

## *Developments and Reminders Affecting Quarterly SEC Reporting*

This memorandum summarizes certain developments to keep in mind as you prepare your next Form 10-K or 10-Q.

### **SEC Proposes New Accelerated Filer Definitions and Deadlines**

The SEC has previously created a category of issuers called “accelerated filers.” These are entities that, as of the end of a fiscal year, have a \$75 million or greater public float, have previously filed at least one Form 10-K and have been subject to Exchange Act reporting requirements for at least 12 months (and are not eligible to use Forms 10-KSB or 10-QSB for annual and quarterly reports).

In November 2004, the SEC adopted rules postponing the final phase-in period for acceleration of periodic report deadlines that apply to all accelerated filers. Under the amended rules, accelerated filers are required to file their Forms 10-Q within 40 days after quarter-end until fiscal years ending on or after December 15, 2005, after which accelerated filers are required to file their Forms 10-Q within 35 days after quarter-end.

On September 22, 2005, the SEC proposed a new category of issuers, “large accelerated filers,” which are filers who meet the current definition of accelerated filer but who have a public float of \$700 million or more. Large accelerated filers would need to file their Forms 10-K within 60 days after fiscal year-end and their Forms 10-Q within 40 days after quarter-end, beginning with years ending after December 15, 2005. The SEC also proposed that accelerated filers who are not large accelerated filers would need to file their Forms 10-K within 75 days after year-end and their Forms 10-Q within 40 days after quarter-end. It also proposed to modify the rules regarding exiting accelerated filer status by permitting an accelerated filer whose public float has dropped below \$25 million to file an annual report on a non-accelerated basis for the same fiscal year that the determination of public float is made. The SEC included a 30-day comment period for its proposals.

### **WKSI Status**

In its new rules adopted on July 19, 2005, the SEC created a cate-

gory of issuers called “well-known seasoned issuers” or “WKSIs.” These are entities that have timely filed all Exchange Act reports for at least one year and either have (a) \$700 million or more of worldwide public float or (b) sold at least \$1 billion in non-convertible securities (other than common equity) in registered offerings issued in the past three years, subject to certain limitations.

**Risk Factors and Updates  
Required in Periodic Filings  
Made After December 1, 2005**

Forms 10-K (but not Forms 10-KSB or 10-QSB) filed after December 1, 2005 will need to include a risk factors section in plain English. Such Exchange Act risk factor disclosure will be the same type of disclosure as is currently required in a Securities Act registration statement by Item 503, other than information about a particular securities offering. Forms 10-Q filed after December 1, 2005 will need to disclose material changes from risk factors previously disclosed in Exchange Act reports. The amendments do not otherwise require (and the SEC is discouraging) unnecessary restatement or repetition of risk factors in Forms 10-Q.

**Disclosure of Unresolved SEC  
Comments in Forms 10-K Filed  
After December 1, 2005**

Forms 10-K filed after December 1, 2005 by accelerated filers and WKSIs

who have received written SEC comments regarding their periodic or current reports not less than 180 days before the end of the relevant fiscal year (which comments remain unresolved) will need to disclose the substance of such unresolved comments that the company believes are material. Companies may provide additional information, including their position with respect to any such comment.

This new requirement does not supersede the existing requirement, under Rule 12b-32, to disclose material information not otherwise required, which may require earlier disclosure of unresolved material comments.

**Disclosure of WKSI and  
Voluntary Filer Status  
Required in Forms 10-K Filed  
After December 1, 2005**

Forms 10-K will need to disclose, on the cover of the form, whether a company is a WKSI and whether it is not required to file reports under Exchange Act Section 13 or 15(d) (in other words, whether it is a voluntary filer).

**New Form 10-Q Cover Page  
and Shell Company Rules**

In mid-August 2005, new rules became effective that require all companies to include a new check box on the cover page of, among other things, Forms 10-Q and 10-QSB, indicating whether the issuer is a “shell company”

as defined in Exchange Act Rule 12b-2. The SEC has not yet updated its blank Form 10-Q on its website to capture this change. The new language required on the Form 10-Q cover page is: “Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). ? Yes ? No”. In addition, part (2) of the language requiring companies to check whether they have filed all Exchange Act reports now reads, “has been subject to the filing requirements for at least the past 90 days” instead of “has been subject to such filing requirements for the past 90 days.”

#### **Sarbanes Section 404 Phase-In Period**

On September 22, 2005, the SEC adopted rules providing that small business issuers and foreign private issuers who qualify as non-accelerated filers may now wait to comply with rules on internal control over financial reporting until their first fiscal year ending on or after July 15, 2007. Foreign private issuers that are accelerated filers will need to comply with those rules beginning with their fiscal years ending on or after July 15, 2006.

#### **Nasdaq Requires Semi-Annual Reporting by Foreign Private Issuers**

Starting with interim periods ending after January 1, 2006, foreign private issuers that are listed on Nasdaq must publish, by press release submitted to the SEC by Form 6-K, a mid-year bal-

ance sheet and semi-annual income statement no later than six months after the end of their second quarter. Such financials will need to be translated into English but will not have to be reconciled to U.S. GAAP. The SEC approved these rules on August 2, 2005.

