

**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**

**Subpart 229.1—General**

Sec.  
229.10 General.

**Subpart 229.100—Business**

229.101 (Item 101) Description of business.  
229.102 (Item 102) Description of property.  
229.103 (Item 103) Legal proceedings.

**Subpart 229.200—Securities of the Registrant**

229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.  
229.202 (Item 202) Description of registrant's securities.

**Subpart 229.300—Financial Information**

229.301 (Item 301) Selected financial data.  
229.302 (Item 302) Supplementary financial information.  
229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.  
229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.  
229.305 (Item 305) Quantitative and qualitative disclosures about market risk.  
229.306 (Item 306) Audit committee report.

**Subpart 229.400—Management and Certain Security Holders**

229.401 (Item 401) Directors, executive officers, promoters and control persons.  
229.402 (Item 402) Executive compensation.  
229.403 (Item 403) Security ownership of certain beneficial owners and management.  
229.404 (Item 404) Certain relationships and related transactions.  
229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.

**Subpart 229.500—Registration Statement and Prospectus Provisions**

229.501 (Item 501) Forepart of registration statement and outside front cover page of prospectus.  
229.502 (Item 502) Inside front and outside back cover pages of prospectus.

229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.  
229.504 (Item 504) Use of proceeds.  
229.505 (Item 505) Determination of offering price.  
229.506 (Item 506) Dilution.  
229.507 (Item 507) Selling security holders.  
229.508 (Item 508) Plan of distribution.  
229.509 (Item 509) Interests of named experts and counsel.  
229.510 (Item 510) Disclosure of Commission position on indemnification for Securities Act liabilities.  
229.511 (Item 511) Other expenses of issuance and distribution.  
229.512 (Item 512) Undertakings.

**Subpart 229.600—Exhibits**

229.601 (Item 601) Exhibits.

**Subpart 229.700—Miscellaneous**

229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.  
229.702 (Item 702) Indemnification of directors and officers.

**Subpart 229.800—List of Industry Guides**

229.801 Securities Act industry guides.  
229.802 Exchange Act industry guides.

**Subpart 229.900—Roll-Up Transactions**

229.901 (Item 901) Definitions.  
229.902 (Item 902) Individual partnership supplements.  
229.903 (Item 903) Summary.  
229.904 (Item 904) Risk factors and other considerations.  
229.905 (Item 905) Comparative information.  
229.906 (Item 906) Allocation of roll-up consideration.  
229.907 (Item 907) Background of the roll-up transaction.  
229.908 (Item 908) Reasons for and alternatives to the roll-up transaction.  
229.909 (Item 909) Conflicts of interest.  
229.910 (Item 910) Fairness of the transaction.  
229.911 (Item 911) Reports, opinions and appraisals.  
229.912 (Item 912) Source and amount of funds and transactional expenses.  
229.913 (Item 913) Other provisions of the transaction.  
229.914 (Item 914) Pro forma financial statements; selected financial data.  
229.915 (Item 915) Federal income tax consequences.

**Subpart 229.1000—Mergers and Acquisitions (Regulation M-A)**

229.1000 (Item 1000) Definitions.

## § 229.10

- 229.1001 (Item 1001) Summary term sheet.
- 229.1002 (Item 1002) Subject company information.
- 229.1003 (Item 1003) Identity and background of filing person.
- 229.1004 (Item 1004) Terms of the transaction.
- 229.1005 (Item 1005) Past contacts, transactions, negotiations and agreements.
- 229.1006 (Item 1006) Purposes of the transaction and plans or proposals.
- 229.1007 (Item 1007) Source and amount of funds or other consideration.
- 229.1008 (Item 1008) Interest in securities of the subject company.
- 229.1009 (Item 1009) Persons/assets, retained, employed, compensated or used.
- 229.1010 (Item 1010) Financial statements.
- 229.1011 (Item 1011) Additional information.
- 229.1012 (Item 1012) The solicitation or recommendation.
- 229.1013 (Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.
- 229.1014 (Item 1014) Fairness of the going-private transaction.
- 229.1015 (Item 1015) Reports, opinions, appraisals and negotiations.
- 229.1016 (Item 1016) Exhibits.

AUTHORITY: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll(d), 79e, 79n, 79t, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, unless otherwise noted.

Section 229.302 is also issued under 15 U.S.C. 79e, 79n, 79t.

Section 229.404 is also issued under 15 U.S.C. 77nn(25) and 77nn(26).

SOURCE: 47 FR 11401, Mar. 16, 1982, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 229 appear at 57 FR 36501, Aug. 13, 1992, and 57 FR 47409, Oct. 16, 1992.

### ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

## 17 CFR Ch. II (4-1-01 Edition)

### Subpart 229.1—General

#### § 229.10 General.

(a) *Application of Regulation S-K.* This part (together with the General Rules and Regulations under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, as amended (*Securities Act*), and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, as amended (*Exchange Act*) (parts 230 and 240 of this chapter), the Interpretative Releases under these Acts (parts 231 and 241 of this chapter) and the forms under these Acts (parts 239 and 249 of this chapter)) states the requirements applicable to the content of the non-financial statement portions of:

(1) Registration statements under the Securities Act (part 239 of this chapter) to the extent provided in the forms to be used for registration under such Act; and

(2) Registration statements under section 12 (subpart C of part 249 of this chapter), annual or other reports under sections 13 and 15(d) (subparts D and E of part 249 of this chapter), going-private transaction statements under section 13 (part 240 of this chapter), tender offer statements under sections 13 and 14 (part 240 of this chapter), annual reports to security holders and proxy and information statements under section 14 (part 240 of this chapter), and any other documents required to be filed under the Exchange Act, to the extent provided in the forms and rules under that Act.

(b) *Commission policy on projections.* The Commission encourages the use in documents specified in Rule 175 under the Securities Act (§230.175 of this chapter) and Rule 3b-6 under the Exchange Act (§240.3b-6 of this chapter) of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines set forth herein represent the Commission's views on important factors to be considered in formulating and disclosing such projections.

(1) *Basis for projections.* The Commission believes that management must have the option to present in Commission filings its good faith assessment of

a registrant's future performance. Management, however, must have a reasonable basis for such an assessment. Although a history of operations or experience in projecting may be among the factors providing a basis for management's assessment, the Commission does not believe that a registrant always must have had such a history or experience in order to formulate projections with a reasonable basis. An outside review of management's projections may furnish additional support for having a reasonable basis for a projection. If management decides to include a report of such a review in a Commission filing, there also should be disclosure of the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* In determining the appropriate format for projections included in Commission filings, consideration must be given to, among other things, the financial items to be projected, the period to be covered, and the manner of presentation to be used. Although traditionally projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss) and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible of misleading inferences through selective projection of only favorable items. Revenues, net income (loss) and earnings (loss) per share usually are presented together in order to avoid any misleading inferences that may arise when the individual items reflect contradictory trends. There may be instances, however, when it is appropriate to present earnings (loss) from continuing operations, or income (loss) before extraordinary items in addition to or in lieu of

net income (loss). It generally would be misleading to present sales or revenue projections without one of the foregoing measures of income. The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two or three year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year. Accordingly, management should select the period most appropriate in the circumstances. In addition, management, in making a projection, should disclose what, in its opinion, is the most probable specific amount or the most reasonable range for each financial item projected based on the selected assumptions. Ranges, however, should not be so wide as to make the disclosures meaningless. Moreover, several projections based on varying assumptions may be judged by management to be more meaningful than a single number or range and would be permitted.

(3) *Investor understanding.* (i) When management chooses to include its projections in a Commission filing, the disclosures accompanying the projections should facilitate investor understanding of the basis for and limitations of projections. In this regard investors should be cautioned against attributing undue certainty to management's assessment, and the Commission believes that investors would be aided by a statement indicating management's intention regarding the furnishing of updated projections. The Commission also believes that investor understanding would be enhanced by disclosure of the assumptions which in management's opinion are most significant to the projections or are the key factors upon which the financial results of the enterprise depend and encourages disclosure of assumptions in a manner that will provide a framework for analysis of the projection.

(ii) Management also should consider whether disclosure of the accuracy or inaccuracy of previous projections would provide investors with important insights into the limitations of

projections. In this regard, consideration should be given to presenting the projections in a format that will facilitate subsequent analysis of the reasons for differences between actual and forecast results. An important benefit may arise from the systematic analysis of variances between projected and actual results on a continuing basis, since such disclosure may highlight for investors the most significant risk and profit-sensitive areas in a business operation.

(iii) With respect to previously issued projections, registrants are reminded of their responsibility to make full and prompt disclosure of material facts, both favorable and unfavorable, regarding their financial condition. This responsibility may extend to situations where management knows or has reason to know that its previously disclosed projections no longer have a reasonable basis.

(iv) Since a registrant's ability to make projections with relative confidence may vary with all the facts and circumstances, the responsibility for determining whether to discontinue or to resume making projections is best left to management. However, the Commission encourages registrants not to discontinue or to resume projections in Commission filings without a reasonable basis.

(c) *Commission policy on security ratings.* In view of the importance of security ratings (*ratings*) to investors and the marketplace, the Commission permits registrants to disclose, on a voluntary basis, ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. In addition, the Commission permits, pursuant to Rule 134(a)(14) under the Securities Act (§ 230.134(a)(14) of this chapter), voluntary disclosure of ratings assigned by any nationally recognized statistical rating organizations (*NRSROs*) in certain communications deemed not to be a prospectus (*tombstone advertisements*). Set forth herein are the Commission's views on important matters to be considered in disclosing security ratings.

(1) *Securities Act filings.* (i) If a registrant includes in a registration state-

ment filed under the Securities Act any rating(s) assigned to a class of securities, it should consider including: (A) Any other rating intended for public dissemination assigned to such class by a NRSRO (*additional NRSRO rating*) that is available on the date of the initial filing of the document and that is materially different from any rating disclosed; and (B) the name of each rating organization whose rating is disclosed; each such rating organization's definition or description of the category in which it rated the class of securities; the relative rank of each rating within the assigning rating organization's overall classification system; and a statement informing investors that a security rating is not a recommendation to buy, sell or hold securities, that it may be subject to revision or withdrawal at any time by the assigning rating organization, and that each rating should be evaluated independently of any other rating. The registrant also should include the written consent of any rating organization that is not a NRSRO whose rating is included. With respect to the written consent of any NRSRO whose rating is included, see Rule 436(g) under the Securities Act (§ 230.436(g) of this chapter). When the registrant has filed a registration statement on Form F-9 (§ 239.39 of this chapter), see Rule 436(g) (§ 230.436(g) of this chapter) under the Securities Act with respect to the written consent of any rating organization specified in the Instruction to paragraph (a)(2) of General Instruction I of Form F-9.

(ii) If a change in a rating already included is available subsequent to the filing of the registration statement, but prior to its effectiveness, the registrant should consider including such rating change in the final prospectus. If the rating change is material or if a materially different rating from any disclosed becomes available during this period, the registrant should consider amending the registration statement to include the rating change or additional rating and recirculating the preliminary prospectus.

(iii) If a materially different additional NRSRO rating or a material change in a rating already included becomes available during any period in

which offers or sales are being made, the registrant should consider disclosing such additional rating or rating change by means of post-effective amendment or sticker to the prospectus pursuant to Rule 424(b) under the Securities Act (§230.424(b) of this chapter), unless, in the case of a registration statement on Form S-3 (§239.13 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering.

(2) *Exchange Act filings.* (i) If a registrant includes in a registration statement or periodic report filed under the Exchange Act any rating(s) assigned to a class of securities, it should consider including the information specified in paragraphs (c)(1)(i)(A) and (B) of this section.

(ii) If there is a material change in the rating(s) assigned by any NRSRO(s) to any outstanding class(es) of securities of a registrant subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act, the registrant should consider filing a report on Form 8-K (§249.308 of this chapter) or other appropriate report under the Exchange Act disclosing such rating change.

(d) *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the reg-

istrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

[47 FR 11401, Mar. 16, 1982, as amended at 52 FR 21260, June 5, 1987; 58 FR 14665, Mar. 18, 1993; 58 FR 62029, Nov. 23, 1993; 60 FR 32824, June 23, 1995; 64 FR 61443, Nov. 10, 1999]

### Subpart 229.100—Business

#### § 229.101 (Item 101) Description of business.

(a) *General development of business.* Describe the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business. Information shall be disclosed for earlier periods if material to an understanding of the general development of the business.

(1) In describing developments, information shall be given as to matters such as the following: the year in which the registrant was organized and its form of organization; the nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries; the nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and any material changes in the mode of conducting the business.

(2) Registrants, (i) filing a registration statement on Form S-1 (§239.11 of this chapter) under the Securities Act or on Form 10 and Form 10-SB (§249.210 of this chapter) under the Exchange Act, (ii) not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately prior to the filing of such registration statement, and (iii) that (including predecessors) have not received revenue from operations during each of the 3 fiscal years immediately prior to the

filing of registration statement, shall provide the following information:

(A) If the registration statement is filed prior to the end of the registrant's second fiscal quarter, a description of the registrant's plan of operation for the remainder of the fiscal year; or

(B) If the registration statement is filed subsequent to the end of the registrant's second fiscal quarter, a description of the registrant's plan of operation for the remainder of the fiscal year and for the first six months of the next fiscal year. If such information is not available, the reasons for its not being available shall be stated. Disclosure relating to any plan shall include such matters as:

(1) In the case of a registration statement on Form S-1, a statement in narrative form indicating the registrant's opinion as to the period of time that the proceeds from the offering will satisfy cash requirements and whether in the next six months it will be necessary to raise additional funds to meet the expenditures required for operating the business of the registrant; the specific reasons for such opinion shall be set forth and categories of expenditures and sources of cash resources shall be identified; however, amounts of expenditures and cash resources need not be provided; in addition, if the narrative statement is based on a cash budget, such budget shall be furnished to the Commission as supplemental information, but not as part of the registration statement;

(2) An explanation of material product research and development to be performed during the period covered in the plan;

(3) Any anticipated material acquisition of plant and equipment and the capacity thereof;

(4) Any anticipated material changes in number of employees in the various departments such as research and development, production, sales or administration; and

(5) Other material areas which may be peculiar to the registrant's business.

(b) *Financial information about segments.* Report for each segment, as defined by generally accepted accounting principles, revenues from external customers, a measure of profit or loss and total assets. A registrant must report

this information for each of the last three fiscal years or for as long as it has been in business, whichever period is shorter. If the information provided in response to this paragraph (b) conforms with generally accepted accounting principles, a registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative information in the financial statements; conversely, a registrant may cross reference to the financial statements.

(1) If a registrant changes the structure of its internal organization in a manner that causes the composition of its reportable segments to change, the registrant must restate the corresponding information for earlier periods, including interim periods, unless it is impracticable to do so. Following a change in the composition of its reportable segments, a registrant shall disclose whether it has restated the corresponding items of segment information for earlier periods. If it has not restated the items from earlier periods, the registrant shall disclose in the year in which the change occurs segment information for the current period under both the old basis and the new basis of segmentation, unless it is impracticable to do so.

(2) If the registrant includes, or is required by Article 3 of Regulation S-X (17 CFR 210) to include, interim financial statements, discuss any facts relating to the performance of any of the segments during the period which, in the opinion of management, indicate that the three year segment financial data may not be indicative of current or future operations of the segment. Comparative financial information shall be included to the extent necessary to the discussion.

(c) *Narrative description of business.* (1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment shall include the information specified in paragraphs (c)(1) (i) through (x) of this section. The

matters specified in paragraphs (c)(1) (xi) through (xiii) of this section shall be discussed with respect to the registrant's business in general; where material, the segments to which these matters are significant shall be identified.

(i) The principal products produced and services rendered by the registrant in the segment and the principal markets for, and methods of distribution of, the segment's principal products and services. In addition, state for each of the last three fiscal years the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years or 15 percent or more of consolidated revenue, if total revenue did not exceed \$50,000,000 during any of such fiscal years.

(ii) A description of the status of a product or segment (*e.g.* whether in the planning stage, whether prototypes exist, the degree to which product design has progressed or whether further engineering is necessary), if there has been a public announcement of, or if the registrant otherwise has made public information about, a new product or segment that would require the investment of a material amount of the assets of the registrant or that otherwise is material. This paragraph is not intended to require disclosure of otherwise nonpublic corporate information the disclosure of which would affect adversely the registrant's competitive position.

(iii) The sources and availability of raw materials.

(iv) The importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held.

(v) The extent to which the business of the segment is or may be seasonal.

(vi) The practices of the registrant and the industry (respective industries) relating to working capital items (*e.g.*, where the registrant is required to carry significant amounts of inventory to meet rapid delivery requirements of customers or to assure itself of a continuous allotment of goods from suppliers; where the registrant provides rights to return merchandise; or where

the registrant has provided extended payment terms to customers).

(vii) The dependence of the segment upon a single customer, or a few customers, the loss of any one or more of which would have a material adverse effect on the segment. The name of any customer and its relationship, if any, with the registrant or its subsidiaries shall be disclosed if sales to the customer by one or more segments are made in an aggregate amount equal to 10 percent or more of the registrant's consolidated revenues and the loss of such customer would have a material adverse effect on the registrant and its subsidiaries taken as a whole. The names of other customers may be included, unless in the particular case the effect of including the names would be misleading. For purposes of this paragraph, a group of customers under common control or customers that are affiliates of each other shall be regarded as a single customer.

