

SEC Amends Accelerated Deadlines for Filing Periodic Reports and Proposes Change in Best Price Rule for Tender Offers

In late December, the SEC amended filing deadlines for periodic reports under the Exchange Act and proposed amendments to the best price rule for tender offers in response to conflicting judicial interpretation.

Exchange Act Filings

The SEC has amended its accelerated filing deadlines for periodic reports, revising the definition of “accelerated filer” under Rule 12b-2 of the Exchange Act to create a three-tiered system of reporting companies. These amendments are part of recent SEC rulemaking efforts to balance the interest of investors in receiving timely access to Exchange Act reports against an issuer’s need to conduct, without undue cost, a high-quality and thorough assessment of its financial information.

§ **Accelerated Filing.** The SEC accelerated filing deadlines in 2002 for a category of issuers called “accelerated filers.” This group was generally comprised of companies with an aggregate worldwide market value of outstanding voting and non-voting common equity held by non-affiliates (referred to as “public float”) of \$75 million or more as of the last business day of the issuer’s most recently completed second fiscal quarter. The rules provided for a three year phase-in period to afford companies and auditors time to adjust to the accelerated deadlines, and would ultimately have shortened the Form 10-K annual report deadline to 60 days (from 90) after an issuer’s fiscal year end and the Form 10-Q quarterly report deadline to 35 days (from 45) after the end of a fiscal quarter. In November 2004 the SEC postponed this final phase-in period for one year.

§ **Large Accelerated Filers.** In response to continuing concerns about the effect that the accelerated filing deadlines would have on smaller public companies, the SEC further amended these rules as of December 27, 2005. The new rules establish an additional “large accelerated filers” category of reporting companies, those having a public float of \$700 million or more as of the last business day of an issuer’s most recently completed second fiscal

quarter. The SEC has retained the definition of “accelerated filer,” applying it under the new rules to issuers with a public float of more than \$75 million, but less than \$700 million, as of the last business day of that issuer’s most recently completed second fiscal quarter.

§ **Annual Report Filing.** An issuer which is a large accelerated filer now must file its annual reports on Form 10-K within 60 days from the end of its fiscal year beginning with the annual report filed for its first fiscal year ending on or after December 15, 2006 (until then, all large accelerated filers will remain subject to the 75-day filing deadline). In a departure from the old rules, a company that qualifies as an accelerated filer, but not a large accelerated filer, may continue to file its annual report on Form 10-K under the 75-day deadline that had been in effect before the 2005 amendments.

§ **Quarterly Report Filing.** Both accelerated filers and large accelerated filers will continue to file their quarterly reports on Form 10-Q within 40 days after the end of each quarter, rather than within the 35-day deadline that was scheduled to be phased in under the 2002 system. In the adopting release to the 2005 rules, the SEC stated that after reconsidering the effect that the previous acceleration schedule would have had on large accelerated filers, it had failed to perceive a net benefit from reducing the Form 10-Q filing deadlines by only 5 days.

§ **Changing Categories.** The SEC eased the conditions for exiting accelerated filer or large accelerated filer status. Previously, an issuer that became an accelerated filer would remain one unless and until that issuer subsequently became eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports. The new rules, however, allow an issuer to exit accelerated filer status at the end of the fiscal year in which its public float falls below \$50 million as of the last business day of its second fiscal quarter. Similarly, an issuer loses large accelerated filer status (and may file its annual report for that year as an accelerated or non-accelerated filer, as appropriate) at the end of the fiscal year in which its public float falls below \$500 million at the end of its second fiscal quarter.

Best Price Rule

The SEC proposed amendments to the “best price” tender offer rule for both third-party tender offers and issuer self-tenders. The best price rule prohibits a buyer from making a tender offer unless the “consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.” The proposed amendments are intended to provide clarification of their scope and would create a third-party best price rule exemption and non-exclusive safe harbor for certain compensatory arrangements. Comments are requested by February 21, 2006.

§ **Background.** The best price rule was adopted to ensure that every shareholder received the highest consideration paid to any other shareholder pursuant to a tender offer. Shareholders have challenged tender offers in federal court on the basis that employment compensation, severance, and other employee benefit arrangements with the employees/shareholders of the target company constitute additional consideration for tendered stock.

The federal courts have been inconsistent in interpreting these rules. The Ninth Circuit has applied an “integral-part” test and examined all integral elements of the tender offer when determining whether a violation of the best price rule occurred. The Seventh Circuit has applied a “bright-line” test and examined only those elements of the tender offer that occurred between the time the offer formally commenced and expired when determining the same.

As a result, parties are sometimes reluctant to engage in tender offers, particularly when commencing such an offer would require the amendment of any agreements or arrangements with employees or directors of the targeted company.

§ **Effects of Proposed Amendments.** The proposed amendments (i) clarify the application of the best price rule, (ii) create a third-party best price rule exemption for certain compensation, severance and employee benefit arrangements, and (iii) provide a non-exclusive safe harbor under the exemption. The best price rule would be restated to require that: “the consideration paid to any security holder for securities

tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.” If adopted, the best price rule would more clearly apply to consideration paid for securities tendered and not to consideration paid to persons for other purposes related to the acquisition, even if such persons are security holders.

The proposed amendments exempt from the best price rule for third party offers “negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement...or payments made...with respect to employees and directors of the subject company” provided such arrangements or payments (i) relate solely to past services performed or future services to be performed or refrained from performing, and (ii) are not based on the number of securities the employee or director owns or tenders.

Finally, the proposed amendments include a non-exclusive safe harbor provision for third-party tender offers upon a determination by the compensation committee of the buyer or the target, as applicable, that the employment compensation, severance or other employee benefit arrangements in the transaction satisfy the exemption.

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