

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229 and 249

[Release No. 34-37801; International Series No. 1020; File No. S7-19-95]

RIN 3235-AG47

Periodic Reporting of Unregistered Equity Sales

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting revisions to forms under the Securities Exchange Act of 1934 and Regulations S-K and S-B to require registrants to report recent sales of equity securities that have not been registered under the Securities Act of 1933. The revisions are designed, in part, to address abusive practices in connection with the sale of equity securities by domestic companies in purported Regulation S offerings by requiring more disclosure about such sales in a timely fashion.

EFFECTIVE DATE: The revisions are effective November 18, 1996.

FOR FURTHER INFORMATION CONTACT: Walter Van Dorn, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, Washington, D.C. 20549, (202) 942-2990.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to the following forms under the Securities Exchange Act of 1934¹ to require periodic disclosure of unregistered equity offerings: Form 10-Q,² Form 10-QSB,³ Form 10-K,⁴ Form 10-KSB⁵ and Form 8-K.⁶ In addition the Commission is amending the following Rules: Item 701⁷ of Regulation S-K⁸ and Item 701⁹ of Regulation S-B¹⁰.

I. Discussion

A. Introduction and Summary

Today the Commission is adopting amendments to its rules and forms applicable to U.S. reporting companies¹¹ to require timely

disclosure of unregistered sales of equity securities. The amendments were proposed in June 1995.¹² They are designed to address concerns that the current rules do not require adequate and timely disclosure to shareholders and the markets of unregistered offerings of equity securities, particularly those made in reliance upon Regulation S¹³, the safe harbor for offshore sales, and Section 4(2)¹⁴, the private placement exemption. As a result, shareholders and the markets have been unaware of the potential dilution or the effects on the financial condition of the issuer that these unregistered sales can cause. Moreover, the lack of a specific disclosure requirement may be permitting the abusive practices¹⁵ of some U.S. issuers selling common equity offshore purportedly in reliance upon Regulation S to occur without notice to the market of such offerings. For example, without a timely disclosure requirement, issuers have been able to sell shares offshore at a substantial discount to the U.S. market price, and the shares have been resold in the U.S. markets before the U.S. markets have been made aware of potential significant dilution or effects on the financial condition of the issuer of such transactions.

The amendments are being adopted substantially as proposed, with one important change. In the proposal, the rules generally would have required quarterly reporting of exempt equity sales (e.g., Regulation S and private placements). As adopted, quarterly reporting will be required for exempt equity sales other than those made in reliance on Regulation S. The Commission believes that quarterly reporting of most exempt equity sales will provide adequate and timely disclosure. Most exempt sales by reporting companies involve private placements. In those cases, the securities cannot be freely resold into the public markets until a significant period of time after sale. Consequently, quarterly reporting should provide sufficient notice.¹⁶

¹² Securities Act Release No. 7189 (June 27, 1995) [60 FR 35656] (the "Proposing Release").

¹³ 17 CFR 230.901-904.

¹⁴ 15 U.S.C. 77d(2).

¹⁵ For a description of such practices, see Securities Act Release No. 7190 (June 27, 1995) [60 FR 35663] (the "Regulation S Interpretive Release").

¹⁶ Under Rule 144, the safe harbor for resales of "restricted" securities (including privately placed securities), resales into the public markets cannot be made until at least two years after the sale by the issuer or an affiliate. Although the Commission proposed to reduce these time periods (see Securities Act Release No. 7187), even under a shortened time period quarterly reporting would still result in disclosure before the securities could

For Regulation S sales, however, current reporting on Form 8-K will be required within 15 days of their occurrence. The Commission believes that quarterly reporting would not be timely enough for Regulation S sales because, under the current 40-day Regulation S restricted period for sales of equity securities by domestic reporting companies, the restricted period could expire, and securities could be resold in the U.S. market (assuming an exemption is available), before disclosure is made. Several commenters supported a Form 8-K filing requirement.¹⁷

The Commission is currently considering whether to revise the issuer safe harbor for sales of equity securities by domestic reporting companies under Regulation S, including possibly lengthening the restricted period.¹⁸ If the restricted period for sales of equity securities pursuant to Regulation S is changed, the Commission intends to consider revising the periodic disclosure requirement for Regulation S sales adopted in this release.

B. Description of Amendments

1. Disclosure Required

Under the new requirements, the following information about unregistered sales of equity securities¹⁹ will be required to be disclosed for the applicable reporting period:

- * the title and amount of securities sold, and the date of the transaction
- * the name of the underwriter or placement agent
- * the consideration received
- * persons or classes of persons to whom the securities were sold
- * the exemption from registration claimed
- * in the case of convertible or exchangeable securities, warrants and options, the terms of conversion or exercise.

