U.S. Securities and Exchange Commission

SEC Adopts Rules on Provisions of Sarbanes-Oxley Act

Actions Cover Non-GAAP Financials, Form 8-K Amendments, Trading During Blackout Periods, Audit Committee Financial Expert Requirements

FOR IMMEDIATE RELEASE
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Washington, D.C., January 15, 2003 — The Securities and Exchange Commission today voted to adopt the following rules and amendments concerning provisions of the Sarbanes-Oxley Act of 2002.

1. Conditions for Use of Non-GAAP Financial Information Under Section 401(b) of Sarbanes-Oxley Act and Amendments to Form 8-K Under Section 409

Conditions for Use of Non-GAAP Financial Information

Section 401(b) of the Sarbanes-Oxley Act of 2002 directs the Commission to issue final rules by Jan. 26, 2003, requiring that any public disclosure or release of "pro forma financial information" by a public company be presented in a manner that (1) does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the "pro forma financial information," in light of the circumstances under which it is presented, not misleading; and (2) reconciles the "pro forma financial information" presented with the financial condition and results of operations of the company under Generally Accepted Accounting Principles (GAAP).

The Commission voted to adopt rules that will satisfy the mandate of Section 401(b) by defining the category of financial information that is subject to that mandate and then taking a two-step approach to regulating the use of that financial information.

The Commission's rules under Section 401(b) of the Sarbanes-Oxley Act will apply to the public disclosure or release of material information that includes a "non-GAAP financial measure." For this purpose, a "non-GAAP financial measure" will be defined as a numerical measure of a company's financial performance that (1) excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or (2) includes amounts, or is subject to

adjustments that have the effect of including amounts, that are excluded from the comparable measure so calculated and presented. Statistical and operating measures are not covered.

The Commission voted to adopt new Regulation G, which will apply whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure. This regulation will prohibit material misstatements or omissions that would make the presentation of the material non-GAAP financial measure, under the circumstances in which it is made, misleading, and will require a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure presented and the comparable financial measure or measures calculated and presented in accordance with GAAP.

Regulation G will provide a limited exception for foreign private issuers where (1) the securities of the issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States; (2) the non-GAAP financial measure and the most comparable GAAP financial measure are not calculated and presented in accordance with generally accepted accounting principles in the United States; and (3) the disclosure is made by or on behalf of the issuer outside the United States, or is included in a written communication that is released by or on behalf of the issuer outside the United States.

The Commission also voted to adopt amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B that address specifically the use of non-GAAP financial measures in filings with the Commission. These amendments will apply to the same categories of non-GAAP financial measures as are covered by Regulation G, but contain more detailed requirements than Regulation G. The Commission also decided to adopt amended Exchange Act Form 20-F to apply these requirements to annual reports filed with the Commission by foreign private issuers.

Form 8-K Amendments

Section 409 of the Sarbanes-Oxley Act added new Section 13(l) to the Exchange Act. New Section 13(l) obligates public companies to disclose "on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer . . . as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest."

The Commission voted to adopt amendments to Form 8-K to require public companies to furnish to the Commission releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods. These amendments will not require the issuance of earnings releases or similar announcements. However, such releases and announcements will trigger the new requirement. The new Form 8-K requirement will apply regardless of whether the release or announcement included disclosure of a non-GAAP financial measure.

Public disclosure of financial information for a completed fiscal period in a presentation that is made orally, telephonically, by Web cast, by broadcast, or by similar means will not be required to be filed, if (1) the presentation occurs within 48 hours of a related release or announcement that is filed on Form 8-K; (2) the presentation is broadly accessible to the public; and (3) the information in the Web cast is posted on the company's Web site.

The new rules and amendments will be effective 60 days from the date of their publication in the Federal Register.

2. Rules Restricting Insider Trading During Pension Fund Blackout Periods

Section 306(a) of the Sarbanes-Oxley Act of 2002 prohibits any director or executive officer of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants and beneficiaries from engaging in transactions involving issuer equity securities held in their plan accounts. These prohibitions apply only if the securities acquired or disposed of by the director or executive officer were acquired in connection with his or her service or employment as a director or executive officer. Section 306(a) also requires an issuer to notify its directors and executive officers, as well as the Commission, of an impending blackout period on a timely basis.

As directed by the statute, on Oct. 30, 2002, the Commission, after consultation with the Secretary of Labor, proposed new Regulation Blackout Trading Restriction (BTR) under the Securities Exchange Act of 1934 to clarify the scope and application of Section 306(a) and to prevent evasion of the statutory trading prohibition. The Commission received 18 comment letters in response to its proposal.