(viii) The dollar amount of backlog orders believed to be firm, as of a recent date and as of a comparable date in the preceding fiscal year, together with an indication of the portion thereof not reasonably expected to be filled within the current fiscal year, and seasonal or other material aspects of the backlog. (There may be included as firm orders government orders that are firm but not yet funded and contracts awarded but not yet signed, provided an appropriate statement is added to explain the nature of such orders and the amount thereof. The portion of orders already included in sales or operating revenues on the basis of percentage of completion or program accounting shall be excluded.)

(ix) A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.

(x) Competitive conditions in the business involved including, where material, the identity of the particular markets in which the registrant competes, an estimate of the number of competitors and the registrant's competitive position, if known or reasonably available to the registrant. Separate consideration shall be given to the

principal products or services or classes of products or services of the segment, if any. Generally, the names of competitors need not be disclosed. The registrant may include such names, unless in the particular case the effect of including the names would be misleading. Where, however, the registrant knows or has reason to know that one or a small number of competitors is dominant in the industry it shall be identified. The principal methods of competition (*e.g.*, price, service, warranty or product performance) shall be identified, and positive and negative factors pertaining to the competitive position of the registrant, to the extent that they exist, shall be explained if known or reasonably available to the registrant.

(xi) If material, the estimated amount spent during each of the last three fiscal years on company-sponsored research and development activities determined in accordance with generally accepted accounting principles. In addition, state, if material, the estimated dollar amount spent during each of such years on customer-sponsored research activities relating to the development of new products, services or techniques or the improvement of existing products, services or techniques.

(xii) Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem materials.

(xiii) The number of persons employed by the registrant.

(d) *Financial information about geographic areas.* (1) State for each of the registrant's last three fiscal years, or for each fiscal year the registrant has

been engaged in business, whichever period is shorter:

(i) Revenues from external customers attributed to:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, from which the registrant derives revenues; and

(C) Any individual foreign country, if material. Disclose the basis for attributing revenues from external customers to individual countries.

(ii) Long-lived assets, other than financial instruments, long-term customer relationships of a financial institution, mortgage and other servicing rights, deferred policy acquisition costs, and deferred tax assets, located in:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, in which the registrant holds assets; and

(C) Any individual foreign country, if material.

(2) A registrant shall report the amounts based on the financial information that it uses to produce the general-purpose financial statements. If providing the geographic information is impracticable, the registrant shall disclose that fact. A registrant may wish to provide, in addition to the information required by paragraph (d)(1) of this section, subtotals of geographic information about groups of countries. To the extent that the disclosed information conforms with generally accepted accounting principles, the registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative data in its financial statements; conversely, a registrant may cross-reference to the financial statements.

(3) A registrant shall describe any risks attendant to the foreign operations and any dependence on one or more of the registrant's segments upon such foreign operations, unless it would be more appropriate to discuss this information in connection with the description of one or more of the registrant's segments under paragraph (c) of this item.

(4) If the registrant includes, or is required by Article 3 of Regulation S-X

(17 CFR 210), to include, interim financial statements, discuss any facts relating to the information furnished under this paragraph (d) that, in the opinion of management, indicate that the three year financial data for geographic areas may not be indicative of current or future operations. To the extent necessary to the discussion, include comparative information.

(e) *Available information.* Disclose the following in any registration statement you file under the Securities Act of 1933:

(1) Whether you file reports with the Securities and Exchange Commission. If you are reporting company, identify the reports and other information you file with the SEC.

(2) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<http://www.sec.gov>). You are encouraged to give your Internet address, if available;

(f) *Reports to security holders.* Disclose the following information in any registration statement you file under the Securities Act:

(1) If the SEC's proxy rules or regulations, or stock exchange requirements, do not require you to send an annual report to security holders or to holders of American depository receipts, describe briefly the nature and frequency of reports that you will give to security holders. Specify whether the reports that you give will contain financial information that has been examined and reported on, with an opinion expressed "by" an independent public or certified public accountant.

(2) For a foreign private issuer, if the report will not contain financial information prepared in accordance with U.S. generally accepted accounting principles, you must state whether the report will include a reconciliation of

this information with U.S. generally accepted accounting principles.

(g) *Enforceability of civil liabilities against foreign persons.* Disclose the following if you are a foreign private issuer filing a registration statement under the Securities Act:

(1) Whether or not investors may bring actions under the civil liability provisions of the U.S. Federal securities laws against the foreign private issuer, any of its officers and directors who are residents of a foreign country, any underwriters or experts named in the registration statement that are residents of a foreign country, and whether investors may enforce these civil liability provisions when the assets of the issuer or these other persons are located outside of the United States. The disclosure must address the following matters:

(i) The investor's ability to effect service of process within the United States on the foreign private issuer or any person;

(ii) The investor's ability to enforce judgments obtained in U.S. courts against foreign persons based upon the civil liability provisions of the U.S. Federal securities laws;

(iii) The investor's ability to enforce, in an appropriate foreign court, judgments of U.S. courts based upon the civil liability provisions of the U.S. Federal securities laws; and

(iv) The investor's ability to bring an original action in an appropriate foreign court to enforce liabilities against the foreign private issuer or any person based upon the U.S. Federal securities laws.

(2) If you provide this disclosure based on an opinion of counsel, name counsel in the prospectus and file as an exhibit to the registration statement a signed consent of counsel to the use of its name and opinion.

*Instructions to Item 101:* 1. In determining what information about the segments is material to an understanding of the registrant's business taken as a whole and therefore required to be disclosed, pursuant to paragraph (c) of this Item, the registrant should take into account both quantitative and qualitative factors such as the significance of the matter to the registrant (*e.g.*, whether a matter with a relatively minor impact on the registrant's business is represented by management to be important to its future

## § 229.102

profitability), the pervasiveness of the matter (*e.g.*, whether it affects or may affect numerous items in the segment information), and the impact of the matter (*e.g.*, whether it distorts the trends reflected in the segment information). Situations may arise when information should be disclosed about a segment, although the information in quantitative terms may not appear significant to the registrant's business taken as a whole.

2. Base the determination of whether information about segments is required for a particular year upon an evaluation of inter-period comparability. For instance, inter-period comparability would require a registrant to report segment information in the current period even if not material under the criteria for reportability of SFAS No. 131 if a segment has been significant in the immediately preceding period and the registrant expects it to be significant in the future.

3. The Commission, upon written request of the registrant and where consistent with the protection of investors, may permit the omission of any of the information required by this Item or the furnishing in substitution thereof of appropriate information of comparable character.

[47 FR 11401, Mar. 16, 1982, as amended at 63 FR 6381, Feb. 6, 1998; 64 FR 1734, Jan. 12, 1999]

### § 229.102 (Item 102) Description of property.

State briefly the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries. In addition, identify the segment(s), as reported in the financial statements, that use the properties described. If any such property is not held in fee or is held subject to any major encumbrance, so state and describe briefly how held.

*Instructions to Item 102:* 1. What is required is such information as reasonably will inform investors as to the suitability, adequacy, productive capacity and extent of utilization of the facilities by the registrant. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and shall not be given.

2. In determining whether properties should be described, the registrant should take into account both quantitative and qualitative factors. See Instruction 1 to Item 101 of Regulation S-K (§ 229.101).

3. In the case of an extractive enterprise, material information shall be given as to production, reserves, locations, development and the nature of the registrant's interest. If

## 17 CFR Ch. II (4-1-01 Edition)

individual properties are of major significance to an industry segment:

A. More detailed information concerning these matters shall be furnished; and

B. Appropriate maps shall be used to disclose location data of significant properties except in cases for which numerous maps would be required.

4. A. If reserve estimates are referred to in the document, the staff of the Office of Engineering, Division of Corporation Finance of the Commission, shall be consulted. That Office may request that a copy of the full report of the engineer or other expert who estimated the reserves be furnished as supplemental information and not as part of the filing. See Rule 418 of Regulation C (§ 230.418 of this chapter) and Rule 12b-4 of Regulation 12B (§ 240.12b-4 of this chapter) with respect to the submission to, and return by, the Commission of supplemental information.

B. If the estimates of reserves, or any estimated valuation thereof, are represented as being based on estimates prepared or reviewed by independent consultants, those independent consultants shall be named in the document.

5. Estimates of oil or gas reserves other than proved or, in the case of other extractive reserves, estimates other than proved or probable reserves, and any estimated values of such reserves shall not be disclosed in any document publicly filed with the Commission, unless such information is required to be disclosed in the document by foreign or state law; provided, however, that where such estimates previously have been provided to a person (or any of its affiliates) that is offering to acquire, merge or consolidate with the registrant or otherwise to acquire the registrant's securities, such estimates may be included in documents relating to such acquisition.

6. The definitions in § 210.4-10(a) of Regulation S-X [17 CFR 210] shall apply to this Item with respect to oil and gas operations.

[47 FR 11401, Mar. 16, 1982, as amended at 64 FR 1735, Jan. 12, 1999]

### § 229.103 (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any

such proceedings known to be contemplated by governmental authorities.

*Instructions to Item 103:* 1. If the business ordinarily results in actions for negligence or other claims, no such action or claim need be described unless it departs from the normal kind of such actions.

2. No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

3. Notwithstanding Instructions 1 and 2, any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries shall be described.

4. Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries also shall be described.

5. Notwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:

A. Such proceeding is material to the business or financial condition of the registrant;

B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or

C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than \$100,000; provided, however, that such proceedings which

are similar in nature may be grouped and described generically.

### Subpart 229.200—Securities of the Registrant

#### § 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.

(a) *Market information.* (1)(i) Identify the principal United States market or markets in which each class of the registrant's common equity is being traded. Where there is no established public trading market for a class of common equity, furnish a statement to that effect. For purposes of this Item the existence of limited or sporadic quotations should not of itself be deemed to constitute an "established public trading market." In the case of foreign registrants, also identify the principal established foreign public trading market, if any, for each class of the registrant's common equity.

(ii) If the principal United States market for such common equity is an exchange, state the high and low sales prices for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X [17 CFR 210], as reported in the consolidated transaction reporting system or, if not so reported, as reported on the principal exchange market for such equity.

(iii) If the principal United States market for such common equity is not an exchange, state the range of high and low bid information for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X, as regularly quoted in the automated quotation system of a registered securities association, or where the equity is not quoted in such a system, the range of reported high and low bid quotations, indicating the source of such quotations. Indicate, as applicable, that such over-the-counter market quotations reflect inter-dealer prices,

without retail mark-up, mark-down or commission and may not necessarily represent actual transactions. Where there is an absence of an established public trading market, reference to quotations shall be qualified by appropriate explanation.

(iv) Where a foreign registrant has identified a principal established foreign trading market for its common equity pursuant to paragraph (a)(1) of this Item, also provide market price information comparable, to the extent practicable, to that required for the principal United States market, including the source of such information. Such prices shall be stated in the currency in which they are quoted. The registrant may translate such prices into United States currency at the currency exchange rate in effect on the date the price disclosed was reported on the foreign exchange. If the primary United States market for the registrant's common equity trades using American Depositary Receipts, the United States prices disclosed shall be on that basis.

(v) If the information called for by this Item is being presented in a registration statement filed pursuant to the Securities Act or a proxy or information statement filed pursuant to the Exchange Act, the document also shall include price information as of the latest practicable date, and, in the case of securities to be issued in connection with an acquisition, business combination or other reorganization, as of the date immediately prior to the public announcement of such transaction.

(2) If the information called for by this paragraph (a) is being presented in a registration statement on Form S-1 (§ 239.11 of this chapter) or Form SB-2 (§ 239.28 of this chapter) under the Securities Act or on Form 10 and Form 10-SB (§ 249.210 of this chapter) under the Exchange Act relating to a class of common equity for which at the time of filing there is no established United States public trading market, indicate the amount(s) of common equity (i) that is subject to outstanding options or warrants to purchase, or securities convertible into, common equity of the registrant; (ii) that could be sold pursuant to Rule 144 under the Securities Act [§ 230.144 of this chapter] or that

the registrant has agreed to register under the Securities Act for sale by security holders; or (iii) that is being, or has been publicly proposed to be, publicly offered by the registrant (unless such common equity is being offered pursuant to an employee benefit plan or dividend reinvestment plan), the offering of which could have a material effect on the market price of the registrant's common equity.

(b) *Holder*s. (1) Set forth the approximate number of holders of each class of common equity of the registrant as of the latest practicable date.

(2) If the information called for by this paragraph (b) is being presented in a registration statement filed pursuant to the Securities Act or a proxy statement or information statement filed pursuant to the Exchange Act that relates to an acquisition, business combination or other reorganization, indicate the effect of such transaction on the amount and percentage of present holdings of the registrant's common equity owned beneficially by (i) any person (including any group as that term is used in section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's common equity and (ii) each director and nominee and (iii) all directors and officers as a group, and the registrant's present commitments to such persons with respect to the issuance of shares of any class of its common equity.

(c) *Dividends*. (1) State the frequency and amount of any cash dividends declared on each class of its common equity by the registrant for the two most recent fiscal years and any subsequent interim period for which financial statements are required to be presented by § 210.3 of Regulation S-X. Where there are restrictions (including, where appropriate, restrictions on the ability of registrant's subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances) that currently materially limit the registrant's ability to pay such dividends or that the registrant reasonably believes are likely to limit materially the future payment of dividends

on the common equity so state and either (i) describe briefly (where appropriate quantify) such restrictions, or (ii) cross reference to the specific discussion of such restrictions in the Management's Discussion and Analysis of financial condition and operating results prescribed by Item 303 of Regulation S-K (§229.303) and the description of such restrictions required by Regulation S-X in the registrant's financial statements.

(2) Where registrants have a record of paying no cash dividends although earnings indicate an ability to do so, they are encouraged to consider the question of their intention to pay cash dividends in the foreseeable future and, if no such intention exists, to make a statement of that fact in the filing. Registrants which have a history of paying cash dividends also are encouraged to indicate whether they currently expect that comparable cash dividends will continue to be paid in the future and, if not, the nature of the change in the amount or rate of cash dividend payments.

*Instructions to Item 201:* 1. Registrants, the common equity of which is listed for trading on more than one securities exchange registered under the Exchange Act, are required to indicate each such exchange pursuant to paragraph (a)(1)(i) of this Item; such registrants, however, need only report one set of price quotations pursuant to paragraph (a)(1)(ii) of this Item; where available, these shall be the prices as reported in the consolidated transaction reporting system and, where the prices are not so reported, the prices on the most significant (in terms of volume) securities exchange for such shares.

2. Market prices and dividends reported pursuant to this Item shall be adjusted to give retroactive effect to material changes resulting from stock dividends, stock splits and reverse stock splits.

3. The computation of the approximate number of holders of registrant's common equity may be based upon the number of record holders or also may include individual participants in security position listings. See Rule 17Ad-8 under the Exchange Act. The method of computation that is chosen shall be indicated.

4. If the registrant is a foreign issuer, describe briefly:

A. Any governmental laws, decrees or regulations in the country in which the registrant is organized that restrict the export or import of capital, including, but not limited to, foreign exchange controls, or that affect the remittance of dividends or other

payments to nonresident holders of the registrant's common equity; and

B. All taxes, including withholding provisions, to which United States common equity holders are subject under existing laws and regulations of the foreign country in which the registrant is organized. Include a brief description of pertinent provisions of any reciprocal tax treaty between such foreign country and the United States regarding withholding. If there is no such treaty, so state.

5. If the registrant is a foreign private issuer whose common equity of the class being registered is wholly or partially in bearer form, the response to this Item shall so indicate together with as much information as the registrant is able to provide with respect to security holdings in the United States. If the securities being registered trade in the United States in the form of American Depositary Receipts or similar certificates, the response to this Item shall so indicate together with the name of the depository issuing such receipts and the number of shares or other units of the underlying security representing the trading units in such receipts.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 25127, June 10, 1982; 47 FR 54768, Dec. 6, 1982]

#### § 229.202 (Item 202) Description of registrant's securities.

NOTE: If the securities being described have been accepted for listing on an exchange, the exchange may be identified. The document should not however, convey the impression that the registrant may apply successfully for listing of the securities on an exchange or that, in the case of an underwritten offering, the underwriters may request the registrant to apply for such listing, unless there is reasonable assurance that the securities to be offered will be acceptable to a securities exchange for listing.

(a) *Capital stock.* If capital stock is to be registered, state the title of the

class and describe such of the matters listed in paragraphs (a) (1) through (5) as are relevant. A complete legal description of the securities need not be given.

(1) Outline briefly: (i) dividend rights; (ii) terms of conversion; (iii) sinking fund provisions; (iv) redemption provisions; (v) voting rights, including any provisions specifying the vote required by security holders to take action; (vi) any classification of the Board of Directors, and the impact of such classification where cumulative voting is permitted or required; (vii) liquidation rights; (viii) preemption rights; and (ix) liability to further calls or to assessment by the registrant and for liabilities of the registrant imposed on its stockholders under state statutes (*e.g.*, to laborers, servants or employees of the registrant), unless such disclosure would be immaterial because the financial resources of the registrant or other factors make it improbable that liability under such state statutes would be imposed; (x) any restriction on alienability of the securities to be registered; and (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such security holder owning a substantial amount of securities.