With the exception of the last disclosure item, this information is

be resold without registration into the public markets.

¹⁷ Twenty-four letters of comment were received in response to the Proposing Release, 16 of which responded specifically to questions relating to quarterly reporting of sales of unregistered sales of equity securities. Five commenters stated that unregistered offerings of equity securities should be reported on Form 8-K. These comment letters, together with a Summary of Comments prepared by Commission staff, are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington D.C. 20549. Persons seeking these materials should make reference to File No. S7-19-95.

¹⁸ See Securities Act Release No. 7190 (June 27, 1995).

¹⁹ "Equity security" is defined in Rule 3a11-1 [17 CFR 240.3a11-1]. It includes convertible and exchangeable securities, warrants, options and other types of equity-related securities.

¹ 15 U.S.C. 78a *et seq.* (the "Exchange Act").

² 17 CFR 249.308a.

³ 17 CFR 249.308b.

⁴ 17 CFR 249.310.

⁵ 17 CFR 249.310b.

⁶ 17 CFR 249.308.

⁷ 17 CFR 229.701.

⁸ 17 CFR Part 229.

⁹ 17 CFR 228.701.

¹⁰ 17 CFR Part 228.

¹¹ The new disclosure requirements apply to U.S. reporting companies and foreign companies not using the foreign integrated disclosure system.

currently required to be disclosed in certain Securities Act filings pursuant to Item 701 of Regulation S-K and Regulation S-B. In response to the Commission's request for comment in the Proposing Release, one commenter suggested that such information in addition to that currently listed in Item 701 would be helpful to investors. The additional information required is disclosure of pricing information for the underlying common equity when convertible securities, warrants and similar securities are sold. In those situations, information about the conversion or exercise price is important to shareholders and the market place since it shows the potential dilutive effects of conversion or exercise. Item 701 of Regulation S-K and Regulation S-B will be amended to require that this additional information be provided in filings of annual, periodic or current reports under the Exchange Act.

Several commenters opposed the requirement that the names of persons to whom the securities were sold be disclosed. Item 701 would continue to provide companies with an option to describe the person or persons to whom the securities were sold by class (for example, to an accredited investor), as opposed to the names of individual investors.

2. Timing of Disclosure

Information about unregistered sales of equity securities (except those made under Regulation S) will be required to be provided in an issuer's Quarterly Report on Form 10-Q or 10-QSB for sales during the issuer's first three fiscal quarters, and in the Annual Report on Form 10-K or 10-KSB for sales made during the final fiscal quarter. Information about sales made in reliance upon Regulation S will be required to be reported pursuant to new Item 9 of Form 8-K and filed within 15 days of the sale. The Form 8-K filing will be required if the issuer claims reliance on Regulation S under Item 701 of Regulation S-K, even if reliance on other possible bases for the unregistered sale also could be claimed.

C. Effective Date of Amendments

The amendments will be effective November 18, 1996. Sales that occur prior to the effective date, but for which a report is not due until after the effective date, must be reported on the appropriate form. For example, an exempt private placement occurring before the effective date must be reported on the Form 10-Q covering the quarter if that form has not been filed before the effective date. A sale of equity securities pursuant to Regulation S

occurring before the effective date must be reported on Form 8-K if the Regulation S sale was made within 15 days before the effective date.

II. Cost-Benefit Analysis

The new requirement to disclose sales of unregistered equity securities is expected to increase modestly registrants' costs and compliance burdens. That requirement should not significantly increase the burden on company resources, since most registrants are required to gather such information in connection with the preparation of audited and unaudited financial statements. To the extent the requirement results in any additional expense, it is justified in view of the material information that will be made available to investors in a timely manner.

III. Summary of Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis pursuant to the requirements of the Regulatory Flexibility Act,²⁰ regarding the amendments. The new rules with respect to disclosure of recent sales of unregistered securities are intended to provide investors with more timely and complete information regarding changes in outstanding securities of public companies.

Small U.S. entities that file current or quarterly reports will be affected by the proposed amendments to the extent that they offer equity securities in unregistered offerings. To the extent small U.S. entities are affected by the proposed amendments, the investors in such small entities are expected to benefit from the increased information required to be provided.

The analysis also indicates that the amendments to the rules and forms modestly increase reporting, recordkeeping and compliance requirements. These requirements should not significantly increase the burden on company resources, since such information will be readily available, as the transaction in question would have been completed within the prior fiscal quarter, or, in the case of Form 8-K reporting, within the prior 15 days.

