

Securities and Exchange Commission

§ 228.10

- 228.510 (Item 510) Disclosure of Commission Position on Indemnification for Securities Act Liabilities.
- 228.511 (Item 511) Other Expenses of Issuance and Distribution.
- 228.512 (Item 512) Undertakings.
- 228.601 (Item 601) Exhibits.
- 228.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.
- 228.702 (Item 702) Indemnification of Directors and Officers.

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EFFECTIVE DATE NOTE: At 68 FR 5998, Feb. 5, 2003, the authority citation for part 228 was amended by adding an entry for § 228.303, effective April 7, 2003. For the convenience of the user, the added text is set forth as follows:

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

SOURCE: 57 FR 36449, Aug. 13, 1992, unless otherwise noted.

ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

Subpart A—Regulation S-B

§ 228.10 (Item 10) General.

(a) *Application of Regulation S-B.* Regulation S-B is the source of disclosure requirements for “small business issuer” filings under the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”).

(1) *Definition of small business issuer.* A small business issuer is defined as a company that meets all of the following criteria:

(i) has revenues of less than \$25,000,000;

(ii) is a U.S. or Canadian issuer;

(iii) is not an investment company; and

(iv) if a majority owned subsidiary, the parent corporation is also a small business issuer.

Provided however, that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer’s outstanding voting and non-voting common equity held by non-affiliates) of \$25,000,000 or more.

NOTE: The public float of a reporting company shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, on a date within 60 days prior to the end of its most recent fiscal year. The public float of a company filing an initial registration statement under the Exchange Act shall be determined as of a date within 60 days of the date the registration statement is filed. In the case of an initial public offering of securities, public float shall be computed on the basis of the number of shares outstanding prior to the offering and the estimated public offering price of the securities.

(2) *Entering and Exiting the Small Business Disclosure System.* (i) A company that meets the definition of small business issuer may use Form SB-2 for registration of its securities under the Securities Act; Form 10-SB for registration of its securities under the Exchange Act; and Forms 10-KSB and 10-QSB for its annual and quarterly reports.

(ii) For a non-reporting company entering the disclosure system for the first time either by filing a registration statement under the Securities Act on Form SB-2 or a registration statement under the Exchange Act on Form 10-SB, the determination as to whether a company is a small business issuer is made with reference to its revenues during its last fiscal year and public float as of a date within 60 days of the date the registration statement is filed. *See* Note to paragraph (a) of this Item.

(iii) Once a small business issuer becomes a reporting company it will remain a small business issuer until it

exceeds the revenue limit or the public float limit at the end of two consecutive years. For example, if a company exceeds the revenue limit for two consecutive years, it will no longer be considered a small business. However, if it exceeds the revenue limit in one year and the next year exceeds the public float limit, but not the revenue limit, it will still be considered a small business. See Note to paragraph (a) of this Item.

(iv) A reporting company that is not a small business company must meet the definition of a small business issuer at the end of two consecutive fiscal years before it will be considered a small business issuer for purposes of using Form SB-2, Form 10-SB, Form 10-KSB and Form 10-QSB. See Note to paragraph (a) of this Item.

(v) The determination as to the reporting category (small business issuer or other issuer) made for a non-reporting company at the time it enters the disclosure system governs all reports relating to the remainder of the fiscal year. The determination made for a reporting company at the end of its fiscal year governs all reports relating to the next fiscal year. An issuer may not change from one category to another with respect to its reports under the Exchange Act for a single fiscal year. A company may, however, choose not to use a Form SB-2 for a registration under the Securities Act.

(b) *Definitions of terms.*

(1) *Common Equity*—means the small business issuer's common stock. If the small business issuer is a limited partnership, the term refers to the equity interests in the partnership.

(2) *Public market*—no public market shall be deemed to exist unless, within the past 60 business days, both bid and asked quotations at fixed prices (excluding “bid wanted” or “offer wanted” quotations) have appeared regularly in any established quotation system on at least half of such business days. Transactions arranged without the participation of a broker or dealer functioning as such are not indicative of a “public market.”

(3) *Reporting company*—means a company that is obligated to file periodic reports with the Securities and Ex-

change Commission under section 15(d) or 13(a) of the Exchange Act.

(4) *Small business issuer*—refers to the issuer and all of its consolidated subsidiaries.

(c) *Preparing the disclosure document.*

(1) The purpose of a disclosure document is to inform investors. Hence, information should be presented in a clear, concise and understandable fashion. Avoid unnecessary details, repetition or the use of technical language. The responses to the items of this Regulation should be brief and to the point.

(2) Small business issuers should consult the General Rules and Regulations under the Securities Act and Exchange Act for requirements concerning the preparation and filing of documents. Small business issuers should be aware that there are special rules concerning such matters as the kind and size of paper that is allowed and how filings should be bound. These special rules are located in Regulation C of the Securities Act (17 CFR 230.400 *et seq.*) and in Regulation 12B of the Exchange Act (17 CFR 240.12b-1 *et seq.*).