(2) If the rights of holders of such stock may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(3) If preferred stock is to be registered, describe briefly any restriction on the repurchase or redemption of shares by the registrant while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(4) If the rights evidenced by, or amounts payable with respect to, the shares to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, include the information regarding such other securities as will enable investors to understand such limitations or qualifications. No information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such retirement will be com-

pleted prior to or upon delivery by the registrant of the shares.

(5) Describe briefly or cross-reference to a description in another part of the document, any provision of the registrant's charter or by-laws that would have an effect of delaying, deferring or preventing a change in control of the registrant and that would operate only with respect to an extraordinary corporate transaction involving the registrant (or any of its subsidiaries), such as a merger, reorganization, tender offer, sale or transfer of substantially all of its assets, or liquidation. Provisions and arrangements required by law or imposed by governmental or judicial authority need not be described or discussed pursuant to this paragraph (a)(5). Provisions or arrangements adopted by the registrant to effect, or further, compliance with laws or governmental or judicial mandate are not subject to the immediately preceding sentence where such compliance did not require the specific provisions or arrangements adopted.

(b) *Debt securities.* If debt securities are to be registered, state the title of such securities, the principal amount being offered, and, if a series, the total amount authorized and the total amount outstanding as of the most recent practicable date; and describe such of the matter listed in paragraphs (b) (1) through (10) as are relevant. A complete legal description of the securities need not be given. For purposes solely of this Item, debt securities that differ from one another only as to the interest rate or maturity shall be regarded as securities of the same class. Outline briefly:

(1) Provisions with respect to maturity, interest, conversion, redemption, amortization, sinking fund, or retirement;

(2) Provisions with respect to the kind and priority of any lien securing the securities, together with a brief identification of the principal properties subject to such lien;

(3) Provisions with respect to the subordination of the rights of holders of the securities to other security holders or creditors of the registrant; where debt securities are designated as subordinated in accordance with Instruction 1 to this Item, set forth the aggregate

amount of outstanding indebtedness as of the most recent practicable date that by the terms of such debt securities would be senior to such subordinated debt and describe briefly any limitation on the issuance of such additional senior indebtedness or state that there is no such limitation;

(4) Provisions restricting the declaration of dividends or requiring the maintenance of any asset ratio or the creation or maintenance of reserves;

(5) Provisions restricting the incurrence of additional debt or the issuance of additional securities; in the case of secured debt, whether the securities being registered are to be issued on the basis of unbonded bondable property, the deposit of cash or otherwise; as of the most recent practicable date, the approximate amount of unbonded bondable property available as a basis for the issuance of bonds; provisions permitting the withdrawal of cash deposited as a basis for the issuance of bonds; and provisions permitting the release or substitution of assets securing the issue; *Provided, however*, That provisions permitting the release of assets upon the deposit of equivalent funds or the pledge of equivalent property, the release of property no longer required in the business, obsolete property, or property taken by eminent domain or the application of insurance moneys, and other similar provisions need not be described;

(6) The general type of event that constitutes a default and whether or not any periodic evidence is required to be furnished as to the absence of default or as to compliance with the terms of the indenture;

(7) Provisions relating to modification of the terms of the security or the rights of security holders;

(8) If the rights evidenced by the securities to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, the information regarding such other securities as will enable investors to understand the rights evidenced by the securities; to the extent not otherwise disclosed pursuant to this Item; no information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such

retirement will be completed prior to or upon delivery by the registrant of the securities;

(9) If debt securities are to be offered at a price such that they will be deemed to be offered at an "original issue discount" as defined in paragraph (a) of section 1273 of the Internal Revenue Code (26 U.S.C. 1273), or if a debt security is sold in a package with another security and the allocation of the offering price between the two securities may have the effect of offering the debt security at such an original issue discount, the tax effects thereof pursuant to sections 1271-1278;

(10) The name of the trustee(s) and the nature of any material relationship with the registrant or with any of its affiliates; the percentage of securities of the class necessary to require the trustee to take action; and what indemnification the trustee may require before proceeding to enforce the lien.

(c) *Warrants and rights*. If the securities described are to be offered pursuant to warrants or rights state:

(1) The amount of securities called for by such warrants or rights;

(2) The period during which and the price at which the warrants or rights are exercisable;

(3) The amount of warrants or rights outstanding;

(4) Provisions for changes to or adjustments in the exercise price; and

(5) Any other material terms of such rights on warrants.

(d) *Other securities*. If securities other than capital stock, debt, warrants or rights are to be registered, include a brief description (comparable to that required in paragraphs (a), (b) and (c) of Item 202) of the rights evidenced thereby.

(e) *Market information for securities other than common equity*. If securities other than common equity are to be registered and there is an established public trading market for such securities (as that term is used in Item 201 of Regulation S-K (§229.201 of this chapter)) provide market information with respect to such securities comparable to that required by paragraph (a) of Item 201 of Regulation S-K (§229.201).

(f) *American Depositary Receipts*. If Depositary Shares represented by American Depositary Receipts are being registered, furnish the following information:

(1) The name of the depositary and the address of its principal executive office.

(2) State the title of the American Depositary Receipts and identify the deposited security. Describe briefly the terms of deposit, including the provisions, if any, with respect to:

(i) The amount of deposited securities represented by one unit of American Depositary Receipts;

(ii) The procedure for voting, if any, the deposited securities;

(iii) The collection and distribution of dividends;

(iv) The transmission of notices, reports and proxy soliciting material;

(v) The sale or exercise of rights;

(vi) The deposit or sale of securities resulting from dividends, splits or plans of reorganization;

(vii) Amendment, extension or termination of the deposit;

(viii) Rights of holders of receipts to inspect the transfer books of the depositary and the list of holders of receipts;

(ix) Restrictions upon the right to deposit or withdraw the underlying securities;

(x) Limitation upon the liability of the depositary.

(3) Describe all fees and charges which may be imposed directly or indirectly against the holder of the American Depositary Receipts, indicating the type of service, the amount of fee or charges and to whom paid.

*Instructions to Item 202:* 1. Wherever the title of securities is required to be stated, there shall be given such information as will indicate the type and general character of the securities, including the following:

A. In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or non-cumulative; a brief indication of the preference, if any; and if convertible or redeemable, a statement to that effect;

B. In the case of debt, the rate of interest; the date of maturity or, if the issue matures serially, a brief indication of the serial maturities, such as "maturing serially from 1955 to 1960"; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and, if convert-

ible or callable, a statement to that effect; or

C. In the case of any other kind of security, appropriate information of comparable character.

2. If the registrant is a foreign registrant, include (to the extent not disclosed in the document pursuant to Item 201 of Regulation S-K (§229.201) or otherwise) in the description of the securities:

A. A brief description of any limitations on the right of nonresident or foreign owners to hold or vote such securities imposed by foreign law or by the charter or other constituent document of the registrant, or if no such limitations are applicable, so state;

B. A brief description of any governmental laws, decrees or regulations in the country in which the registrant is organized affecting the remittance of dividends, interest and other payments to nonresident holders of the securities being registered;

C. A brief outline of all taxes, including withholding provisions, to which United States security holders are subject under existing laws and regulations of the foreign country in which the registrant is organized; and

D. A brief description of pertinent provisions of any reciprocal tax treaty between such foreign country and the United States regarding withholding or, if there is no such treaty, so state.

3. Section 305(a)(2) of the Trust Indenture Act of 1939, 15 U.S.C. 77aaa et seq., as amended ("Trust Indenture Act"), shall not be deemed to require the inclusion in a registration statement or in a prospectus of any information not required by this Item.

4. Where convertible securities or stock purchase warrants are being registered that are subject to redemption or call, the description of the conversion terms of the securities or material terms of the warrants shall disclose:

A. Whether the right to convert or purchase the securities will be forfeited unless it is exercised before the date specified in a notice of the redemption or call;

B. The expiration or termination date of the warrants;

C. The kinds, frequency and timing of notice of the redemption or call, including the cities or newspapers in which notice will be published (where the securities provide for a class of newspapers or group of cities in which the publication may be made at the discretion of the registrant, the registrant should describe such provision); and

D. In the case of bearer securities, that investors are responsible for making arrangements to prevent loss of the right to convert or purchase in the event of redemption of call, for example, by reading the newspapers

## Securities and Exchange Commission

## § 229.301

in which the notice of redemption or call may be published.

5. The response to paragraph (f) shall include information with respect to fees and charges in connection with (A) the deposit or substitution of the underlying securities; (B) receipt and distribution of dividends; (C) the sale or exercise of rights; (D) the withdrawal of the underlying security; and (E) the transferring, splitting or grouping of receipts. Information with respect to the right to collect the fees and charges against dividends received and deposited securities shall be included in response to this item.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 54768, Dec. 6, 1982; 51 FR 42056, Nov. 20, 1986]

### Subpart 229.300—Financial Information

#### § 229.301 (Item 301) Selected financial data.

Furnish in comparative columnar form the selected financial data for the registrant referred to below, for

(a) Each of the last five fiscal years of the registrant (or for the life of the registrant and its predecessors, if less), and

(b) Any additional fiscal years necessary to keep the information from being misleading.

*Instructions to Item 301:* 1. The purpose of the selected financial data shall be to supply in a convenient and readable format selected financial data which highlight certain significant trends in the registrant's financial condition and results of operations.

2. Subject to appropriate variation to conform to the nature of the registrant's business, the following items shall be included in the table of financial data: net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred stock as defined in §210.5-02.28(a) of Regulation S-X [17 CFR 210]; and cash dividends declared per common share. Registrants may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations.

Briefly describe, or cross-reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the information

## § 229.302

reflected in selected financial data. Discussion of, or reference to, any material uncertainties should also be included where such matters might cause the data reflected herein not to be indicative of the registrant's future financial condition or results of operations.

3. All references to the registrant in the table of selected financial data and in this Item shall mean the registrant and its subsidiaries consolidated.

4. If interim period financial statements are included, or are required to be included, by Article 3 of Regulation S-X, registrants should consider whether any or all of the selected financial data need to be updated for such interim periods to reflect a material change in the trends indicated; where such updating information is necessary, registrants shall provide the information on a comparative basis unless not necessary to an understanding of such updating information.

5. A foreign private issuer shall disclose also the following information in all filings containing financial statements:

A. In the forepart of the document and as of the latest practicable date, the exchange rate into U.S. currency of the foreign currency in which the financial statements are denominated;

B. A history of exchange rates for the five most recent years and any subsequent interim period for which financial statements are presented setting forth the rates for period end, the average rates, and the range of high and low rates for each year; and

C. If equity securities are being registered, a five year summary of dividends per share stated in both the currency in which the financial statements are denominated and United States currency based on the exchange rates at each respective payment date.

6. A foreign private issuer shall present the selected financial data in the same currency as its financial statements. The issuer may present the selected financial data on the basis of the accounting principles used in its primary financial statements but in such case shall present this data also on the basis of any reconciliations of such data to United States generally accepted accounting principles and Regulation S-X made pursuant to Rule 4-01 of Regulation S-X (§210.4-01 of this chapter).

7. For purposes of this rule, the rate of exchange means the noon buying rate in New York City for cable transfers in foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York. The average rate means the average of the ex-

## 17 CFR Ch. II (4-1-01 Edition)

change rates on the last day of each month during a year.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8, 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 54768, Dec. 6, 1982; 52 FR 30919, Aug. 18, 1987]

### § 229.302 (Item 302) Supplementary financial information.

(a) *Selected quarterly financial data.* Registrants specified in paragraph (a)(5) of this Item shall provide the information specified below.

(1) Disclosure shall be made of net sales, gross profit (net sales less costs and expenses associated directly with or allocated to products sold or services rendered), income (loss) before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income (loss), and net income (loss), for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S-X [17 CFR 210].

(2) When the data supplied pursuant to this paragraph (a) vary from the amounts previously reported on the Form 10-Q and Form 10-QSB (§ 249.308a of this chapter) filed for any quarter, such as would be the case when a pooling of interests occurs or where an error is corrected, reconcile the amounts given with those previously reported and describe the reason for the difference.

(3) Describe the effect of any disposals of segments of a business, and extraordinary, unusual or infrequently occurring items recognized in each full

quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S-X, as well as the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter.

(4) If the financial statements to which this information relates have been reported on by an accountant, appropriate professional standards and procedures, as enumerated in the Statements of Auditing Standards issued by the Auditing Standards Board of the American Institute of Certified Public Accountants, shall be followed by the reporting accountant with regard to the data required by this paragraph (a).

(5) This paragraph (a) applies to any registrant, except a foreign private issuer, that has securities registered pursuant to sections 12(b) (15 U.S.C. § 78l(b)) (other than mutual life insurance companies) or 12(g) of the Exchange Act (15 U.S.C. § 78l(g)).

(b) *Information about oil and gas producing activities.* Registrants engaged in oil and gas producing activities shall present the information about oil and gas producing activities (as those activities are defined in Regulation S-X, § 210.4-10(a)) specified in paragraphs 9-34 of Statement of Financial Accounting Standards ("SFAS") No. 69, "Disclosures about Oil and Gas Producing Activities." If such oil and gas producing activities are regarded as significant under one or more of the tests set forth in paragraph 8 of SFAS No. 69.

*Instructions to Paragraph (b):* 1. (a) SFAS No. 69 disclosures that relate to annual periods shall be presented for each annual period for which an income statement is required. (b) SFAS No. 69 disclosures required as of the end of an annual period shall be presented as of the date of each audited balance sheet required, and (c) SFAS No. 69 disclosures required as of the beginning of an annual period shall be presented as of the beginning of each annual period for which an income statement is required.

2. This paragraph, together with § 210.4-10 of Regulation S-X, prescribes financial reporting standards for the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States, pursuant to Section 503 of the Energy Policy and Con-

servation Act of 1975 (42 U.S.C. 8383) ("EPCA") and Section 11(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796) ("ESECA") as amended by Section 506 of EPCA. The application of the paragraph to those oil and gas producing operations of companies regulated for rate-making purposes on an individual-company-cost-of-service basis may, however, give appropriate recognition to differences arising because of the effect of the ratemaking process.

3. Any person exempted by the Department of Energy from any record-keeping or reporting requirements pursuant to Section 11(c) of ESECA, as amended, is similarly exempted from the related provisions of this paragraph in the preparation of accounts pursuant to EPCA. This exemption does not affect the applicability of this paragraph to filings pursuant to the federal securities laws.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 57914, Dec. 29, 1982; 52 FR 30919, Aug. 18, 1987; 56 FR 30053, July 1, 1991; 64 FR 73402, Dec. 30, 1999]

**§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.**

(a) *Full fiscal years.* Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a) (1), (2) and (3) with respect to liquidity, capital resources and results of operations and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or

proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(2) *Capital resources.* (i) Describe the registrant's material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments.

(ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any expected material changes in the mix and relative cost of such resources. The discussion shall consider changes between equity, debt and any off-balance sheet financing arrangements.

(3) *Results of operations.* (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

(iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

(iv) For the three most recent fiscal years of the registrant, or for those fiscal years beginning after December 25,

1979, or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations.

*Instructions to Paragraph 303(a):* 1. The registrant's discussion and analysis shall be of the financial statements and of other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion shall cover the three year period covered by the financial statements and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding. However, where trend information is relevant, reference to the five year selected financial data appearing pursuant to Item 301 of Regulation S-K (§229.301) may be necessary.

2. The purpose of the discussion and analysis shall be to provide to investors and other users information relevant to an assessment of the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources. The information provided pursuant to this Item need only include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's financial statements.

3. The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations.

4. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necessary to an understanding of the registrant's businesses as a whole; *Provided, however,* That if the causes for a change in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Registrants need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion shall not merely

repeat numerical data contained in the consolidated financial statements.

5. The term “liquidity” as used in this Item refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise’s needs for cash. Except where it is otherwise clear from the discussion, the registrant shall indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally shall be discussed on both a long-term and short-term basis. The issue of liquidity shall be discussed in the context of the registrant’s own business or businesses. For example a discussion of working capital may be appropriate for certain manufacturing, industrial or related operations but might be inappropriate for a bank or public utility.

6. Where financial statements presented or incorporated by reference in the registration statement are required by §210.4-08(e)(3) of Regulation S-X [17 CFR part 210] to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity shall include a discussion of the nature and extent of such restrictions and the impact such restrictions have had and are expected to have on the ability of the parent company to meet its cash obligations.

7. Registrants are encouraged, but not required, to supply forward-looking information. This is to be distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials. This latter data may be required to be disclosed. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230.175], Rule 3b-6 under the Exchange Act [17 CFR 240.3b-6] and Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

8. Registrants are only required to discuss the effects of inflation and other changes in prices when considered material. This discussion may be made in whatever manner appears appropriate under the circumstances. All that is required is a brief textual presentation of management’s views. No specific numerical financial data need be presented except as Rule 3-20(c) of Regulation S-X (§210.3-20(c) of this chapter) otherwise requires. However, registrants may elect to voluntarily disclose supplemental information on the effects of changing prices as provided for in Statement of Financial Accounting Standards No. 89, “Financial Reporting and Changing Prices” or through other supplemental disclosures. The Commission encourages experimentation with these disclosures in order to provide the most meaningful presentation of the impact

of price changes on the registrant’s financial statements.

