SEC Adopts Rules Requiring the Filing of Earnings Releases on Form 8-K

February 2003

Introduction

On January 15, 2003, the Securities and Exchange Commission adopted final rules requiring all public companies to furnish press releases containing material non-public information regarding historical operating results or financial condition to the SEC on a Current Report on Form 8-K (see SEC Release No. 33-8176). New Item 12 of Form 8-K does not require any company to issue an earnings release. However, if a company issues an earnings release, then the company must furnish the release to the SEC on a Form 8-K within five business days.

Once a company has submitted the earnings release, the company does not have to file subsequent press releases or other announcements of the same information. However, if a subsequent release contains additional, material non-public information or amended or updated information, then the company would be required to submit the new release or announcement on another Form 8-K.

Time Frame for Compliance

The amendments to Form 8-K regarding the furnishing of certain press releases and other public announcements will apply to announcements made after March 28, 2003.

Applies to Oral, Telephonic or Webcast Statements

The filing requirements apply to any type of public announcements regardless of whether such announcements are made orally or in writing, such as earnings conference calls and investor presentations. The SEC has provided a limited exception to the filing obligation for material, non-public information regarding historical operating results or financial condition disclosed orally, telephonically or by webcast, broadcast or similar means within 48 hours of the initial release that triggers the Form 8-K requirement if:

- The oral information is provided as part of a presentation that is “complementary to” the written information;
- the related written release or announcement has been furnished to the SEC on Form 8-K prior to the presentation;
- the presentation is accessible to the public by dial-in conference call, webcast or similar technology;
- the financial and statistical information contained in the presentation is posted on the company’s website along with any information that would be required under Regulation G (the SEC’s new regulation on non-GAAP financial measures)\(^1\); and
- the presentation was announced by a widely disseminated press release that included information about how to access the presentation and information about the location of the company’s website.

Form 8-K Filing Triggered by Historical Information Only

Although a press release or other announcement may contain forward-looking statements about future earnings or financial condition, such as earnings guidance for the fiscal year, the forward-looking guidance by itself does not trigger a requirement to furnish the release or announcement to the SEC on a Form 8-K. The SEC does not require companies to submit forward-looking statements under Item 12 of

\(^1\) Please note that the SEC has suggested that, at a minimum, companies provide web site access to this information for at least a 12-month period.
Form 8-K unless the release or announcement containing the forward-looking statements also contains material, nonpublic information about historical annual or quarterly results of operations.

**Requirement to Furnish Rather than File**

The press release or other announcement would be “furnished” on Form 8-K rather than “filed.” The impact of “furnishing” rather than “filing” the information is that the submission is not subject to the liability provisions of Section 18 of the Exchange Act or the disclosure requirements of Item 10 of Regulation S-K or Item 10 of Regulation S-B unless the company specifically states that the information is to be considered “filed.” Such “furnished” information will not be incorporated by reference into any registration statement, proxy statement or any other report unless the company specifically incorporates that information into those documents by reference.

**Practical Implications for Release of Operating Results**

Most companies issue press releases containing their results of operations either before the stock market opens or after the market closes on a given day and then hold a conference call with investors to review that release shortly thereafter and before the market reopens. The imposition of a requirement to furnish the earnings release or other announcements on Form 8-K will impact the sequence of events surrounding the release of results.

The following steps will assist the company in complying with (a) Regulation FD, (b) the new Item 12 of Form 8-K and (c) the “safe harbor” from filing an additional Form 8-K under Item 12 for the conference call:

- make the presentation accessible to the public by dial-in conference call, webcast or similar technology and provide that access information in the earnings release;
- prior to the conference call, issue the earnings release and submit the release to the SEC on Form 8-K, which will require that the release be in final form with enough lead time prior to its issuance so that the company has adequate time to have the release EDGARized;
- hold the conference call to discuss the earnings release within 48 hours of the submission of the Form 8-K with the SEC; and
- make available the release and the webcast of the conference call on the company’s website along with any information that would be required under Regulation G (the SEC’s new regulation on non-GAAP financial measures) as soon as possible after the call concludes.

**Impact on Investor Presentations and Conferences**

If the company presents information at an investor conference or other similar forum, the company needs to be concerned with Regulation FD, as always, and may also need to file a Form 8-K under Item 12. Where the company is only repeating information about a historical quarterly or annual period, which has previously been publicly disclosed and furnished on Form 8-K, or disclosing information which is not material, then the company will not need to submit its presentation to the SEC pursuant to Item 12 of Form 8-K. However, if the company releases additional or updated material, nonpublic information about a historical quarterly or annual period, it will need to file its presentation on Form 8-K.

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2 Please note that the release calls for additional financial and statistical information to be posted, however, since this is a conference call, a webcast should satisfy this obligation in the vast majority of circumstances. Please contact your WSGR partner to discuss the archiving and presentation of this information on your web site.
8-K. Companies should review their investor presentations with counsel prior to attending a public forum to ensure compliance with Regulation FD and Item 12 of Form 8-K.

**Further 8-K Amendments**

The SEC has indicated that it continues to consider its proposed rules that would amend the Securities Act of 1934 provisions governing the operation and filing of Form 8-K. Based on SEC comments, we expect that the SEC will issue final rules which expand the filing categories for Form 8-K and possibly shorten the filing dates sometime during 2003.

This memorandum is intended only as general information about the matters discussed, and should not be construed as legal advice. For more information about these matters, please contact your Wilson Sonsini Goodrich & Rosati partner.