Regulation BTR will incorporate a number of concepts developed under Section 16 of the Exchange Act. This will enable issuers to use the well-established body of rules and interpretations concerning the trading activities of corporate insiders under Section 16 in interpreting how Section 306(a) operates and, as to directors and executive officers of domestic issuers, facilitate enforcement of the statutory trading prohibition through monitoring of the reports publicly filed by directors and officers pursuant to Section 16 (a).

Persons Subject to Trading Prohibition

Section 306(a) applies to the directors and executive officers of an issuer:

- with a class of securities registered under Section 12 of the Exchange Act;
- that is required to file reports under Section 15(d) of the Exchange Act;

or

- that files or has filed a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn.

Accordingly, Regulation BTR will apply to the directors and executive officers of domestic issuers, foreign private issuers, banks and savings associations, small business issuers and, in rare instances, registered investment companies.

Under Regulation BTR, the term "director" will have the same meaning as under the general Exchange Act definition, and the term "executive officer" will have the same meaning as the term "officer" under the Section 16 rules.

Securities Subject to Trading Prohibition

By its terms, Section 306(a) applies to any equity security of an issuer. Regulation BTR will define the term "equity security" to include both equity securities and derivative securities relating to an equity security, whether or not issued by the issuer. To promote consistency and streamline compliance, Regulation BTR will provide that the term "derivative security" has the same meaning as under the Section 16 rules.

Transactions Subject to Trading Prohibition

The statutory trading prohibition of Section 306(a) is limited to equity securities that a director or executive officer "acquires in connection with his or her service or employment as a director or executive officer." Regulation BTR will specify the instances where an acquisition of equity securities by a director or executive officer is "in connection with" his or her service to, or employment with, an issuer. In addition, Regulation BTR will provide that any equity securities sold or otherwise transferred during a blackout period will be treated as "acquired in connection with service or employment as a director or executive officer" unless he or she establishes that the equity securities were acquired from another source and this identification is consistent with the treatment of the securities for tax purposes and all other disclosure and reporting requirements.

To prevent evasion of the statutory trading prohibition, Regulation BTR will apply to indirect, as well as direct, acquisitions and dispositions of equity securities where a director or executive officer has a "pecuniary interest" in the transaction. "Pecuniary interest" will have the same meaning as under the Section 16 rules. Accordingly, acquisitions or dispositions of equity securities by family members, partnerships, corporations, limited liability companies and trusts will be deemed to be acquisitions or dispositions by a director or executive officer if he or she has a pecuniary interest in the equity securities.

Regulation BTR will exempt from the statutory trading prohibition several categories of transactions that occur automatically, are made pursuant to an

advance election or are otherwise outside the control of the director or executive officer, including:

- acquisitions of equity securities under dividend or interest reinvestment plans;
- purchases or sales of equity securities that satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c);
- purchases or sales of equity securities, other than "discretionary transactions" (as defined under the Section 16 rules) pursuant to certain employee benefit plans;
- compensatory grants and awards of equity securities pursuant to programs under which grants and awards occur automatically;
- exercises, conversions or terminations of certain derivative securities, which, by their terms, occur only on a fixed date, or are exercised, converted or terminated by a counter-party who is not subject to the influence of the director or executive officer;
- acquisitions or dispositions of equity securities involving a bona fide gift or a transfer by will or the laws of descent and distribution;
- acquisitions or dispositions of equity securities pursuant to a domestic relations order;
- sales or other dispositions of equity securities compelled by the laws or other requirements of an applicable jurisdiction;
- acquisitions or dispositions of equity securities in connection with a merger, acquisition, divestiture or similar transaction occurring by operation of law; and
- increases or decreases in equity securities holdings resulting from a stock split, stock dividend or pro rata rights distribution.

Blackout Period

The Section 306(a) trading prohibition is triggered only if a blackout period lasts more than three consecutive business days and temporarily suspends the ability of at least 50% of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell or otherwise acquire or transfer an interest in issuer equity securities held in an account plan.

Regulation BTR will provide that, in the case of a domestic issuer, the Section 306(a) trading prohibition is triggered only if the ability of U.S. pension plan participants to trade in an issuer's equity securities through their individual plan accounts is temporarily suspended for more than three consecutive business days and this temporary suspension affects 50% or more of the

participants under all pension plans with individual accounts maintained by the issuer.

Regulation BTR will provide that, in the case of a foreign private issuer, the Section 306(a) trading prohibition is triggered only if the 50% test is satisfied and the number of U.S. plan participants subject to the temporary trading suspension is either (1) greater than 15% of the issuer's worldwide workforce, or (2) greater than 50,000 in number.