9. Registrants that elect to disclose supplementary information on the effects of changing prices as specified by SFAS No. 89, “Financial Reporting and Changing Prices,” may combine such explanations with the discussion and analysis required pursuant to this Item or may supply such information separately with appropriate cross reference.

10. All references to the registrant in the discussion and in this Item shall mean the registrant and its subsidiaries consolidated.

11. Foreign private registrants also shall discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals.

12. If the registrant is a foreign private issuer, the discussion shall focus on the primary financial statements presented in the registration statement or report. There shall be a reference to the reconciliation to United States generally accepted accounting principles, and a discussion of any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole.

(b) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S-X (17 CFR 210), a management’s discussion and analysis of the financial condition and results of operations shall be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (b) (1) and (2) of this Item. The discussion and analysis shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.

(1) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from

that date to the date of the most recent interim balance sheet provided also shall be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.* Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year. If the registrant is required to or has elected to provide an income statement for the most recent fiscal quarter, such discussion also shall cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year. In addition, if the registrant has elected to provide an income statement for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the discussion also shall cover material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year. Notwithstanding the above, if for purposes of a registration statement a registrant subject to paragraph (b) of § 210.3-03 of Regulation S-X provides a statement of income for the twelve-month period ended as of the date of the most recent interim balance sheet provided in lieu of the interim income statements otherwise required, the discussion of material changes in that twelve-month period will be in respect to the preceding fiscal year rather than the corresponding preceding period.

*Instructions to Paragraph (b) of Item 303:* 1. If interim financial statements are presented

together with financial statements for full fiscal years, the discussion of the interim financial information shall be prepared pursuant to this paragraph (b) and the discussion of the full fiscal year's information shall be prepared pursuant to paragraph (a) of this Item. Such discussions may be combined.

2. In preparing the discussion and analysis required by this paragraph (b), the registrant may presume that users of the interim financial information have read or have access to the discussion and analysis required by paragraph (a) for the preceding fiscal year.

3. The discussion and analysis required by this paragraph (b) is required to focus only on material changes. Where the interim financial statements reveal material changes from period to period in one or more significant line items, the causes for the changes shall be described if they have not already been disclosed: *Provided, however,* That if the causes for a change in one line item also relate to other line items, no repetition is required. Registrants need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the financial statements. The information provided shall include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's condensed interim financial statements.

4. The registrant's discussion of material changes in results of operations shall identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

5. The registrant shall discuss any seasonal aspects of its business which have had a material effect upon its financial condition or results of operation.

6. Registrants are encouraged but are not required to discuss forward-looking information. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230.175], Rule 3b-6 under the Exchange Act [17 CFR 249.3b-6] and

## Securities and Exchange Commission

## § 229.304

Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

(Secs. 7 and 19a of the Securities Act, 15 U.S.C. 77g, 77s(a), 77aa(25)(26); secs. 12, 13, 14, 15(d), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78l, 78m, 78n, 78o(d), 78w(a), secs. 5(b), 10(a), 14, 20(a) of the Public Utility Holding Company Act, 15 U.S.C. 79e(a), 79n, 79t(a); secs. 8, 20, 30, 31(c), 38(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-8, 80a-20, 80a-29, 80a-30(c), 80a-37(a); secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 29839, July 9, 1982; 47 FR 54768, Dec. 6, 1982; 52 FR 30919, Aug. 18, 1987]

### **§ 229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.**

(a)(1) If during the registrant's two most recent fiscal years or any subsequent interim period, an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant who was previously engaged to audit a significant subsidiary and on whom the principal accountant expressed reliance in its report, has resigned (or indicated it has declined to stand for reelection after the completion of the current audit) or was dismissed, then the registrant shall:

(i) State whether the former accountant resigned, declined to stand for reelection or was dismissed and the date thereof.

(ii) State whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or accounting principles; and also describe the nature of each such

adverse opinion, disclaimer of opinion, modification, or qualification.

(iii) State whether the decision to change accountants was recommended or approved by:

(A) Any audit or similar committee of the board of directors, if the issuer has such a committee; or

(B) The board of directors, if the issuer has no such committee.

(iv) State whether during the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreement(s), if not resolved to the satisfaction of the former accountant, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report. Also, (A) describe each such disagreement; (B) state whether any audit or similar committee of the board of directors, or the board of directors, discussed the subject matter of each of such disagreements with the former accountant; and (C) state whether the registrant has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements and, if not, describe the nature of any limitation thereon and the reason therefore. The disagreements required to be reported in response to this Item include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this Item are those that occur at the decision-making level, i.e., between personnel of the registrant responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering its report.

(v) Provide the information required by paragraph (a)(1)(iv) of this Item for each of the kinds of events (even though the registrant and the former accountant did not express a difference of opinion regarding the event) listed in paragraphs (a)(1)(v) (A) through (D) of this section, that occurred within

the registrant's two most recent fiscal years and any subsequent interim period preceding the former accountant's resignation, declination to stand for re-election, or dismissal ("reportable events"). If the event led to a disagreement or difference of opinion, then the event should be reported as a disagreement under paragraph (a)(1)(iv) and need not be repeated under this paragraph.

(A) The accountant's having advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist;

(B) The accountant's having advised the registrant that information has come to the accountant's attention that has led it to no longer be able to rely on management's representations, or that has made it unwilling to be associated with the financial statements prepared by management;

(C) (1) The accountant's having advised the registrant of the need to expand significantly the scope of its audit, or that information has come to the accountant's attention during the time period covered by Item 304(a)(1)(iv), that if further investigated may:

(i) Materially impact the fairness or reliability of either: a previously issued audit report or the underlying financial statements; or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that may prevent it from rendering an unqualified audit report on those financial statements), or

(ii) Cause it to be unwilling to rely on management's representations or be associated with the registrant's financial statements, and

(2) Due to the accountant's resignation (due to audit scope limitations or otherwise) or dismissal, or for any other reason, the accountant did not so expand the scope of its audit or conduct such further investigation; or

(D)(1) The accountant's having advised the registrant that information has come to the accountant's attention that it has concluded materially impacts the fairness or reliability of ei-

ther (i) a previously issued audit report or the underlying financial statements, or (ii) the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that, unless resolved to the accountant's satisfaction, would prevent it from rendering an unqualified audit report on those financial statements), and

(2) Due to the accountant's resignation, dismissal or declination to stand for re-election, or for any other reason, the issue has not been resolved to the accountant's satisfaction prior to its resignation, dismissal or declination to stand for re-election.

(2) If during the registrant's two most recent fiscal years or any subsequent interim period, a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements, or as an independent accountant to audit a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, then the registrant shall identify the newly engaged accountant and indicate the date of such accountant's engagement. In addition, if during the registrant's two most recent fiscal years, and any subsequent interim period prior to engaging that accountant, the registrant (or someone on its behalf) consulted the newly engaged accountant regarding:

(i) Either: The application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the registrant's financial statements, and either a written report was provided to the registrant or oral advice was provided that the new accountant concluded was an important factor considered by the registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was either the subject of a disagreement (as defined in paragraph 304(a)(1)(iv) and the related instructions to this item) or a reportable event (as described in paragraph 304(a)(1)(v)), then the registrant shall:

(A) So state and identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the newly engaged accountant as expressed orally or in writing to the registrant on each such issue and, if written views were received by the registrant, file them as an exhibit to the report or registration statement requiring compliance with this Item 304(a);

(C) State whether the former accountant was consulted by the registrant regarding any such issues, and if so, provide a summary of the former accountant's views; and

(D) Request the newly engaged accountant to review the disclosure required by this Item 304(a) before it is filed with the Commission and provide the new accountant the opportunity to furnish the registrant with a letter addressed to the Commission containing any new information, clarification of the registrant's expression of its views, or the respects in which it does not agree with the statements made by the registrant in response to Item 304(a). The registrant shall file any such letter as an exhibit to the report or registration statement containing the disclosure required by this Item.

(3) The registrant shall provide the former accountant with a copy of the disclosures it is making in response to this Item 304(a) that the former accountant shall receive no later than the day that the disclosures are filed with the Commission. The registrant shall request the former accountant to furnish the registrant with a letter addressed to the Commission stating whether it agrees with the statements made by the registrant in response to this Item 304(a) and, if not, stating the respects in which it does not agree. The registrant shall file the former accountant's letter as an exhibit to the report on registration statement containing this disclosure. If the former accountant's letter is unavailable at the time of filing such report or registration statement, then the registrant shall request the former accountant to provide the letter as promptly as possible so that the registrant can file the letter with the Commission within ten business days after the filing of the report or reg-

istration statement. Notwithstanding the ten business day period, the registrant shall file the letter by amendment within two business days of receipt; if the letter is received on a Saturday, Sunday or holiday on which the Commission is not open for business, then the two business day period shall begin to run on and shall include the first business day thereafter. The former accountant may provide the registrant with an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming within the ten business day period noted above. If not filed with the report or registration statement containing the registrant's disclosure under this Item 304(a), then the interim letter, if any, shall be filed by the registrant by amendment within two business days of receipt.

(b) If: (1) In connection with a change in accountants subject to paragraph (a) of this Item 304, there was any disagreement of the type described in paragraph (a)(1)(iv) or any reportable event as described in paragraph (a)(1)(v) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved such disagreement or reportable event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required, the registrant shall state the existence and nature of the disagreement or reportable event and also state the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required.

These disclosures need not be made if the method asserted by the former accountants ceases to be generally accepted because of authoritative standards or interpretations subsequently issued.

*Instructions to Item 304:* 1. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported as that term is defined in Rule 12b-2 under the Exchange Act (§240.12b-2 of this

chapter); the disclosure called for by paragraph (a) must be provided, however, notwithstanding prior disclosure, if required pursuant to Item 9 of Schedule 14A (§240.14a-101 of this chapter). The disclosure called for by paragraph (b) of this section must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

2. When disclosure is required by paragraph (a) of this section in an annual report to security holders pursuant to Rule 14a-3 (§240.14a-3 of this chapter) or Rule 14c-3 (§240.14c-3 of this chapter), or in a proxy or information statement filed pursuant to the requirements of Schedule 14A or 14C (§240.14a-101 or §240.14c-101 of this chapter), in lieu of a letter pursuant to paragraph (a)(2)(D) or (a)(3), prior to filing such materials with or furnishing such materials to the Commission, the registrant shall furnish the disclosure required by paragraph (a) of this section to any former accountant engaged by the registrant during the period set forth in paragraph (a) of this section and to the newly engaged accountant. If any such accountant believes that the statements made in response to paragraph (a) of this section are incorrect or incomplete, it may present its views in a brief statement, ordinarily expected not to exceed 200 words, to be included in the annual report or proxy or information statement. This statement shall be submitted to the registrant within ten business days of the date the accountant receives the registrant's disclosure. Further, unless the written views of the newly engaged accountant required to be filed as an exhibit by paragraph (a)(2)(B) of this Item 304 have been previously filed with the Commission the registrant shall file a Form 8-K concurrently with the annual report or proxy or information statement for the purpose of filing the written views as exhibits thereto.

3. The information required by Item 304(a) need not be provided for a company being acquired by the registrant that is not subject to the filing requirements of either section 13(a) or 15(d) of the Exchange Act, or, because of section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a-3 or Rule 14c-3 for its latest fiscal year.

4. The term "disagreements" as used in this Item shall be interpreted broadly, to include any difference of opinion concerning any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure which (if not resolved to the satisfaction of the former accountant) would have caused it to make reference to the subject matter of the disagreement in connection with its report. It is not necessary for there to have been an argument to have had a disagreement, merely a difference of opinion. For purposes of this

Item, however, the term disagreements does not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the former accountant's satisfaction by, and providing the registrant and the accountant do not continue to have a difference of opinion upon, obtaining additional relevant facts or information.

5. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm's opinion (or their designee) will generally suffice as the accountant advising the registrant of a reportable event or as a statement of a disagreement at the "decision-making level" within the accounting firm and require disclosure under this Item.

[53 FR 12929, Apr. 20, 1988, as amended at 54 FR 9774, Mar. 8, 1989]

**§ 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.**

(a) *Quantitative information about market risk.* (1) Registrants shall provide, in their reporting currency, quantitative information about market risk as of the end of the latest fiscal year, in accordance with one of the following three disclosure alternatives. In preparing this quantitative information, registrants shall categorize market risk sensitive instruments into instruments entered into for trading purposes and instruments entered into for purposes other than trading purposes. Within both the trading and other than trading portfolios, separate quantitative information shall be presented, to the extent material, for each market risk exposure category (*i.e.*, interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market risks, such as equity price risk). A registrant may use one of the three alternatives set forth in this section for all of the required quantitative disclosures about market risk. A registrant also may choose, from among the three alternatives, one disclosure alternative for market risk sensitive instruments entered into for trading purposes and another disclosure alternative for market risk sensitive instruments entered into for other than trading purposes. Alternatively, a registrant may choose any disclosure alternative, from among the

three alternatives, for each risk exposure category within the trading and other than trading portfolios. The three disclosure alternatives are:

(i)(A)(I) Tabular presentation of information related to market risk sensitive instruments; such information shall include fair values of the market risk sensitive instruments and contract terms sufficient to determine future cash flows from those instruments, categorized by expected maturity dates.

(2) Tabular information relating to contract terms shall allow readers of the table to determine expected cash flows from the market risk sensitive instruments for each of the next five years. Comparable tabular information for any remaining years shall be displayed as an aggregate amount.

(3) Within each risk exposure category, the market risk sensitive instruments shall be grouped based on common characteristics. Within the foreign currency exchange rate risk category, the market risk sensitive instruments shall be grouped by functional currency and within the commodity price risk category, the market risk sensitive instruments shall be grouped by type of commodity.

(4) See the Appendix to this Item for a suggested format for presentation of this information; and

(B) Registrants shall provide a description of the contents of the table and any related assumptions necessary to understand the disclosures required under paragraph (a)(1)(i)(A) of this Item 305; or

(ii)(A) Sensitivity analysis disclosures that express the potential loss in future earnings, fair values, or cash flows of market risk sensitive instruments resulting from one or more selected hypothetical changes in interest rates, foreign currency exchange rates, commodity prices, and other relevant market rates or prices over a selected period of time. The magnitude of selected hypothetical changes in rates or prices may differ among and within market risk exposure categories; and

(B) Registrants shall provide a description of the model, assumptions, and parameters, which are necessary to understand the disclosures required

under paragraph (a)(1)(ii)(A) of this Item 305; or

(iii)(A) Value at risk disclosures that express the potential loss in future earnings, fair values, or cash flows of market risk sensitive instruments over a selected period of time, with a selected likelihood of occurrence, from changes in interest rates, foreign currency exchange rates, commodity prices, and other relevant market rates or prices;

(B)(I) For each category for which value at risk disclosures are required under paragraph (a)(1)(iii)(A) of this Item 305, provide either:

(i) The average, high and low amounts, or the distribution of the value at risk amounts for the reporting period; or

(ii) The average, high and low amounts, or the distribution of actual changes in fair values, earnings, or cash flows from the market risk sensitive instruments occurring during the reporting period; or

(iii) The percentage or number of times the actual changes in fair values, earnings, or cash flows from the market risk sensitive instruments exceeded the value at risk amounts during the reporting period;

(2) Information required under paragraph (a)(1)(iii)(B)(I) of this Item 305 is not required for the first fiscal year end in which a registrant must present Item 305 information; and

(C) Registrants shall provide a description of the model, assumptions, and parameters, which are necessary to understand the disclosures required under paragraphs (a)(1)(iii)(A) and (B) of this Item 305.

(2) Registrants shall discuss material limitations that cause the information required under paragraph (a)(1) of this Item 305 not to reflect fully the net market risk exposures of the entity. This discussion shall include summarized descriptions of instruments, positions, and transactions omitted from the quantitative market risk disclosure information or the features of instruments, positions, and transactions that are included, but not reflected fully in the quantitative market risk disclosure information.

(3) Registrants shall present summarized market risk information for the

preceding fiscal year. In addition, registrants shall discuss the reasons for material quantitative changes in market risk exposures between the current and preceding fiscal years. Information required by this paragraph (a)(3), however, is not required if disclosure is not required under paragraph (a)(1) of this Item 305 for the current fiscal year. Information required by this paragraph (a)(3) is not required for the first fiscal year end in which a registrant must present Item 305 information.

(4) If registrants change disclosure alternatives or key model characteristics, assumptions, and parameters used in providing quantitative information about market risk (*e.g.*, changing from tabular presentation to value at risk, changing the scope of instruments included in the model, or changing the definition of loss from fair values to earnings), and if the effects of any such change is material, the registrant shall:

- (i) Explain the reasons for the change; and
- (ii) Either provide summarized comparable information, under the new disclosure method, for the year preceding the current year or, in addition to providing disclosure for the current year under the new method, provide disclosures for the current year and preceding fiscal year under the method used in the preceding year.

*Instructions to Paragraph 305(a):* 1. Under paragraph 305(a)(1):

A. For each market risk exposure category within the trading and other than trading portfolios, registrants may report the average, high, and low sensitivity analysis or value at risk amounts for the reporting period, as an alternative to reporting year-end amounts.