The term "small business," as used with reference to an issuer for purposes of the Regulatory Flexibility Act, is defined by Rule 157²¹ under the Securities Act as an issuer whose total assets on the last day of its most recent fiscal year were \$5 million or less and who is engaged or proposing to engage

in small business financing. The Commission is aware of approximately 1,100 Exchange Act reporting companies that currently satisfy the definition of "small business" under Rule 157. Because these rules will affect issuers that sell securities in unregistered offerings, and in the majority of situations not reporting with the Commission of unregistered security offerings currently is required, little information is available to the Commission that would make it possible to estimate the number of small issuers that will be affected by these amendments. However, approximately 11,400 issuers are subject to Exchange Act reporting requirements, and, based on discussions with intermediaries and other participants in the Regulation S market, the Commission staff estimates that approximately 500 of such issuers may conduct Regulation S offerings of equity securities per year. The Commission staff further estimates that approximately 250 such issuers are "small businesses" under Rule 157.

As stated in the analysis, the economic impact of the new rules is expected to be small, particularly in view of the additional information and protection to be provided to investors. In part, to minimize the recordkeeping and reporting burden, and corresponding economic impact, on small entities and others, the Commission has decided to require that unregistered sales of securities (other than sales in reliance on Regulation S) be reported on a quarterly basis. Only sales of securities which were not registered in reliance on Regulation S are proposed to be reported within 15 days.

A copy of the Final Regulatory Flexibility Analysis may be obtained by contacting Walter Van Dorn, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, (202) 942-2990.

IV. Paperwork Reduction Act

In June, 1995, the staff submitted to the Office of Management and Budget ("OMB") for review proposals to amend the following information collections under the Exchange Act to require periodic disclosure of unregistered equity offerings: Form 10-Q, Form 10-QSB, Form 10-K and Form 10-KSB.²²

²² There are no changes regarding the purpose, use or necessity of the information collections for which OMB approval was requested, nor are there changes to the estimates of reporting or recordkeeping burden expected to result from adoption of the proposed amendments. See the Proposing Release for estimates of changes in reporting or recordkeeping burden.

²⁰ 5 U.S.C. 603 (1988).

²¹ 17 CFR 230.157.

These information collections display an OMB control number and expiration date.²³ The information collections are required to be filed by registrants subject to the Exchange Act reporting requirements and are publicly available. The Commission solicited comment on the compliance burdens associated with the proposals but received no public comment on the burden estimates.

In response to public comments received on the Proposing Release, as discussed in Section I.A of this release, in addition to adopting changes to the information collections listed in the preceding paragraph, the Commission also is adopting changes to Form 8-K to require current reporting on Form 8-K of Regulation S sales within 15 days after their occurrence. Form 8-K contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.²⁴ The Commission is submitting the revision to Form 8-K to OMB for review.

The title of the affected information collection is "Form 8-K." The likely respondents to Form 8-K generally are all issuers reporting under the Exchange Act that are not foreign private issuers. Currently, an estimated 11,400 respondents file 21,000 Forms 8-K per year for a total annual burden of 105,000 hours. The Commission believes that the same number of respondents will file Form 8-K after the revision described in this release becomes effective, but those making Regulation S sales will file Form 8-K more frequently, resulting in an increased number of total burden hours. Since there currently is not any Exchange Act reporting requirement when Regulation S sales are made, the Commission has no basis for estimating the increase in the Form 8-K total burden hours expected to result from this rulemaking.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549 with reference to File No. S7-19-95. OMB is required to make a decision concerning the collections of information between 30

and 60 days after publication, so a comment to OMB is best assured of having its full affect if OMB receives it within 30 days of publication.

V. Statutory Bases

The amendments to the Commission's rules and forms are being adopted pursuant to sections 3(b), 4A, 12, 13, 14, 15, 16 and 23 of the Securities Exchange Act.

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

Reporting and recordkeeping requirements, and 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 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78w, 78ll, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted,

2. By amending § 228.701 by adding paragraph (e) to read as follows:

§ 228.701 (Item 701) Recent sales of unregistered securities.

* * * * *

(e) If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-QSB, Form 10-Q, Form 10-KSB or Form 10-K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

3. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79e, 79n, 79t, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted,

* * * * *

4. By amending § 229.701 by adding paragraph (e) before the Instructions to read as follows:

§ 229.701 (Item 701) Recent sales of unregistered securities.

* * * * *

(e) *Terms of conversion or exercise.* If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-QSB, Form 10-Q, Form 10-KSB or Form 10-K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

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PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

6. By amending Form 8-K (referenced in § 249.308) by adding a sentence to the end of General Instruction B.1 and by adding Item 9 to read as follows:

Note: Form 8-K does not and these amendments will not appear in the Code of Federal Regulations

Form 8-K

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GENERAL INSTRUCTIONS

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B. Events To Be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to Item 9 is required to be filed within 15 calendar days after the date of sale.