Remedies

A violation of the Section 306(a) trading prohibition by a director or executive officer is a violation of the Exchange Act, subject to possible Commission enforcement action. In addition, Section 306(a) provides that an issuer, or a security holder on its behalf, may bring an action to recover the profits realized by a director or executive officer from a prohibited transaction during a blackout period. Regulation BTR will provide that, generally, the amount recoverable in a private action is the difference between the amount paid or received for the equity security on the date of the transaction during the blackout period and the amount that would have been paid or received for the equity security if the transaction had taken place outside the blackout period.

Notice

Regulation BTR will specify the content and timing of the notice that an issuer is required to provide to its directors and executive officers and to the Commission about an impending blackout period. In the case of a domestic issuer, the notice to the Commission will be provided in a Form 8-K report.

Section 306(a) takes effect on Jan. 26, 2003. Regulation BTR will take effect at the same time.

3. Disclosure Requirements to Implement Sections 406 and 407 of Sarbanes-Oxley Act

The Commission voted to adopt rules implementing Sections 406 and 407 of the Sarbanes-Oxley Act of 2002. These rules will require public companies to disclose information about corporate codes of ethics and audit committee financial experts.

The rules will require a company subject to the reporting requirements of the Securities Exchange Act of 1934 to include the following two new types of disclosures in their Exchange Act filings.

- Pursuant to Section 407, a company will be required to annually disclose whether it has at least one "audit committee financial expert" on its audit committee, and if so, the name of the audit committee financial expert and whether the expert is independent of

management. A company that does not have an audit committee financial expert will be required to disclose this fact and explain why it has no such expert.

- Pursuant to Section 406, a company will be required to disclose annually whether the company has adopted a code of ethics for the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If it has not, the company will be required to explain why it has not. The rules also will require a company to disclose on a current basis amendments to, and waivers from, the code of ethics relating to any of those officers.

Audit Committee Financial Experts

The rules will expand the proposed definition of the term "financial expert" and also substitute the designation "audit committee financial expert" for "financial expert." The rules will define "audit committee financial expert" to mean a person who has the following attributes:

(1) an understanding of financial statements and generally accepted accounting principles;

(2) an ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(3) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;

(4) an understanding of internal controls and procedures for financial reporting; and

(5) an understanding of audit committee functions.

A person can acquire such attributes through any one or more of the following means:

(1) education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(2) experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions, or experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(3) other relevant experience.

An individual will have to possess all of the attributes listed in the above definition to qualify as an audit committee financial expert. Furthermore, the

rules will eliminate the proposed requirement that a person's experience applying generally accepted accounting principles in connection with accounting for estimates, accruals and reserves be "generally comparable" to the estimates, accruals and reserves used in the registrant's financial statements.

The rules also will provide a safe harbor to make clear that an audit committee financial expert will not be deemed an "expert" for any purpose, including for purposes of Section 11 of the Securities Act of 1933, and that the designation of a person as an audit committee financial expert does not impose any duties, obligations or liability on the person that are greater than those imposed on such a person as a member of the audit committee in the absence of such designation, nor does it affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Codes of Ethics

Under the rules, a company will be required to disclose in its annual report whether it has a code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. The rules will define a code of ethics as written standards that are reasonably necessary to deter wrongdoing and to promote

1. honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

2. full, fair, accurate, timely, and understandable disclosure in reports and documents that a company files with, or submits to, the Commission and in other public communications made by the company;

3. compliance with applicable governmental laws, rules and regulations;

4. the prompt internal reporting of code violations to an appropriate person or persons identified in the code; and

5. accountability for adherence to the code.

A company will be required to make available to the public a copy of its code of ethics, or portion of the code that applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. A company can make the code of ethics available to the public by filing it as an exhibit to its annual report, providing it on the company's Internet Web site, or as otherwise set forth in the final rule.

A company, other than a foreign private issuer or registered investment company, also will be required to disclose any changes to, or waivers of, the code of ethics within five business days, to the extent that the change or

waiver applies to the company's principal executive officer or senior financial officers. A company can provide this disclosure on Form 8-K or on its Internet Web site. Foreign private issuers and registered investment companies will be required to disclose changes to, and waivers of, such codes of ethics in their periodic reports or on their Internet Web sites.

The new rules will be effective 30 days from the date of their publication in the Federal Register. Companies will be required to provide the new disclosures in annual reports for fiscal years ending on or after July 15, 2003. Small business issuers will be required to provide the new audit committee financial expert disclosure in annual reports for fiscal years ending on or after Dec. 15, 2003.

The full text of detailed releases concerning each of these items will be posted to the SEC Web site as soon as possible.

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