B. In determining the average, high, and low amounts for the fiscal year under instruction 1.A. of the Instructions to Paragraph 305(a), registrants should use sensitivity analysis or value at risk amounts relating to at least four equal time periods throughout the reporting period (*e.g.*, four quarter-end amounts, 12 month-end amounts, or 52 week-end amounts).

C. Functional currency means functional currency as defined by generally accepted accounting principles (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 52, "Foreign Currency Translation"*, ("FAS 52") paragraph 20 (December 1981)).

D. Registrants using the sensitivity analysis and value at risk disclosure alternatives

are encouraged, but not required, to provide quantitative amounts that reflect the aggregate market risk inherent in the trading and other than trading portfolios.

2. Under paragraph 305(a)(1)(i):

A. Examples of contract terms sufficient to determine future cash flows from market risk sensitive instruments include, but are not limited to:

- i. Debt instruments—principal amounts and weighted average effective interest rates;
- ii. Forwards and futures—contract amounts and weighted average settlement prices;
- iii. Options—contract amounts and weighted average strike prices;
- iv. Swaps—notional amounts, weighted average pay rates or prices, and weighted average receive rates or prices; and
- v. Complex instruments—likely to be a combination of the contract terms presented in 2.A.i. through iv. of this Instruction;

B. When grouping based on common characteristics, instruments should be categorized, at a minimum, by the following characteristics, when material:

- i. Fixed rate or variable rate assets or liabilities;
- ii. Long or short forwards and futures;
- iii. Written or purchased put or call options with similar strike prices;
- iv. Receive fixed and pay variable swaps, receive variable and pay fixed swaps, and receive variable and pay variable swaps;
- v. The currency in which the instruments' cash flows are denominated;
- vi. Financial instruments for which foreign currency transaction gains and losses are reported in the same manner as translation adjustments under generally accepted accounting principles (see, *e.g.*, FAS 52 paragraph 20 (December 1981)); and
- vii. Derivatives used to manage risks inherent in anticipated transactions;

C. Registrants may aggregate information regarding functional currencies that are economically related, managed together for internal risk management purposes, and have statistical correlations of greater than 75% over each of the past three years;

D. Market risk sensitive instruments that are exposed to rate or price changes in more than one market risk exposure category should be presented within the tabular information for each of the risk exposure categories to which those instruments are exposed;

E. If a currency swap (see, *e.g.*, FAS 52 Appendix E for a definition of currency swap) eliminates all foreign currency exposures in the cash flows of a foreign currency denominated debt instrument, neither the currency swap nor the foreign currency denominated debt instrument are required to be disclosed in the foreign currency risk exposure category. However, both the currency swap and

the foreign currency denominated debt instrument should be disclosed in the interest rate risk exposure category; and

F. The contents of the table and related assumptions that should be described include, but are not limited to:

i. The different amounts reported in the table for various categories of the market risk sensitive instruments (*e.g.*, principal amounts for debt, notional amounts for swaps, and contract amounts for options and futures);

ii. The different types of reported market rates or prices (*e.g.*, contractual rates or prices, spot rates or prices, forward rates or prices); and

iii. Key prepayment or reinvestment assumptions relating to the timing of reported amounts.

3. Under paragraph 305(a)(1)(ii):

A. Registrants should select hypothetical changes in market rates or prices that are expected to reflect reasonably possible near-term changes in those rates and prices. In this regard, absent economic justification for the selection of a different amount, registrants should use changes that are not less than 10 percent of end of period market rates or prices;

B. For purposes of instruction 3.A. of the Instructions to Paragraph 305(a), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FASB, *Statement of Financial Accounting Standards No. 5*, "Accounting for Contingencies," ("FAS 5") paragraph 3 (March 1975));

C. For purposes of instruction 3.A. of the Instructions to Paragraph 305(a), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally AICPA, *Statement of Position 94-6*, "Disclosure of Certain Significant Risks and Uncertainties," ("SOP 94-6") at paragraph 7 (December 30, 1994));

D. Market risk sensitive instruments that are exposed to rate or price changes in more than one market risk exposure category should be included in the sensitivity analysis disclosures for each market risk category to which those instruments are exposed;

E. Registrants with multiple foreign currency exchange rate exposures should prepare foreign currency sensitivity analysis disclosures that measure the aggregate sensitivity to changes in all foreign currency exchange rate exposures, including the effects of changes in both transactional currency/functional currency exchange rate exposures and functional currency/reporting currency exchange rate exposures. For example, assume a French division of a registrant presenting its financial statements in U.S. dollars (\$US) invests in a deutschmark(DM)-denominated debt security. In these circumstances, the \$US is the reporting cur-

rency and the DM is the transactional currency. In addition, assume this division determines that the French franc (FF) is its functional currency according to FAS 52. In preparing the foreign currency sensitivity analysis disclosures, this registrant should report the aggregate potential loss from hypothetical changes in both the DM/FF exchange rate exposure and the FF/\$US exchange rate exposure; and

F. Model, assumptions, and parameters that should be described include, but are not limited to, how *loss* is defined by the model (*e.g.*, loss in earnings, fair values, or cash flows), a general description of the modeling technique (*e.g.*, duration modeling, modeling that measures the change in net present values arising from selected hypothetical changes in market rates or prices, and a description as to how optionality is addressed by the model), the types of instruments covered by the model (*e.g.*, derivative financial instruments, other financial instruments, derivative commodity instruments, and whether other instruments are included voluntarily, such as certain commodity instruments and positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)), and other relevant information about the model's assumptions and parameters, (*e.g.*, the magnitude and timing of selected hypothetical changes in market rates or prices used, the method by which discount rates are determined, and key prepayment or reinvestment assumptions).

4. Under paragraph 305(a)(1)(iii):

A. The confidence intervals selected should reflect reasonably possible near-term changes in market rates and prices. In this regard, absent economic justification for the selection of different confidence intervals, registrants should use intervals that are 95 percent or higher;

B. For purposes of instruction 4.A. of the Instructions to Paragraph 305(a), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, *e.g.*, FAS 5, paragraph 3 (March 1975));

C. For purposes of instruction 4.A. of the Instructions to Paragraphs 305(a), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally SOP 94-6, at paragraph 7 (December 30, 1994));

D. Registrants with multiple foreign currency exchange rate exposures should prepare foreign currency value at risk analysis disclosures that measure the aggregate sensitivity to changes in all foreign currency

exchange rate exposures, including the aggregate effects of changes in both transactional currency/functional currency exchange rate exposures and functional currency/reporting currency exchange rate exposures. For example, assume a French division of a registrant presenting its financial statements in U.S. dollars (\$US) invests in a deutschmark(DM)-denominated debt security. In these circumstances, the \$US is the reporting currency and the DM is the transactional currency. In addition, assume this division determines that the French franc (FF) is its functional currency according to FAS 52. In preparing the foreign currency value at risk disclosures, this registrant should report the aggregate potential loss from hypothetical changes in both the DM/FF exchange rate exposure and the FF/\$US exchange rate exposure; and

E. Model, assumptions, and parameters that should be described include, but are not limited to, how *loss* is defined by the model (*e.g.*, loss in earnings, fair values, or cash flows), the type of model used (*e.g.*, variance/covariance, historical simulation, or Monte Carlo simulation and a description as to how optionality is addressed by the model), the types of instruments covered by the model (*e.g.*, derivative financial instruments, other financial instruments, derivative commodity instruments, and whether other instruments are included voluntarily, such as certain commodity instruments and positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)), and other relevant information about the model's assumptions and parameters, (*e.g.*, holding periods, confidence intervals, and, when appropriate, the methods used for aggregating value at risk amounts across market risk exposure categories, such as by assuming perfect positive correlation, independence, or actual observed correlation).

5. Under paragraph 305(a)(2), limitations that should be considered include, but are not limited to:

A. The exclusion of certain market risk sensitive instruments, positions, and transactions from the disclosures required under paragraph 305(a)(1) (*e.g.*, derivative commodity instruments not permitted by contract or business custom to be settled in cash or with another financial instrument, commodity positions, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b)). Failure to include such instruments, positions, and transactions in preparing the disclosures under paragraph 305(a)(1) may be a limitation because the resulting disclosures may not fully reflect the net market risk of a registrant; and

B. The ability of disclosures required under paragraph 305(a)(1) to reflect fully the market risk that may be inherent in instruments with leverage, option, or prepayment features (*e.g.*, options, including written options, structured notes, collateralized mortgage obligations, leveraged swaps, and options embedded in swaps).

(b) *Qualitative information about market risk.* (1) To the extent material, describe:

(i) The registrant's primary market risk exposures;

(ii) How those exposures are managed. Such descriptions shall include, but not be limited to, a discussion of the objectives, general strategies, and instruments, if any, used to manage those exposures; and

(iii) Changes in either the registrant's primary market risk exposures or how those exposures are managed, when compared to what was in effect during the most recently completed fiscal year and what is known or expected to be in effect in future reporting periods.

(2) Qualitative information about market risk shall be presented separately for market risk sensitive instruments entered into for trading purposes and those entered into for purposes other than trading.

*Instructions to Paragraph 305(b):* 1. For purposes of disclosure under paragraph 305(b), *primary market risk exposures* means:

A. The following categories of market risk: interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (*e.g.*, equity price risk); and

B. Within each of these categories, the particular markets that present the primary risk of loss to the registrant. For example, if a registrant has a material exposure to foreign currency exchange rate risk and, within this category of market risk, is most vulnerable to changes in dollar/yen, dollar/pound, and dollar/peso exchange rates, the registrant should disclose those exposures. Similarly, if a registrant has a material exposure to interest rate risk and, within this category of market risk, is most vulnerable to changes in short-term U.S. prime interest rates, it should disclose the existence of that exposure.

2. For purposes of disclosure under paragraph 305(b), registrants should describe primary market risk exposures that exist as of the end of the latest fiscal year, and how those exposures are managed.

*General Instructions to Paragraphs 305(a) and 305(b):* 1. The disclosures called for by paragraphs 305(a) and 305(b) are intended to clarify the registrant's exposures to market risk associated with activities in derivative financial instruments, other financial instruments, and derivative commodity instruments.

2. In preparing the disclosures under paragraphs 305(a) and 305(b), registrants are required to include derivative financial instruments, other financial instruments, and derivative commodity instruments.

3. For purposes of paragraphs 305(a) and 305(b), derivative financial instruments, other financial instruments, and derivative commodity instruments (collectively referred to as "market risk sensitive instruments") are defined as follows:

A. *Derivative financial instruments* has the same meaning as defined by generally accepted accounting principles (see, e.g., FASB, *Statement of Financial Accounting Standards No. 119*, "Disclosure about Derivative Financial Instruments and Fair Value of Financial Instruments," ("FAS 119") paragraphs 5-7 (October 1994)), and includes futures, forwards, swaps, options, and other financial instruments with similar characteristics;

B. *Other financial instruments* means all financial instruments as defined by generally accepted accounting principles for which fair value disclosures are required (see, e.g., FASB, *Statement of Financial Accounting Standards No. 107*, "Disclosures about Fair Value of Financial Instruments," ("FAS 107") paragraphs 3 and 8 (December 1991)), except for derivative financial instruments, as defined above;

C.i. Other financial instruments include, but are not limited to, trade accounts receivable, investments, loans, structured notes, mortgage-backed securities, trade accounts payable, indexed debt instruments, interest-only and principal-only obligations, deposits, and other debt obligations;

ii. Other financial instruments exclude employers' and plans' obligations for pension and other post-retirement benefits, substantively extinguished debt, insurance contracts, lease contracts, warranty obligations and

rights, unconditional purchase obligations, investments accounted for under the equity method, minority interests in consolidated enterprises, and equity instruments issued by the registrant and classified in stockholders' equity in the statement of financial position (see, e.g., FAS 107, paragraph 8 (December 1991)). For purposes of this item, trade accounts receivable and trade accounts payable need not be considered other financial instruments when their carrying amounts approximate fair value; and

D. *Derivative commodity instruments* include, to the extent such instruments are not derivative financial instruments, commodity futures, commodity forwards, commodity swaps, commodity options, and other commodity instruments with similar characteristics that are permitted by contract or business custom to be settled in cash or with another financial instrument. For purposes of this paragraph, settlement in cash includes settlement in cash of the net change in value of the derivative commodity instrument (e.g., net cash settlement based on changes in the price of the underlying commodity).

4.A. In addition to providing required disclosures for the market risk sensitive instruments defined in instruction 2. of the General Instructions to Paragraphs 305(a) and 305(b), registrants are encouraged to include other market risk sensitive instruments, positions, and transactions within the disclosures required under paragraphs 305(a) and 305(b). Such instruments, positions, and transactions might include commodity positions, derivative commodity instruments that are not permitted by contract or business custom to be settled in cash or with another financial instrument, cash flows from anticipated transactions, and certain financial instruments excluded under instruction 3.C.ii. of the General Instructions to Paragraphs 305(a) and 305(b).

B. Registrants that voluntarily include other market risk sensitive instruments, positions and transactions within their quantitative disclosures about market risk under the sensitivity analysis or value at risk disclosure alternatives are not required to

provide separate market risk disclosures for any voluntarily selected instruments, positions, or transactions. Instead, registrants selecting the sensitivity analysis and value at risk disclosure alternatives are permitted to present comprehensive market risk disclosures, which reflect the combined market risk exposures inherent in both the required and any voluntarily selected instruments, position, or transactions. Registrants that choose the tabular presentation disclosure alternative should present voluntarily selected instruments, positions, or transactions in a manner consistent with the requirements in Item 305(a) for market risk sensitive instruments.

C. If a registrant elects to include voluntarily a particular type of instrument, position, or transaction in their quantitative disclosures about market risk, that registrant should include all, rather than some, of those instruments, positions, or transactions within those disclosures. For example, if a registrant holds in inventory a particular type of commodity position and elects to include that commodity position within their market risk disclosures, the registrant should include the entire commodity position, rather than only a portion thereof, in their quantitative disclosures about market risk.

5.A. Under paragraphs 305(a) and 305(b), a materiality assessment should be made for each market risk exposure category within the trading and other than trading portfolios.

B. For purposes of making the materiality assessment under instruction 5.A. of the General Instructions to Paragraphs 305(a) and 305(b), registrants should evaluate both:

i. The materiality of the fair values of derivative financial instruments, other financial instruments, and derivative commodity instruments outstanding as of the end of the latest fiscal year; and

ii. The materiality of potential, near-term losses in future earnings, fair values, and/or cash flows from reasonably possible near-term changes in market rates or prices.

iii. If either paragraphs B.i. or B.ii. in this instruction of the General Instructions to Paragraphs 305(a) and 305(b) are material, the registrant should dis-

close quantitative and qualitative information about market risk, if such market risk for the particular market risk exposure category is material.

C. For purposes of instruction 5.B.i. of the General Instructions to Paragraphs 305(a) and 305(b), registrants generally should not net fair values, except to the extent allowed under generally accepted accounting principles (see, e.g., *FASB Interpretation No. 39, "Offsetting of Amounts Related to Certain Contracts"* (March 1992)). For example, under this instruction, the fair value of assets generally should not be netted with the fair value of liabilities.

D. For purposes of instruction 5.B.ii. of the General Instructions to Paragraphs 305(a) and 305(b), registrants should consider, among other things, the magnitude of:

- i. Past market movements;
- ii. Reasonably possible, near-term market movements; and
- iii. Potential losses that may arise from leverage, option, and multiplier features.

E. For purposes of instructions 5.B.ii and 5.D.ii of the General Instructions to Paragraphs 305(a) and 305(b), the term *near term* means a period of time going forward up to one year from the date of the financial statements (see generally SOP 94-6, at paragraph 7 (December 30, 1994)).

F. For the purpose of instructions 5.B.ii. and 5.D.ii. of the General Instructions to Paragraphs 305(a) and 305(b), the term *reasonably possible* has the same meaning as defined by generally accepted accounting principles (see, e.g., FAS 5, paragraph 3 (March 1975)).

6. For purposes of paragraphs 305(a) and 305(b), registrants should present the information outside of, and not incorporate the information into, the financial statements (including the footnotes to the financial statements). In addition, registrants are encouraged to provide the required information in one location. However, alternative presentation, such as inclusion of all or part of the information in Management's Discussion and Analysis, may be used at the discretion of the registrant. If information is disclosed in more than

one location, registrants should provide cross-references to the locations of the related disclosures.

7. For purposes of the instructions to paragraphs 305(a) and 305(b), *trading purposes* has the same meaning as defined by generally accepted accounting principles (see, e.g., FAS 119, paragraph 9a (October 1994)). In addition, *anticipated transactions* means transactions (other than transactions involving existing assets or liabilities or transactions necessitated by existing firm commitments) an enterprise expects, but is not obligated, to carry out in the normal course of business (see, e.g., FASB, *Statement of Financial Accounting Standards No. 80, "Accounting for Futures Contracts,"* paragraph 9, (August 1984)).

(c) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S-X (17 CFR 210), discussion and analysis shall be provided so as to enable the reader to assess the sources and effects of material changes in information that would be provided under Item 305 of Regulation S-K from the end of the preceding fiscal year to the date of the most recent interim balance sheet.