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

* * * * *

Item 9. Sales of Equity Securities Pursuant to Regulation S.

Furnish the information required by Item 701 of Regulation S-B (§ 228.701 of this chapter) as to all equity securities of the registrant sold by the registrant that were not registered under the Securities Act in reliance upon Regulation S under the Securities Act.

* * * * *

²³ Unless a currently valid OMB number is displayed, an agency may not sponsor or conduct or require response to an information collection pursuant to 44 U.S.C. § 3506(c)(1)(B).

²⁴ 44 U.S.C. 3501 *et seq.*

7. By amending Form 10-Q (referenced in § 249.308a) by adding paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10-Q does not and these amendments will not appear in the Code of Federal Regulations

Form 10-Q

* * * * *

Part II

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S-K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S.

* * * * *

8. By amending Form 10-QSB (referenced in § 249.308b) by adding paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10-QSB does not and these amendments will not appear in the Code of Federal Regulations

Form 10-QSB

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Part II

* * * * *

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S-B (§ 228.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S.

* * * * *

9. By amending Form 10-K (referenced in § 249.310) by revising Item 5 of Part II to read as follows:

Note: Form 10-K does not and these amendments will not appear in the Code of Federal Regulations

Form 10-K

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Part II

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Item 5. Market for Registrant's Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S-K (§ 229.201 of this chapter) and Item 701 of Regulation S-K (§ 229.701 of this chapter) as to all

equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10-Q or 10-QSB (§ 249.308a or 249.308b of this chapter) it need not be furnished.

* * * * *

10. By amending Form 10-KSB (referenced in § 249.310b) by revising Item 5 of Part II to read as follows:

Note: Form 10-K does not and these amendments will not appear in the Code of Federal Regulations

Form 10-KSB

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Part II

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Item 5. Market for Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S-B and Item 701 of Regulation S-B as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act other than unregistered sales made in reliance on Regulation S. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10-Q or 10-QSB it need not be furnished.

* * * * *

Dated: October 10, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96-26560 Filed 10-17-96; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 239 and 249

[Release Nos. 33-7355; 34-37802; FR-47; International Series No. 1021; File No. S7-19-95]

RIN 3235-AG47

Streamlining Disclosure Requirements Relating to Significant Business Acquisitions

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting revisions to its rules that will streamline requirements with respect to financial

statements of significant business acquisitions in filings made under the Securities Act of 1933 and the Securities Exchange Act of 1934.

EFFECTIVE DATE: The rule revisions are effective November 18, 1996.

FOR FURTHER INFORMATION CONTACT:

Douglas Tanner, (202) 942-2960, Associate Chief Accountant, Office of Chief Accountant, or Walter Van Dorn, (202) 942-2990, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to the following rules and forms under the Securities Act of 1933 (the "Securities Act")¹ and the Securities Exchange Act of 1934 (the "Exchange Act")² concerning financial statements of acquired (or to be acquired) businesses: Rule 3-05 of Regulation S-X,³ Item 310 of Regulation S-B,⁴ Item 17 of Form S-4,⁵ Item 17 of Form F-4,⁶ and General Instructions and Item 7 of Form 8-K.⁷

I. Introduction

On June 27, 1995, the Commission published for comment proposed revisions to rules and forms that would streamline reporting requirements concerning financial statements of acquired and to be acquired businesses and require quarterly reporting of unregistered equity offerings.⁸ The proposals were intended to reduce impediments to registered offerings and address certain problematic practices involving unregistered sales of equity securities of domestic reporting companies purportedly in reliance on Regulation S.⁹ A significant number of sales under Regulation S have been attributed to the inability of issuers to meet the registration disclosure requirement of providing audited financial statements of significant businesses acquired or likely to be acquired.¹⁰ The Commission is today adopting amendments to those requirements. In a companion release

¹ 15 U.S.C. 77a *et seq.*

² 15 U.S.C. 78a *et seq.*

³ 17 CFR 210.3-05.

⁴ 17 CFR 228.310.

⁵ 17 CFR 239.25.

⁶ 17 CFR 239.34.

⁷ 17 CFR 249.308.

⁸ Securities Act Release No. 7189 (June 27, 1995) [60 FR 35656] (the "Proposing Release").

⁹ 17 CFR 230.901-904. Regulation S was adopted by the Commission in 1990 to clarify the extraterritorial application of the registration requirements of the Securities Act. See Release No. 33-6863 (Apr. 24, 1990) [55 FR 18306].

¹⁰ See "Recent Problems Arising Under Regulation S," *Insights*, Volume 98, Number 8, August 1994.