the small business issuer believes is necessary for such an understanding.

(i) The nature and business purpose to the small business issuer of such off-balance sheet arrangements;

(ii) The importance to the small business issuer of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits; (iii) The amounts of revenues, expenses and cash flows of the small business issuer arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the small business issuer in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the small business issuer arising from such arrangements that are or are reasonably