*Instructions to Paragraph 305(c):* 1. Information required under paragraph (c) of this Item 305 is not required until after the first fiscal year end in which this Item 305 is applicable.

(d) *Safe Harbor.* (1) The safe harbor provided in Section 27A of the Securities Act of 1933 (15 U.S.C. 77z-2) and Section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbors") shall apply, with respect to all types of issuers and transactions, to information provided pursuant to paragraphs (a), (b), and (c) of this Item 305, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (d) of this Item 305 only:

(i) All information required by paragraphs (a), (b)(1)(i), (b)(1)(iii), and (c) of this Item 305 is considered *forward looking statements* for purposes of the statutory safe harbors, except for historical facts such as the terms of particular contracts and the number of market risk sensitive instruments held during or at the end of the reporting period; and

(ii) With respect to paragraph (a) of this Item 305, the *meaningful cautionary statements* prong of the statutory safe harbors will be satisfied if a registrant satisfies all requirements of that same paragraph (a) of this Item 305.

(e) *Small business issuers.* Small business issuers, as defined in §230.405 of this chapter and §230.12b-2 of this chapter, need not provide the information required by this Item 305, whether or not they file on forms specially designated as small business issuer forms.

*General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e):* 1. Bank registrants, thrift registrants, and non-bank and non-thrift registrants with market capitalizations on January 28, 1997 in excess of \$2.5 billion should provide Item 305 disclosures in filings with the Commission that include annual financial statements for fiscal years ending after June 15, 1997. Non-bank and non-thrift registrants with market capitalizations on January 28, 1997 of \$2.5 billion or less should provide Item 305 disclosures in filings with the Commission that include financial statements for fiscal years ending after June 15, 1998.

2.A. For purposes of instruction 1. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), *bank registrants and thrift registrants* include any registrant which has control over a depository institution.

B. For purposes of instruction 2.A. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), a registrant has control over a depository institution if:

- i. The registrant directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25% or more of any class of voting securities of the depository institution;
- ii. The registrant controls in any manner the election of a majority of the directors or trustees of the depository institution; or
- iii. The Federal Reserve Board or Office of Thrift Supervision determines, after notice and opportunity for hearing, that the registrant directly or indirectly exercises a controlling influence over the management or policies of the depository institution.

C. For purposes of instruction 2.B. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d), and 305(e), a depository institution means any of the following:

i. An insured depository institution as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C.A. Sec. 1813 (c));

ii. An institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, which both accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others and is engaged in the business of making commercial loans.

D. For purposes of instruction 1. of the General Instructions to Paragraphs 305(a), 305(b), 305(c), 305(d) and 305(e), *market capitalization* is the aggregate market value of common equity as set forth in General Instruction I.B.1. of Form S-3; provided however, that common equity held by affiliates is included in the calculation of market capitalization; and provided further that instead of using the 60 day period prior to filing referenced in General Instruction I.B.1. of Form S-3, the measurement date is January 28, 1997.

APPENDIX TO ITEM 305—TABULAR DISCLOSURES

The tables set forth below are illustrative of the format that might be used when a registrant elects to present the information required by paragraph (a)(1)(i)(A) of Item 305 regarding terms and information about derivative financial instruments, other financial instruments, and derivative commodity

instruments. These examples are for illustrative purposes only. Registrants are not required to display the information in the specific format illustrated below. Alternative methods of display are permissible as long as the disclosure requirements of the section are satisfied. Furthermore, these examples were designed primarily to illustrate possible formats for presentation of the information required by the disclosure item and do not purport to illustrate the broad range of derivative financial instruments, other financial instruments, and derivative commodity instruments utilized by registrants.

INTEREST RATE SENSITIVITY

The table below provides information about the Company's derivative financial instruments and other financial instruments that are sensitive to changes in interest rates, including interest rate swaps and debt obligations. For debt obligations, the table presents principal cash flows and related weighted average interest rates by expected maturity dates. For interest rate swaps, the table presents notional amounts and weighted average interest rates by expected (contractual) maturity dates. Notional amounts are used to calculate the contractual payments to be exchanged under the contract. Weighted average variable rates are based on implied forward rates in the yield curve at the reporting date. The information is presented in U.S. dollar equivalents, which is the Company's reporting currency. The instrument's actual cash flows are denominated in both U.S. dollars (\$US) and German deutschmarks (DM), as indicated in parentheses.

December 31, 19X1

	Expected maturity date							
	19X2	19X3	19X4	19X5	19X6	Thereafter	Total	Fair value
Liabilities	(US\$ Equivalent in millions)							
Long-term Debt:								
Fixed Rate (\$US) .....	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX
Average interest rate .....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%
Fixed Rate (DM) .....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average interest rate .....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%
Variable Rate (\$US) .....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average interest rate .....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%
Interest Rate Derivatives	(In millions)							
Interest Rate Swaps:								
Variable to Fixed (\$US)	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX
Average pay rate ....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%
Average receive rate .....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%
Fixed to Variable (\$US)	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX
Average pay rate ....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%

Securities and Exchange Commission

§ 229.305

December 31, 19X1

	Expected maturity date							Total	Fair value
	19X2	19X3	19X4	19X5	19X6	Thereafter			
Average receive rate .....	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%	X.X%		

EXCHANGE RATE SENSITIVITY

The table below provides information about the Company's derivative financial instruments, other financial instruments, and firmly committed sales transactions by functional currency and presents such information in U.S. dollar equivalents.<sup>1</sup> The table summarizes information on instruments and transactions that are sensitive to foreign currency exchange rates, including foreign currency forward exchange agreements, deutschmark (DM)-denominated debt obligations, and firmly committed DM sales trans-

actions. For debt obligations, the table presents principal cash flows and related weighted average interest rates by expected maturity dates. For firmly committed DM-sales transactions, sales amounts are presented by the expected transaction date, which are not expected to exceed two years. For foreign currency forward exchange agreements, the table presents the notional amounts and weighted average exchange rates by expected (contractual) maturity dates. These notional amounts generally are used to calculate the contractual payments to be exchanged under the contract.

December 31, 19X1

	Expected maturity date							Total	Fair value
	19X2	19X3	19X4	19X5	19X6	Thereafter			
On-Balance Sheet Financial Instruments	(US\$ Equivalent in millions)								
\$US Functional Currency <sup>2</sup> : Liabilities									
Long-Term Debt:									
Fixed Rate (DM) .....	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	\$XXX	
Average interest rate .....	X.X	X.X	X.X	X.X	X.X	X.X	X.X	.....	
Anticipated Transactions and Related Derivatives <sup>3</sup>	Expected maturity or transaction date (US\$ Equivalent in millions)								
\$US Functional Currency: Firmly committed Sales Contracts (DM) .....	\$XXX	\$XXX	.....	.....	.....	.....	\$XXX	\$XXX	
Forward Exchange Agreements (Receive \$US/Pay DM):									
Contract Amount .....	XXX	XXX	.....	.....	.....	.....	XXX	XXX	
Average Contractual Exchange Rate	X.X	X.X	.....	.....	.....	.....	X.X	.....	

<sup>2</sup> Similar tabular information would be provided for other functional currencies.

<sup>3</sup> Pursuant to General Instruction 4. to Items 305(a) and 305(b) of Regulation S-K, registrants may include cash flows from anticipated transactions and operating cash flows resulting from non-financial and non-commodity instruments.

<sup>1</sup> The information is presented in U.S. dollars because that is the registrant's reporting currency.

§ 229.306

17 CFR Ch. II (4-1-01 Edition)

COMMODITY PRICE SENSITIVITY

The table below provides information about the Company's corn inventory and futures contracts that are sensitive to changes in commodity prices, specifically corn prices. For inventory, the table presents the carrying amount and fair value at December 31, 19x1. For the futures contracts the table

presents the notional amounts in bushels, the weighted average contract prices, and the total dollar contract amount by expected maturity dates, the latest of which occurs one year from the reporting date. Contract amounts are used to calculate the contractual payments and quantity of corn to be exchanged under the futures contracts.

December 31, 19X1

	Carrying amount	Fair value
(In millions)		
On Balance Sheet Commodity Position and Related Derivatives		
Corn Inventory <sup>4</sup> .....	\$XXX	\$XXX
Related Derivatives		
Futures Contracts (Short):		
Contract Volumes (100,000 bushels) .....	XXX	.....
Weighted Average Price (Per 100,000 bushels) .....	\$X.XX	.....
Contract Amount (\$US in millions) .....	\$XXX	\$XXX

<sup>4</sup>Pursuant to General Instruction 4. to Items 305(a) and 305(b) of Regulation S-K, registrants may include information on commodity positions, such as corn inventory.

[62 FR 6064, Feb. 10, 1997]

§ 229.306 (Item 306) Audit committee report.

(a) The audit committee must state whether:

(1) The audit committee has reviewed and discussed the audited financial statements with management;

(2) The audit committee has discussed with the independent auditors the matters required to be discussed by SAS 61 (Codification of Statements on Auditing Standards, AU §380), as may be modified or supplemented;

(3) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as may be modified or supplemented, and has discussed with the independent accountant the independent accountant's independence; and

(4) Based on the review and discussions referred to in paragraphs (a)(1) through (a)(3) of this Item, the audit committee recommended to the Board of Directors that the audited financial statements be included in the com-

pany's Annual Report on Form 10-K (17 CFR 249.310) (or, for closed-end investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), the annual report to shareholders required by Section 30(e) of the Investment Company Act of 1940 (15 U.S.C. 80a-29(e)) and Rule 30d-1 (17 CFR 270.30d-1) thereunder) for the last fiscal year for filing with the Commission.

(b) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by this Item.

(c) The information required by paragraphs (a) and (b) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 *et seq.* or 240.14c-1 *et seq.*), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the company specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act.

(d) The information required by paragraphs (a) and (b) of this Item need not be provided in any filings other than a company proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the company specifically incorporates it by reference.

[64 FR 73402, Dec. 30, 1999]

### Subpart 229.400—Management and Certain Security Holders

#### § 229.401 (Item 401) Directors, executive officers, promoters and control persons.

(a) *Identification of directors.* List the names and ages of all directors of the registrant and all persons nominated or chosen to become directors; indicate all positions and offices with the registrant held by each such person; state his term of office as director and any period(s) during which he has served as such; describe briefly any arrangement or understanding between him and any other person(s) (naming such person(s)) pursuant to which he was or is to be selected as a director or nominee.

*Instructions to Paragraph (a) of Item 401:* 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No nominee or person chosen to become a director who has not consented to act as such shall be named in response to this Item. In this regard, with respect to proxy statements, see Rule 14a-4(d) under the Exchange Act (§ 240.14a-4(d) of this chapter).

3. If the information called for by this paragraph (a) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

4. With regard to proxy statements in connection with action to be taken concerning the election of directors, if fewer nominees are named than the number fixed by or pursuant to the governing instruments, state the reasons for this procedure and that the proxies cannot be voted for a greater number of persons than the number of nominees named.

5. With regard to proxy statements in connection with action to be taken concerning the election of directors, if the solicitation is made by persons other than management, information shall be given as to nominees of the persons making the solicitation. In all other instances, information shall be given as to directors and persons nominated for election or chosen by management to become directors.

(b) *Identification of executive officers.* List the names and ages of all executive officers of the registrant and all persons chosen to become executive officers; indicate all positions and offices with the registrant held by each such person; state his term of office as officer and the period during which he has served as such and describe briefly any arrangement or understanding between him and any other person(s) (naming such person) pursuant to which he was or is to be selected as an officer.

*Instructions to Paragraph (b) of Item 401:* 1. Do not include arrangements or understandings with directors or officers of the registrant acting solely in their capacities as such.

2. No person chosen to become an executive officer who has not consented to act as such shall be named in response to this Item.

3. The information regarding executive officers called for by this Item need not be furnished in proxy or information statements prepared in accordance with Schedule 14A under the Exchange Act (§ 240.14a-101 of this chapter) by those registrants relying on General Instruction G of Form 10-K and Form 10-KSB under the Exchange Act (§ 249.310 of this chapter), *Provided*, That such information is furnished in a separate item captioned "Executive officers of the registrant" and included in Part I of the registrant's annual report on Form 10-K and Form 10-KSB.

(c) *Identification of certain significant employees.* Where the registrant employs persons such as production managers, sales managers, or research scientists who are not executive officers but who make or are expected to make significant contributions to the business of the registrant, such persons shall be identified and their background disclosed to the same extent as in the case of executive officers. Such disclosure need not be made if the registrant was subject to section 13(a) or 15(d) of the Exchange Act or was exempt from section 13(a) by section 12(g)(2)(G) of such Act immediately prior to the filing of the registration

statement, report, or statement to which this Item is applicable.

(d) *Family relationships.* State the nature of any family relationship between any director, executive officer, or person nominated or chosen by the registrant to become a director or executive officer.

*Instruction to Paragraph 401(d):* The term “family relationship” means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(e) *Business experience—(1) Background.* Briefly describe the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each person named in answer to paragraph (c) of Item 401, including: Each person’s principal occupations and employment during the past five years; the name and principal business of any corporation or other organization in which such occupations and employment were carried on; and whether such corporation or organization is a parent, subsidiary or other affiliate of the registrant. When an executive officer or person named in response to paragraph (c) of Item 401 has been employed by the registrant or a subsidiary of the registrant for less than five years, a brief explanation shall be included as to the nature of the responsibility undertaken by the individual in prior positions to provide adequate disclosure of his prior business experience. What is required is information relating to the level of his professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(2) *Directorships.* Indicate any other directorships held by each director or person nominated or chosen to become a director in any company with a class of securities registered pursuant to section 12 of the Exchange Act or subject to the requirements of section 15(d) of such Act or any company registered as an investment company under the Investment Company Act of 1940, 15 U.S.C. 80a-1, *et seq.*, as amended, naming such company.

*Instruction to Paragraph (e) of Item 401:* For the purposes of paragraph (e)(2), where the

other directorships of each director or person nominated or chosen to become a director include directorships of two or more registered investment companies that are part of a “fund complex” as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act (§240.14a-101 of this chapter), the registrant may, rather than listing each such investment company, identify the fund complex and provide the number of investment company directorships held by the director or nominee in such fund complex.

(f) *Involvement in certain legal proceedings.* Describe any of the following events that occurred during the past five years and that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant:

(1) A petition under the Federal bankruptcy laws or any state insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was a general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing;

(2) Such person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Such person was the subject of any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining him from, or otherwise limiting, the following activities:

(i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or

## Securities and Exchange Commission

## § 229.401

continuing any conduct or practice in connection with such activity;

(ii) Engaging in any type of business practice; or

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or State securities laws or Federal commodities laws;

(4) Such person was the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or State authority barring, suspending or otherwise limiting for more than 60 days the right of such person to engage in any activity described in paragraph (f)(3)(i) of this section, or to be associated with persons engaged in any such activity; or

(5) Such person was found by a court of competent jurisdiction in a civil action or by the Commission to have violated any Federal or State securities law, and the judgment in such civil action or finding by the Commission has not been subsequently reversed, suspended, or vacated.

(6) Such person was found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodity Futures Trading Commission has not been subsequently reversed, suspended or vacated.

*Instructions to Paragraph (f) of Item 401:* 1. For purposes of computing the five year period referred to in this paragraph, the date of a reportable event shall be deemed the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees have lapsed. With respect to bankruptcy petitions, the computation date shall be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final.

2. If any event specified in this paragraph (f) has occurred and information in regard thereto is omitted on the grounds that it is not material, the registrant may furnish to the Commission, at time of filing (or at the time preliminary materials are filed, or ten days before definitive materials are filed in preliminary filing is not required, pursuant to Rule 14a-6 or 14c-5 under the Exchange Act (§§240.14a-6 and 240-14c-5 of this chap-

ter)), as supplemental information and not as part of the registration statement, report, or proxy or information statement, materials to which the omission relates, a description of the event and a statement of the reasons for the omission of information in regard thereto.

3. The registrant is permitted to explain any mitigating circumstances associated with events reported pursuant to this paragraph.

4. If the information called for by this paragraph (f) is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

(g) *Promoters and control persons.* (1) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which were organized within the last five years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

(2) Registrants, which have not been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, shall describe with respect to any control person, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

*Instructions to Paragraph (g) of Item 401:* 1. Instructions 1. through 3. to paragraph (f) shall apply to this paragraph (g).

2. Paragraph (g) shall not apply to any subsidiary of a registrant which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 48 FR 19874, May 3, 1983; 49 FR 32763, Aug. 16, 1984; 52 FR 48982, Dec. 29, 1987; 59 FR 52695, Oct. 19, 1994]

**§ 229.402 (Item 402) Executive compensation.**

(a) *General*—(1) *Treatment of specific types of issuers*—(i) *Small business issuers*. A registrant that qualifies as “small business issuer,” as defined by Item 10(a)(1) of Regulation S-B [17 CFR 228.10(a)(1)], will be deemed to comply with this item if it provides the information required by paragraph (b) (Summary Compensation Table), paragraphs (c)(1) and (c)(2)(i)–(v) (Option/SAR Grants Table), paragraph (d) (Aggregated Option/SAR Exercise and Fiscal Year-End Option/SAR Value Table), paragraph (e) (Long-Term Incentive Plan Awards Table), paragraph (g) (Compensation of Directors), paragraph (h) (Employment Contracts, Termination of Employment and Change in Control Arrangements) and paragraph (i) (1) and (2) (Report on Repricing of Options/SARs) of this item.