(d) *Commission policy on projections.* The Commission encourages the use of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines below set forth the Commission's views on important factors to be considered in preparing and disclosing such projections. (See also 17 CFR 230.175 and 240.3b-6).

(1) *Basis for projections.* Management has the option to present in Commission filings its good faith assessment of a small business issuer's future performance. Management, however, must have a reasonable basis for such an assessment. An outside review of management's projections may furnish additional support in this regard. If management decides to include a report of such a review in a Commission filing, it should also disclose the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under

the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* Traditionally, projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss) and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible to misleading inferences through selective projection of only favorable items. It generally would be misleading to present sales or revenue projections without one of the foregoing measures of income. The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two or three year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year.

(3) *Investor understanding.* Disclosures accompanying the projections should facilitate investor understanding of the basis for and limitations of projections. The Commission believes that investor understanding would be enhanced by disclosure of the assumptions which in management's opinion are most significant to the projections or are the key factors upon which the financial results of the enterprise depend and encourages disclosure of assumptions in a manner that will provide a framework for analysis of the projection. Management also should consider whether disclosure of the accuracy or inaccuracy of previous projections would provide investors with important insights into the limitations of projections.

(e) *Commission policy on security ratings.* In view of the importance of security ratings ("ratings") to investors and the marketplace, the Commission permits small business issuers to disclose ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. In addition, the

Commission permits, disclosure of ratings assigned by any nationally recognized statistical rating organizations ("NRSROs") in certain communications deemed not to be a prospectus ("tombstone advertisements"). Below are the Commission's views on important matters to be considered in disclosing security ratings.

(1)(i) If a small business issuer includes in a filing any rating(s) assigned to a class of securities, it should consider including any other rating assigned by a different NRSRO that is materially different. A statement that a security rating is not a recommendation to buy, sell or hold securities and that it may be subject to revision or withdrawal at any time by the assigning rating organization should also be included.

(ii)(A) If the rating is included in a filing under the Securities Act, the written consent of any rating organization that is not a NRSRO whose rating is included should be filed. The consent of any NRSRO is not required. (See Rule 436(g) under the Securities Act (§230.436(g) of this chapter.)

(B) If a change in a rating already included is available before effectiveness of the registration statement, the small business issuer should consider including such rating change in the prospectus. If the rating change is material, consideration should be given to recirculating the preliminary prospectus.

(C) If a materially different additional NRSRO rating or a material change in a rating already included becomes available during any period in which offers or sales are being made, the small business issuer should consider disclosing this information in a sticker to the prospectus.

(iii) If there is a material change in the rating(s) assigned by any NRSRO(s) to any outstanding class(es) of securities of a reporting company, the registrant should consider filing a report on Form 8-K (§249.308 of this chapter) or other appropriate report under the Exchange Act disclosing such rating change.

(2) [Reserved]

(f) *Incorporation by Reference.* Where rules, regulations, or instructions to

forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

(g) *Quantitative and qualitative disclosures about market risk.* The safe harbor provision included in paragraph (d) of Item 305 of Regulation S-K (§ 229.305(d) of this chapter) shall apply to information required by Item 305 of Regulation S-K (§ 229.305 of this chapter) that is voluntarily provided by or on behalf of a small business issuer as defined in Rule 12b-2 of the Exchange Act.

NOTE TO PARAGRAPH (g): Such small business issuers are not required to provide the information required by Item 305 of Regulation S-K.

(h) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (h)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (h)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

(B) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03); or

(E) Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures; and

(iii) If the filing is not an annual report on Form 10-KSB (17 CFR 249.310b), a registrant need not include the information required by paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-KSB or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (h), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flow that:

(i) 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 statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or

(ii) 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.

(3) For purposes of this paragraph (h), GAAP refers to generally accepted accounting principles in the United States.

(4) For purposes of this paragraph (h), non-GAAP financial measures exclude:

(i) Operating and other statistical measures; and

(ii) Ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (h), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government

or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (h) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 32824, June 23, 1995; 62 FR 6064, Feb. 10, 1997; 62 FR 26388, May 14, 1997; 68 FR 4830, Jan. 30, 2003]

§ 228.101 (Item 101) Description of Business.

(a) *Business Development.* Describe the development of the small business issuer during the last three years. If the small business issuer has not been in business for three years, give the same information for predecessor(s) of the small business issuer if there are any. This business development description should include:

(1) Form and year of organization;

(2) Any bankruptcy, receivership or similar proceeding; and

(3) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(b) *Business of Issuer.* Briefly describe the business and include, to the extent material to an understanding of the issuer:

(1) Principal products or services and their markets;

(2) Distribution methods of the products or services;

(3) Status of any publicly announced new product or service;

(4) Competitive business conditions and the small business issuer's competitive position in the industry and methods of competition;