#### **NYSE- Listed Entities: Three Audit Committee Meetings Per Quarter?**

A question was raised to the NYSE Staff to clarify the November 2004 change to Section 303A.07(c)(iii)(B) of the Listed Company Manual that inserts the phrase “meet to review and” before the current requirement “to discuss.” The concern was that the audit committee will now be required to “meet” to review specific MD&A disclosures. Most companies typically schedule two meetings of the audit committee each quarter: one to address the earnings release (including the financial statements) and the other to review the draft Forms 10-K and 10-Q. During their second meeting, audit committees will discuss disclosures to be made under MD&A, but sometimes do not have a draft of the complete Form 10-K and 10-Q (including MD&A) available at that meeting. Now audit committees may have to hold a third meeting to review a “relatively advanced” draft of MD&A or push back the second meeting until the MD&A is available.

### **Additional Form 10-K Reporting Item: Jobs Act**

Pursuant to the American Jobs Creation Act of 2004 (known as the “Jobs Act”), taxpayers who fail to disclose in their Forms 10-K penalties from tax shelters (including penalties of consolidated subsidiaries) may be subject to up to a \$200,000 penalty.

### **Interplay Between Forms 8-K and 10-Q**

Under the Form 8-K rules, if a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during a quarterly reporting period covered by a Form 10-Q, a Form 8-K must be filed promptly (i.e., within four business days) to disclose the existence of the relevant contract or plan, but the actual contract, plan, etc. need not be filed as an exhibit until the filing of the Form 10-Q (or, if it occurred in the fourth quarter, the Form 10-K) covering the period during which the contract, plan etc. was entered into. Amendments and modifications to previously filed exhibits must be filed as exhibits to a Form 10-Q (or Form-10-K). The SEC Staff has cautioned that companies should ensure that their disclosure controls and procedures are adequate to deal with their heightened Form 8-K disclosure obligations.

### **Quarterly Changes in Internal Control Disclosures**

Under Regulation S-K Item 308(c), accelerated filers’ Forms 10-Q will now

need to include an internal control report of management evaluating any change in internal controls over financial reporting that occurred during a fiscal quarter and that has materially affected (or is reasonably likely to materially affect) internal controls over financial reporting. One aspect of the Item 308(c) requirement that often is overlooked is that positive (as well as negative) changes should be disclosed.

Accelerated filers needed to comply with the rules relating to internal control reports in their Forms 10-K for their first fiscal year ending on or after November 15, 2004, and to begin to disclose material changes to internal controls in their first Forms 10-Q due after the Forms 10-K were first required to include the internal control report. Non-accelerated filers and foreign private issuers will need to comply with the rules relating to internal control reports commencing with their annual reports filed for fiscal years ending on or after July 15, 2007.

### **FASB to Issue Guidance on Option Grant Date Issue**

On September 14, 2005, the FASB met to discuss providing further guidance on the determination of grant dates under FAS 123(R). The FASB decided to treat the date the board of directors approves an award as the grant date, provided that (1) employees are not able to negotiate the terms of their grants after the board has approved them, and (2) the terms of the grants are communi-

cated to employees within a reasonable period of time. The determination of what is considered a reasonable period of time depends on the circumstances of the grant (e.g., the size of the company, number of grant recipients, and other considerations). The FASB staff will issue a FASB Staff Position on this decision, subject to a 15-day comment period, with the intention to issue the final FSP in time for companies that are required to adopt FAS 123(R) on July 1, 2005 to rely on it in their first quarter financial statements.

### **Introducing XBRL**

Beginning March 16, 2005, issuers may voluntarily submit supplemental tagged financial information using the eXtensible Business Reporting Language (XBRL) format as exhibits to specified EDGAR filings under the Exchange Act. XBRL technology tags data for easier online searches. Unlike HTML (hypertext mark-up language), XBRL allows for ready comparisons and analysis of financial results. The relatively new XBRL software reportedly makes it easier for companies to prepare quarterly and annual financial reports because it creates a single document that is able to be converted to different formats, reducing duplication, inefficiencies and errors.

Registrants choosing to participate in the voluntary program also will continue to file their financial information in HTML or ASCII format, as currently required. To participate in

the program, volunteers will need to submit their XBRL formatted information in accordance with specified rules. The voluntary program is intended to help the SEC evaluate the usefulness of data tagging and XBRL to registrants, investors, the SEC and the marketplace.

### **Disclosure As to End of Quarter Sales Practices**

On April 18, 2005, the SEC announced that that Coca-Cola Company had settled an enforcement action relating to that company's failure to disclose certain end-of-quarter sales practices used to meet earnings expectations. Even though Coke's accounting treatment for sales made in connection with "gallon pushing" (i.e., a form of "channel stuffing" in the beverage industry) was found to be without issue, the SEC still found that Coke's failure to disclose the impact of gallon pushing on current and future earnings in its MD&A violated the antifraud and periodic reporting requirements.

### **Circumstances Where an Independent Auditor is Not Able to Complete a Review**

Section 10-01(d) of Regulation S-X requires interim financial statements to be reviewed prior to filing. If the auditors cannot complete their review in time (and the Rule 12b-25 extension runs out), companies will need to decide whether or not to file their Forms 10-Q. This will be a case-by-case decision. If they decide to file, the Forms 10-Q must

clearly disclose the fact that the review was not completed and the reasons therefor. They should make sure their auditors know in advance that they plan to file and review the related disclosures. When they draft the disclosure, they should fully describe the issues that are delaying the auditors from completing their review.

### **Director Nomination Procedures**

Beginning in April 2004, companies have been required to disclose in their Forms 10-Q any changes in their procedures (or the adoption of procedures) for stockholders to recommend director candidates for consideration.

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