(ii) *Foreign private issuers*. A foreign private issuer will be deemed to comply with this item if it provides the information required by Items 6.B. and 6.E.2. of Form 20-F (17 CFR 249.220f), with more detailed information provided if otherwise made publicly available.

(2) *All compensation covered*. This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this item, and directors covered by paragraph (g) of this item by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specified in this item. Except as provided by paragraph (a)(5) of this item, all such compensation shall be reported pursuant to this item, even if also called for by another requirement, including transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to any such named executive officer or director. No item reported as compensation for one fiscal year need be reported as compensation for a subsequent fiscal year.

(3) *Persons covered*. Disclosure shall be provided pursuant to this item for each of the following (the “named executive officers”):

(i) All individuals serving as the registrant’s chief executive officer or acting in a similar capacity during the last completed fiscal year (“CEO”), regardless of compensation level;

(ii) The registrant’s four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(3)(ii) of this item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

*Instructions to Item 402(a)(3): 1. Determination of Most Highly Compensated Executive Officers.* The determination as to which executive officers are most highly compensated shall be made by reference to total annual salary and bonus for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii) (A) and (B) of this item), but including the dollar value of salary or bonus amounts forgone pursuant to Instruction 3 to paragraph (b)(2)(iii) (A) and (B) of this item: *Provided, however,* That no disclosure need be provided for any executive officer, other than the CEO, whose total annual salary and bonus, as so determined, does not exceed \$100,000.

*2. Inclusion of Executive Officer of Subsidiary.* It may be appropriate in certain circumstances for a registrant to include an executive officer of a subsidiary in the disclosure required by this item. *See* Rule 3b-7 under the Exchange Act [17 CFR 240.3b-7].

*3. Exclusion of Executive Officer due to Unusual or Overseas Compensation.* It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this item an individual, other than its CEO, who is one of the registrant’s most highly compensated executive officers. Among the factors that should be considered in determining not to name an individual are: (a) the distribution or accrual of an unusually large amount of cash compensation (such as a bonus or commission) that is not part of a recurring arrangement and is unlikely to continue; and (b) the payment of amounts of cash compensation relating to overseas assignments that may be attributed predominantly to such assignments.

(4) *Information for full fiscal year.* If the CEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of

his or her compensation for the full fiscal year. If a named executive officer (other than the CEO) served as an executive officer of the registrant (whether or not in the same position) during any part of a fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(5) *Transactions with third parties reported under item 404.* This item includes transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to a named executive officer. No information need be given in response to any paragraph of this item, other than paragraph (j), as to any such third-party transaction if the transaction has been reported in response to Item 404 of Regulation S-K (§ 229.404).

(6) *Omission of table or column.* A table or column may be omitted, if there has been no compensation awarded to, earned by or paid to any of the named executives required to be reported in that table or column in any fiscal year covered by that table.

(7) *Definitions.* For purposes of this item:

(i) The term *stock appreciation rights (SARs)* refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer.

(ii) The term *plan* includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which the following may be received: cash, stock, restricted stock or restricted stock units, phantom stock, stock options, SARs, stock options in tandem with SARs, warrants, convertible securities, performance units and performance shares, and similar instruments. A plan may be applicable to one person. Registrants may omit information regarding group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in scope, terms or operation, in

favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term *long-term incentive plan* means any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other measure, but excluding restricted stock, stock option and SAR plans.

(8) *Location of specified information.* The information required by paragraphs (i), (k) and (l) of this item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

(9) *Liability for specified information.* The information required by paragraphs (k) and (l) of this item shall not be deemed to be "soliciting material" or to be "filed" with the Commission or subject to Regulations 14A or 14C [17 CFR 240.14a-1 *et seq.* or 240.14c-1 *et seq.*], other than as provided in this item, or to the liabilities of section 18 of the Exchange Act [15 U.S.C. 78r], except to the extent that the registrant specifically requests that such information be treated as soliciting material or specifically incorporates it by reference into a filing under the Securities Act or the Exchange Act.

(b) *Summary Compensation Table.* (1) *General.* The information specified in paragraph (b)(2) of this item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, shall be provided in a Summary Compensation Table, in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and principal position	Year	Annual compensation			Long term compensation			
		Salary (\$)	Bonus (\$)	Other annual compensation (\$)	Awards		Payouts LTIP payouts (\$)	All other compensation (\$)
					Restricted stock award(s)	Securities under-lying options/SARs (#)		
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
CEO .....	—							
	—							
A .....	—							
	—							
B .....	—							
	—							
C .....	—							
	—							
D .....	—							
	—							
	—							

- (2) The Table shall include:
- (i) The name and principal position of the executive officer (column (a));
  - (ii) Fiscal year covered (column (b));
  - (iii) Annual compensation (columns (c), (d) and (e)), including:
    - (A) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));
    - (B) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d)); and

*Instructions to Item 402(b)(2)(iii) (A) and (B):* 1. Amounts deferred at the election of a named executive officer, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)], or otherwise, shall be included in the salary column (column (c)) or bonus column (column (d)), as appropriate, for the fiscal year in which earned. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, that fact must be disclosed in a footnote and such amount must be disclosed in the subsequent fiscal year in the appropriate column for the fiscal year in which earned.

2. For stock or any other form of non-cash compensation, disclose the fair market value at the time the compensation is awarded, earned or paid.

3. Registrants need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive

officer pursuant to a registrant program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive in lieu of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation in lieu of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Table corresponding to that fiscal year (i.e., restricted stock awards (column (f)); options or SARs (column (g)); all other compensation (column (i)), or, if made pursuant to a long-term incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column so disclosing and referring to the Long-Term Incentive Plan Table (required by paragraph (e) of this item) where the award is reported.

(C) The dollar value of other annual compensation not properly categorized as salary or bonus, as follows (column (e)):

(1) Perquisites and other personal benefits, securities or property, unless the aggregate amount of such compensation is the lesser of either \$50,000 or 10% of the total of annual salary and bonus reported for the named executive officer in columns (c) and (d);

(2) Above-market or preferential earnings on restricted stock, options, SARs or deferred compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(3) Earnings on long-term incentive plan compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(4) Amounts reimbursed during the fiscal year for the payment of taxes; and

(5) The dollar value of the difference between the price paid by a named executive officer for any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise), and the fair market value of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant.

*Instructions to Item 402(b)(2)(iii)(C):* 1. Each perquisite or other personal benefit exceeding 25% of the total perquisites and other personal benefits reported for a named executive officer must be identified by type and amount in a footnote or accompanying narrative discussion to column (e).

2. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant and its subsidiaries.

3. Interest on deferred or long-term compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, [26 U.S.C. 1274(d)]) at the rate that corresponds most closely to the rate under the registrant's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate.

4. Dividends (and dividend equivalents) on restricted stock, options, SARs or deferred compensation denominated in stock ("deferred stock") are preferential only if earned at a rate higher than dividends on the registrant's common stock. Only the preferential portion of the dividends or equivalents must be included.

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) The dollar value (net of any consideration paid by the named executive officer) of any award of restricted stock, including share units (calculated by multiplying the closing market price of the registrant's unrestricted stock on the date of grant by the number of shares awarded) (column (f));

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of freestanding SARs (column (g)); and

(C) The dollar value of all payouts pursuant to long-term incentive plans ("LTIPs") as defined in paragraph (a)(7)(iii) of this item (column (h)).

*Instructions to Item 402(b)(2)(iv):* 1. Awards of restricted stock that are subject to performance-based conditions on vesting, in addition to lapse of time and/or continued service with the registrant or a subsidiary, may be reported as LTIP awards pursuant to paragraph (e) of this item instead of in column (f). If this approach is selected, once the restricted stock vests, it must be reported as an LTIP payout in column (h).

2. The registrant shall, in a footnote to the Summary Compensation Table (appended to column (f), if included), disclose:

a. The number and value of the aggregate restricted stock holdings at the end of the last completed fiscal year. The value shall be calculated in the manner specified in paragraph (b)(2)(iv)(A) of this item using the value of the registrant's shares at the end of the last completed fiscal year;

b. For any restricted stock award reported in the Summary Compensation Table that will vest, in whole or in part, in under three years from the date of grant, the total number of shares awarded and the vesting schedule; and

c. Whether dividends will be paid on the restricted stock reported in column (f).

3. If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of stock options or freestanding SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), the registrant shall include the number of options or freestanding SARs so repriced as Stock Options/SARs granted and required to be reported in column (g).

4. If any specified performance target, goal or condition to payout was waived with respect to any amount included in LTIP payouts reported in column (h), the registrant shall so state in a footnote to column (h).

(v) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Any compensation reported in this column for the last completed fiscal year shall be identified and quantified in a footnote. Such compensation shall include, but not be limited to:

(A) The amount paid, payable or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries; or

(2) A change in control of the registrant or a change in the executive officer's responsibilities following such a change in control;

(B) The dollar value of above-market or preferential amounts earned on restricted stock, options, SARs or deferred compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during the period, or payable during the period but deferred at the election of a named executive officer, this information shall be reported as Other Annual Compensation in column (e). See Instructions 3 and 4 to paragraph 402(b)(2)(iii)(C) of this item;

(C) The dollar value of amounts earned on long-term incentive plan compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during that period, or payable during that period at the election of the named executive officer, this information shall be reported as Other Annual Compensation in column (e);

(D) Annual registrant contributions or other allocations to vested and unvested defined contribution plans; and

(E) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to term life insurance for the benefit of a named executive officer, and, if there is any arrangement or understanding, whether

formal or informal, that such executive officer has or will receive or be allocated an interest in any cash surrender value under the insurance policy, either:

(1) The full dollar value of the remainder of the premiums paid by, or on behalf of, the registrant; or

(2) If the premiums will be refunded to the registrant on termination of the policy, the dollar value of the benefit to the executive officer of the remainder of the premium paid by, or on behalf of, the registrant during the fiscal year. The benefit shall be determined for the period, projected on an actuarial basis, between payment of the premium and the refund.

*Instructions to Item 402(b)(2)(v):* 1. LTIP awards and amounts received on exercise of options and SARs need not be reported as All Other Compensation in column (i).

2. Information relating to defined benefit and actuarial plans should not be reported pursuant to paragraph (b) of this item, but instead should be reported pursuant to paragraph (f) of this item.

3. Where alternative methods of reporting are available under paragraph (b)(2)(v)(E) of this item, the same method should be used for each of the named executive officers. If the registrant chooses to change methods from one year to the next, that fact, and the reason therefor, should be disclosed in a footnote to column (i).

*Instruction to Item 402(b):* Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to Section 13(a) or 15(d) of the Exchange Act at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

(c) *Option/SAR Grants Table.* (1) The information specified in paragraph (c)(2) of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and free-standing SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified as follows:

OPTION/SAR GRANTS IN LAST FISCAL YEAR

Individual grants					Potential realizable value at assumed annual rates of stock price appreciation for option term		Alternative to (f) and (g): grant date value
Name	Number of securities underlying options/SARs granted (#)	Percent of total options/SARs granted to employees in fiscal year	Exercise of base price (\$/Sh)	Expiration date	5% (\$)	10% (\$)	Grant date present value \$
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(f)
CEO .....							
A .....							
B .....							
C .....							
D .....							

(2) The Table shall include, with respect to each grant:

(i) The name of the executive officer (column (a));

(ii) Number of securities underlying option/SARs granted (column (b)).

(iii) The percent the grant represents of total options and SARs granted to employees during the fiscal year (column (c));

(iv) The per-share exercise or base price of the options or SARs granted (column (d)). If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate, adjoining column shall be added showing market price on the date of grant;

(v) The expiration date of the options or SARs (column (e)); and

(vi) Either (A) the potential realizable value of each grant of options or freestanding SARs or (B) the present value of each grant, as follows:

(A) The potential realizable value of each grant of options or freestanding SARs, assuming that the market price of the underlying security appreciates in value from the date of grant to the end of the option or SAR term, at the following annualized rates:

(1) 5% (column (f));

(2) 10% (column (g)); and

(3) If the exercise or base price was below the market price of the underlying security at the date of grant, provide an additional column labeled 0%, to show the value at grant-date market price; or

(B) The present value of the grant at the date of grant, under any option pricing model (alternative column (f)).

*Instructions to Item 402(c):* 1. If more than one grant of options and/or freestanding SARs was made to a named executive officer during the last completed fiscal year, a separate line should be used to provide disclosure of each such grant. However, multiple grants during a single fiscal year may be aggregated where each grant was made at the same exercise and/or base price and has the same expiration date, and the same performance vesting thresholds, if any. A single grant consisting of options and/or freestanding SARs shall be reported as separate grants with respect to each tranche with a different exercise and/or base price, performance vesting threshold, or expiration date.

2. Options or freestanding SARs granted in connection with an option repricing transaction shall be reported in this table. See Instruction 3 to paragraph (b)(2)(iv) of this item.

3. Any material term of the grant, including but not limited to the date of exercisability, the number of SARs, performance units or other instruments granted in tandem with options, a performance-based condition to exercisability, a reload feature, or a tax-reimbursement feature, shall be footnoted.

4. If the exercise or base price is adjustable over the term of any option or freestanding SAR in accordance with any prescribed standard or formula, including but not limited to an index or premium price provision, describe the following, either by footnote to column (c) or in narrative accompanying the Table: (a) the standard or formula; and (b) any constant assumption made by the registrant regarding any adjustment to the exercise price in calculating the potential option or SAR value.

5. If any provision of a grant (other than an antidilution provision) could cause the exercise price to be lowered, registrants must clearly and fully disclose these provisions and their potential consequences either by a footnote or accompanying textual narrative.

6. In determining the grant-date market or base price of the security underlying options

§ 229.402

17 CFR Ch. II (4-1-01 Edition)

or freestanding SARs, the registrant may use either the closing market price per share of the security, or any other formula prescribed for the security.

7. The potential realizable dollar value of a grant (columns (f) and (g)) shall be the product of:

(a) The difference between:

(i) The product of the per-share market price at the time of the grant and the sum of 1 plus the adjusted stock price appreciation rate (the assumed rate of appreciation compounded annually over the term of the option or SAR); and

(ii) The per-share exercise price of the option or SAR; and

(b) The number of securities underlying the grant at fiscal year-end.

8. Registrants may add one or more separate columns using the formula prescribed in Instruction 7 to paragraph (c) of this item, to reflect the following:

a. The registrant's historic rate of appreciation over a period equivalent to the term of such options and/or SARs;

b. 0% appreciation, where the exercise or base price was equal to or greater than the market price of the underlying securities on the date of grant; and

c. N% appreciation, the percentage appreciation by which the exercise or base price exceeded the market price at grant. Where the grant included multiple tranches with exercise or base prices exceeding the market

price of the underlying security by varying degrees, include an additional column for each additional tranche.

9. Where the registrant chooses to use the grant-date valuation alternative specified in paragraph (c)(2)(vi)(B) of this item, the valuation shall be footnoted to describe the valuation method used. Where the registrant has used a variation of the Black-Scholes or binomial option pricing model, the description shall identify the use of such pricing model and describe the assumptions used relating to the expected volatility, risk-free rate of return, dividend yield and time of exercise. Any adjustments for non-transferability or risk of forfeiture also shall be disclosed. In the event another valuation method is used, the registrant is required to describe the methodology as well as any material assumptions.

(d) *Aggregated option/SAR exercises and fiscal year-end option/SAR value table.* (1) The information specified in paragraph (d)(2) of this item, concerning each exercise of stock options (or tandem SARs) and freestanding SARs during the last completed fiscal year by each of the named executive officers and the fiscal year-end value of unexercised options and SARs, shall be provided on an aggregated basis in the tabular format specified below:

AGGREGATED OPTION/SAR EXERCISES IN LAST FISCAL YEAR AND FY-END OPTION/SAR VALUES

Name	Shares acquired on exercise (#)	Value realized (\$)	Number of securities underlying unexercised options/SARs at FY-end (#) Exercisable/Unexercisable	Value of unexercised in-the-money options/SARs at FY-end (\$) Exercisable/Unexercisable
(a)	(b)	(c)	(d)	(e)
CEO .....				
A .....				
B .....				
C .....				
D .....				

(2) The table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares received upon exercise, or, if no shares were received, the number of securities with respect to which the options or SARs were exercised (column (b));

(iii) The aggregate dollar value realized upon exercise (column (c));

(iv) The total number of securities underlying unexercised options and SARs held at the end of the last completed fiscal year, separately identifying

the exercisable and unexercisable options and SARs (column (d)); and

(v) The aggregate dollar value of in-the-money, unexercised options and SARs held at the end of the fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (e)).

*Instructions to Item 402(d)(2):* 1. Options or freestanding SARs are in-the-money if the fair market value of the underlying securities exceeds the exercise or base price of the option or SAR. The dollar values in columns (c) and (e) are calculated by determining the difference between the fair market value of

**Securities and Exchange Commission**

**§ 229.402**

the securities underlying the options or SARs and the exercise or base price of the options or SARs at exercise or fiscal year-end, respectively.

