



New Requirements for 2003 Proxy Season

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AS YOU KNOW, the Sarbanes-Oxley Act of 2002 dramatically changed many aspects of public company corporate governance, accounting and disclosure. Sarbanes-Oxley required the Securities and Exchange Commission to adopt new rules on a variety of subjects by January 26, 2003. We wanted to alert you to some of the changes that are currently in effect or are about to go into effect that may be of particular interest to calendar year companies now that we are into the 2003 proxy season. This Client Alert is not meant as an exhaustive summary of any of these new rules.

Conditions for Use of Non-GAAP Financial Information and Regulation G

The SEC has adopted a new regulation, Regulation G, which applies whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure. A non-GAAP financial measure is any numerical measure of a company's financial performance that excludes amounts that are reported in GAAP or includes amounts not reported in GAAP, except for statistical or operating measures.

Regulation G will apply to public disclosures and releases made after March 28, 2003. It prohibits material misstatements or omissions that would make the material non-GAAP presentations misleading and requires companies to reconcile the non-GAAP financial measure presented with the comparable GAAP financial measure. Under Regulation G, companies must state why management believes presentation of the non-GAAP financial measure provides useful information to investors. Regulation G will provide a limited exception for foreign private issuers listed or quoted outside the United States.

The SEC also added a new item to Form 8-K that requires public companies to furnish their earnings releases and announcements to the SEC within five business days. This new Form 8-K requirement applies regardless of whether or not the earnings release uses non-GAAP measures. The new requirement to furnish earnings releases on Form 8-K will create some logistical issues related to the timing of the releases and analyst conference calls because of the need to comply with both the new rule and Regulation FD. We will be sending out a more detailed discussion of this new set of rules soon.



Accelerated Filer Status

In September 2002, new rules became effective that over a three year period accelerate the time of filing of Forms 10-K and 10-Q for companies with a public float over \$75 million. Companies must check a box on the cover page of the 10-K or 10-Q filing indicating whether or not they are accelerated filers. The accelerated filing requirements do not apply to foreign issuers.

Website Postings The September 2002 rules about accelerated filing of Forms 10-K and 10-Q also require accelerated filers to disclose their website address on their Form 10-K and post their periodic reports, including the exhibits, on their website if they have one. This generally must be done on the same day the reports are filed with the SEC. Companies must disclose if a periodic report was not timely posted, and state the reason why. Accelerated filers must comply with these new requirements for Forms 10-K filed for fiscal years ending on or after December 15, 2002. Accelerated filers should have procedures in place now to ensure compliance with this requirement.

Insider Trades During Pension Fund Blackout Periods

Effective January 26, 2003, the SEC adopted Regulation BTR to implement Section 306 of Sarbanes-Oxley. Regulation BTR prohibits any officer or director of a publicly traded company from directly or indirectly purchasing, selling or otherwise acquiring or transferring any company stock during a pension plan blackout period that temporarily prevents plan participants or beneficiaries from engaging in equity securities transactions through their plan accounts. This prohibition only applies to equity securities an executive officer or director acquired in connection with his or her employment or service. The trading prohibition is only triggered if the blackout period is longer than three consecutive business days and the blackout suspends the trading ability of at least 50% of the plan's participants. In addition, Regulation BTR specifies the content and timing of notices that companies must provide to their executive officers and directors and the SEC about a blackout period. Domestic companies must also file a Form 8-K on the same day the notice is given. These provisions may apply to foreign private issuers depending on the number of plan beneficiaries in the United States.

Certification Requirements

The Chief Executive Officer and Chief Financial Officer certifications of financial statements and other information contained in annual reports mandated by Sections 302 and 906 of Sarbanes-Oxley have been in effect since the summer. These certification requirements apply to all Forms 10-K, 10-Q and 20-F filed with the SEC under the Securities Exchange Act of 1934 (the "Exchange Act"), including filings made by foreign private issuers and small business issuers. For more information on the requirements of these certifications, please refer to two of our Client Alerts issued in August and October 2002, or contact your Brown Rudnick attorney or one of the attorneys listed below.

Disclosure Controls and Procedures

New Rules 13a-15 and 15a-15 under the Exchange Act require all companies subject to the Section 302 certification requirements discussed above to assess their "disclosure controls and procedures" as of a date within 90 days prior to each certification. Disclosure controls and procedures are the controls and other procedures of a company designed to ensure that any information required to be disclosed in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time period

specified in the SEC's rules and forms. For more information on the requirements of these new rules, please refer to our Client Alert issued in October 2002, or contact your Brown Rudnick attorney or one of the attorneys listed below. Under a proposed SEC rule on "internal controls for financial reporting," the assessment of both disclosure controls and procedures and internal controls for financial reporting purposes would have to be done as of the last day of the reporting period. However, this rule has not yet been adopted.

Critical Accounting Policies

In January 2002, the SEC issued an interpretive release on MD&A that called for companies to discuss those accounting policies and assumptions that are critical to their business and financial results. In May 2002, it issued proposed rules that would mandate additional MD&A disclosures on that topic. Under a separate SEC rule, effective in May 2003, auditors must disclose these critical accounting policies to audit committees, along with

information about other permitted practices and the auditor's recommendation among alternatives. Although the SEC has not yet issued final rules on MD&A disclosure of critical accounting policies, in practice the guidance in the interpretive release and proposed rule is already being generally followed.

The proposed rules require companies to discuss the accounting policies that have a material impact on their financial statement in a new section of the MD&A entitled "Application of Critical Accounting Policies." Specifically, if a company adopted an accounting policy in the past year that had a material impact on the company's financial condition or results of operations, then the company would be required to disclose certain information in the new section of MD&A. In addition, the company would also have to disclose each "critical accounting estimate" used in the financial statements. This disclosure requirement would apply to foreign private issuers. For more information about the specific information to be included in this new section of MD&A, please refer to our Client Alert issued in July 2002, or contact your Brown Rudnick attorney or one of the attorneys listed below.

Disclosure of Equity Compensation Plan Information

One change that technically is not part of Sarbanes-Oxley but that has gone into effect since last year's proxy season is an SEC rule requiring companies to include a new table about option overhang in their annual reports on Form 10-K and in their proxy statements in years when they are submitting a compensation plan for security holder action. This new table requires disclosure of information about plans that have been approved by security holders and plans that have not been approved by security holders. In each category, a company must disclose: 1) the number of securities to be issued upon the exercise of outstanding options, warrants and rights; 2) the weighted-average exercise price of all outstanding options, warrants and rights; and 3) the number of securities remaining available for future issuance under the company's equity compensation plans (excluding securities already reflected in 1). These requirements do not apply to foreign private issuers.

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