2. In calculating the dollar value realized upon exercise (column (c)), the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes, shall not be included. Payments by the registrant in reimbursement of tax obligations incurred by a named execu-

tive officer are required to be disclosed in accordance with paragraph (b)(2)(iii)(C)(4) of this item.

(e) *Long-Term Incentive Plan (“LTIP”) awards table.* (1) The information specified in paragraph (e)(2) of this item, regarding each award made to a named executive officer in the last completed fiscal year under any LTIP, shall be provided in the tabular format specified below:

**LONG-TERM INCENTIVE PLANS—AWARDS IN LAST FISCAL YEAR**

Name (a)	Number of shares, units or other rights (#) (b)	Performance or other period until maturation or payout (c)	Estimated future payouts under non-stock price-based plans		
			Threshold (\$ or #) (d)	Target (\$ or #) (e)	Maximum (\$ or #) (f)
CEO .....					
A .....					
B .....					
C .....					
D .....					

(2) The Table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares, units or other rights awarded under any LTIP, and, if applicable, the number of shares underlying any such unit or right (column (b));

(iii) The performance or other time period until payout or maturation of the award (column (c)); and

(iv) For plans not based on stock price, the dollar value of the estimated payout, the number of shares to be awarded as the payout or a range of estimated payouts denominated in dollars or number of shares under the award (threshold, target and maximum amount) (columns (d) through (f)).

*Instructions to Item 402(e):* 1. For purposes of this paragraph, the term “long-term incentive plan” or “LTIP” shall be defined in accordance with paragraph (a)(7)(iii) of this item.

2. Describe in a footnote or in narrative text accompanying this table the material terms of any award, including a general description of the formula or criteria to be applied in determining the amounts payable. Registrants are not required to disclose any factor, criterion or performance-related or other condition to payout or maturation of a particular award that involves confidential commercial or business information, disclosure of which would adversely affect the registrant’s competitive position.

3. Separate disclosure shall be provided in the Table for each award made to a named executive officer, accompanied by the information specified in Instruction 2 to this paragraph. If awards are made to a named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such award was made.

4. For column (d), “threshold” refers to the minimum amount payable for a certain level of performance under the plan. For column (e), “target” refers to the amount payable if the specified performance target(s) are reached. For column (f), “maximum” refers to the maximum payout possible under the plan.

5. In column (e), registrants must provide a representative amount based on the previous fiscal year’s performance if the target award is not determinable.

6. A tandem grant of two instruments, only one of which is pursuant to a LTIP, need be reported only in the table applicable to the other instrument. For example, an option granted in tandem with a performance share would be reported only as an option grant, with the tandem feature noted.

(f) *Defined benefit or actuarial plan disclosure—(1) Pension plan table.* (i) For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide a separate Pension Plan Table showing estimated annual benefits payable upon retirement (including amounts attributable to any

§ 229.402

17 CFR Ch. II (4-1-01 Edition)

defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications in the format specified below.

PENSION PLAN TABLE					
Remuneration	Years of service				
	15	20	25	30	35
125,000 .....	.....	.....	.....	.....	.....
150,000 .....	.....	.....	.....	.....	.....
175,000 .....	.....	.....	.....	.....	.....
200,000 .....	.....	.....	.....	.....	.....
225,000 .....	.....	.....	.....	.....	.....
250,000 .....	.....	.....	.....	.....	.....
300,000 .....	.....	.....	.....	.....	.....
400,000 .....	.....	.....	.....	.....	.....
450,000 .....	.....	.....	.....	.....	.....
500,000 .....	.....	.....	.....	.....	.....

(ii) Immediately following the Table, the registrant shall disclose:

(A) The compensation covered by the plan(s), including the relationship of such covered compensation to the annual compensation reported in the Summary Compensation Table required by paragraph (b)(2)(iii) of this item, and state the current compensation covered by the plan for any named executive officer whose covered compensation differs substantially (by more than 10%) from that set forth in the annual compensation columns of the Summary Compensation Table;

(B) The estimated credited years of service for each of the named executive officers; and

(C) A statement as to the basis upon which benefits are computed (e.g., straight-life annuity amounts), and whether or not the benefits listed in the Pension Plan Table are subject to any deduction for Social Security or other offset amounts.

(2) *Alternative pension plan disclosure.* For any defined benefit or actuarial plan under which benefits are not determined primarily by final compensation (or average final compensation) and years of service, the registrant shall state in narrative form:

(i) The formula by which benefits are determined; and

(ii) The estimated annual benefits payable upon retirement at normal retirement age for each of the named executive officers.

*Instructions to Item 402(f):* 1. *Pension Levels.* Compensation set forth in the Pension Plan

Table pursuant to paragraph (f)(1)(i) of this item shall allow for reasonable increases in existing compensation levels; alternatively, registrants may present as the highest compensation level in the Pension Plan Table an amount equal to 120% of the amount of covered compensation of the most highly compensated individual named in the Summary Compensation Table required by paragraph (b)(2) of this item.

2. *Normal Retirement Age.* The term “normal retirement age” means normal retirement age as defined in a pension or similar plan or, if not defined therein, the earliest time at which a participant may retire without any benefit reduction due to age.

(g) *Compensation of Directors—(1) Standard arrangements.* Describe any standard arrangements, stating amounts, pursuant to which directors of the registrant are compensated for any services provided as a director, including any additional amounts payable for committee participation or special assignments.

(2) *Other arrangements.* Describe any other arrangements pursuant to which any director of the registrant was compensated during the registrant’s last completed fiscal year for any service provided as a director, stating the amount paid and the name of the director.

*Instruction to Item 402(g)(2):* The information required by paragraph (g)(2) of this item shall include any arrangement, including consulting contracts, entered into in consideration of the director’s service on the board. The material terms of any such arrangement shall be included.

(h) *Employment contracts and termination of employment and change-in-control arrangements.* Describe the terms and conditions of each of the following contracts or arrangements:

(1) Any employment contract between the registrant and a named executive officer; and

(2) Any compensatory plan or arrangement, including payments to be received from the registrant, with respect to a named executive officer, if such plan or arrangement results or will result from the resignation, retirement or any other termination of such executive officer’s employment with the registrant and its subsidiaries or

**Securities and Exchange Commission**

**§ 229.402**

from a change-in-control of the registrant or a change in the named executive officer's responsibilities following a change-in-control and the amount involved, including all periodic payments or installments, exceeds \$100,000.

(i) *Report on repricing of options/SARs.* (1) If at any time during the last completed fiscal year, the registrant, while a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act [15 U.S.C. 78m(a), 78o(d)], has adjusted or amended the exercise price of stock options or SARs previously awarded to any of the named executive officers, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), the registrant shall provide the information

specified in paragraphs (i)(2) and (i)(3) of this item.

(2) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) shall explain in reasonable detail any such repricing of options and/or SARs held by a named executive officer in the last completed fiscal year, as well as the basis for each such repricing.

(3)(i) The information specified in paragraph (i)(3)(ii) of this item, concerning all such repricings of options and SARs held by any executive officer during the last ten completed fiscal years, shall be provided in the tabular format specified below:

TEN-YEAR OPTION/SAR REPRICINGS

Name	Date	Number of securities underlying options/SARs repriced or amended (#)	Market price of stock at time of repricing or amendment (\$)	Exercise price at time of repricing or amendment (\$)	New exercise price (\$)	Length of original option term remaining at date of repricing or amendment
(a)	(b)	(c)	(d)	(e)	(f)	(g)

(ii) The Table shall include, with respect to each repricing:

(A) The name and position of the executive officer (column (a));

(B) The date of each repricing (column (b));

(C) The number of securities underlying replacement or amended options or SARs (column (c));

(D) The per-share market price of the underlying security at the time of repricing (column (d));

(E) The original exercise price or base price of the cancelled or amended option or SAR (column (e));

(F) The per-share exercise price or base price of the replacement option or SAR (column (f)); and

(G) The amount of time remaining before the replaced or amended option or SAR would have expired (column (g)).

*Instructions to Item 402(i):* 1. The required report shall be made over the name of each member of the registrant's compensation committee, or other board committee performing equivalent functions or, in the ab-

sence of any such committee, the entire board of directors.

2. A replacement grant is any grant of options or SARs reasonably related to any prior or potential option or SAR cancellation, whether by an exchange of existing options or SARs for options or SARs with new terms; the grant of new options or SARs in tandem with previously granted options or SARs that will operate to cancel the previously granted options or SARs upon exercise; repricing of previously granted options or SARs; or otherwise. If a corresponding original grant was canceled in a prior year, information about such grant nevertheless must be disclosed pursuant to this paragraph.

3. If the replacement grant is not made at the current market price, describe the terms of the grant in a footnote or accompanying textual narrative.

4. This paragraph shall not apply to any repricing occurring through the operation of:

- a. A plan formula or mechanism that results in the periodic adjustment of the option or SAR exercise or base price;
- b. A plan antidilution provision; or
- c. A recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

§ 229.402

17 CFR Ch. II (4-1-01 Edition)

5. Information required by paragraph (i)(3) of this item shall not be provided for any repricings effected before the registrant became a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act.

(j) *Additional information with respect to Compensation Committee Interlocks and Insider Participation in compensation decisions.* Under the caption “Compensation Committee Interlocks and Insider Participation,”

(1) The registrant shall identify each person who served as a member of the compensation committee of the registrant’s board of directors (or board committee performing equivalent functions) during the last completed fiscal year, indicating each committee member who:

(i) Was, during the fiscal year, an officer or employee of the registrant or any of its subsidiaries;

(ii) Was formerly an officer of the registrant or any of its subsidiaries; or

(iii) Had any relationship requiring disclosure by the registrant under any paragraph of Item 404 of Regulation S-K (§229.404). In this event, the disclosure required by Item 404 shall accompany such identification.

(2) If the registrant has no compensation committee (or other board committee performing equivalent functions), the registrant shall identify each officer and employee of the registrant or any of its subsidiaries, and any former officer of the registrant or any of its subsidiaries, who, during the last completed fiscal year, participated in deliberations of the registrant’s board of directors concerning executive officer compensation.

(3) The registrant shall describe any of the following relationships that existed during the last completed fiscal year:

(i) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant;

(ii) An executive officer of the registrant served as a director of another entity, one of whose executive officers served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of the registrant; and

(iii) An executive officer of the registrant served as a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served as a director of the registrant.

(4) Disclosure required under paragraph (j)(3) of this item regarding any compensation committee member or other director of the registrant who also served as an executive officer of another entity shall be accompanied by the disclosure called for by Item 404 (§229.404) with respect to that person.

*Instruction to Item 402(j):* For purposes of this paragraph, the term “entity” shall not include an entity exempt from tax under section 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)].

(k) *Board compensation committee report on executive compensation.* (1) Disclosure of the compensation committee’s compensation policies applicable to the registrant’s executive officers (including the named executive officers), including the specific relationship of corporate performance to executive compensation, is required with respect to compensation reported for the last completed fiscal year.

(2) Discussion is required of the compensation committee’s bases for the CEO’s compensation reported for the last completed fiscal year, including the factors and criteria upon which the CEO’s compensation was based. The committee shall include a specific discussion of the relationship of the registrant’s performance to the CEO’s compensation for the last completed fiscal year, describing each measure of the registrant’s performance, whether qualitative or quantitative, on which the CEO’s compensation was based.

(3) The required disclosure shall be made over the name of each member of

the registrant's compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, entire board of directors). If the board of directors modified or rejected in any material way any action or recommendation by such committee with respect to such decisions in the last completed fiscal year, the disclosure must so indicate and explain the reasons for the board's actions, and be made over the names of all members of the board.

*Instructions to Item 402(k):* 1. Boilerplate language should be avoided in describing factors and criteria underlying awards or payments of executive compensation in the statement required.

2. Registrants are not required to disclose target levels with respect to specific quantitative or qualitative performance-related factors considered by the committee (or board), or any factors or criteria involving confidential commercial or business information, the disclosure of which would have an adverse effect on the registrant.

(1) Performance graph. (1) Provide a line graph comparing the yearly percentage change in the registrant's cumulative total shareholder return on a class of common stock registered under section 12 of the Exchange Act (as measured by dividing (i) the sum of (A) the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and (B) the difference between the registrant's share price at the end and the beginning of the measurement period; by (ii) the share price at the beginning of the measurement period) with

(i) the cumulative total return of a broad equity market index assuming reinvestment of dividends, that includes companies whose equity securities are traded on the same exchange or NASDAQ market or are of comparable market capitalization; *Provided, however,* That if the registrant is a company within the Standard & Poor's 500 Stock Index, the registrant must use that index; and

(ii) The cumulative total return, assuming reinvestment of dividends, of:

(A) A published industry or line-of-business index;

(B) Peer issuer(s) selected in good faith. If the registrant does not select its peer issuer(s) on an industry or line-

of-business basis, the registrant shall disclose the basis for its selection; or

(C) Issuer(s) with similar market capitalization(s), but only if the registrant does not use a published industry or line-of-business index and does not believe it can reasonably identify a peer group. If the registrant uses this alternative, the graph shall be accompanied by a statement of the reasons for this selection.

(2) For purposes of paragraph (1)(1) of this item, the term "measurement period" shall be the period beginning at the "measurement point" established by the market close on the last trading day before the beginning of the registrant's fifth preceding fiscal year, through and including the end of the registrant's last completed fiscal year. If the class of securities has been registered under section 12 of the Exchange Act for a shorter period of time, the period covered by the comparison may correspond to that time period.

(3) For purposes of paragraph (1)(1)(ii)(A) of this item, the term "published industry or line-of-business index" means any index that is prepared by a party other than the registrant or an affiliate and is accessible to the registrant's security holders; provided, however, that registrants may use an index prepared by the registrant or affiliate if such index is widely recognized and used.

(4) If the registrant selects a different index from an index used for the immediately preceding fiscal year, explain the reason(s) for this change and also compare the registrant's total return with that of both the newly selected index and the index used in the immediately preceding fiscal year.

*Instructions to Item 402(l):* 1. In preparing the required graphic comparisons, the registrant should:

a. Use, to the extent feasible, comparable methods of presentation and assumptions for the total return calculations required by paragraph (1)(1) of this item; *Provided, however,* That if the registrant constructs its own peer group index under paragraph (1)(1)(ii)(B), the same methodology must be used in calculating both the registrant's total return and that on the peer group index; and

b. Assume the reinvestment of dividends into additional shares of the same class of equity securities at the frequency with

**§ 229.403**

**17 CFR Ch. II (4-1-01 Edition)**

which dividends are paid on such securities during the applicable fiscal year.

2. In constructing the graph:

(a) The closing price at the measurement point must be converted into a fixed investment, stated in dollars, in the registrant's stock (or in the stocks represented by a given index), with cumulative returns for each subsequent fiscal year measured as a change from that investment; and

(b) Each fiscal year should be plotted with points showing the cumulative total return as of that point. The value of the investment as of each point plotted on a given return line is the number of shares held at that point multiplied by the then-prevailing share price.

3. The registrant is required to present information for the registrant's last five fiscal years, and may choose to graph a longer period; but the measurement point, however, shall remain the same.

4. Registrants may include comparisons using performance measures in addition to total return, such as return on average common shareholders' equity, so long as the registrant's compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) describes the link between that measure and the level of executive compensation in the statement required by paragraph (k) of this Item.

5. If the registrant uses a peer issuer(s) comparison or comparison with issuer(s) with similar market capitalizations, the identity of those issuers must be disclosed and the returns of each component issuer of the group must be weighted according to the respective issuer's stock market capitalization at the beginning of each period for which a return is indicated.

[57 FR 48150, Oct. 21, 1992, as amended at 57 FR 53985, Nov. 16, 1992; 58 FR 63013, Nov. 29, 1993; 64 FR 11115, Mar. 8, 1999; 64 FR 53909, Oct. 5, 1999]

**§ 229.403 (Item 403) Security ownership of certain beneficial owners and management.**

(a) *Security ownership of certain beneficial owners.* Furnish the following information, as of the most recent practicable date, substantially in the tabular form indicated, with respect to any person (including any "group" as that term is used in section 13(d)(3) of the Exchange Act) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's voting securities. The address given in column (2) may be a business, mailing or residence address.

Show in column (3) the total number of shares beneficially owned and in column (4) the percentage of class so owned. Of the number of shares shown in column (3), indicate by footnote or otherwise the amount known to be shares with respect to which such listed beneficial owner has the right to acquire beneficial ownership, as specified in Rule 13d-3(d)(1) under the Exchange Act (§ 240.13d-3(d)(1) of this chapter).

(1) Title of class	(2) Name and address of beneficial owner	(3) Amount and nature of beneficial ownership	(4) Percent of class

(b) *Security ownership of management.* Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(3) (§ 229.402(a)(3)), and directors and executive officers of the registrant as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in § 240.13d-3(d)(1) of this chapter.

(1) Title of class	(2) Name of beneficial owner	(3) Amount of nature of beneficial ownership	(4) Percent of class

(c) *Changes in control.* Describe any arrangements, known to the registrant, including any pledge by any person of securities of the registrant or any of its parents, the operation of which may at a subsequent date result in a change in control of the registrant.

*Instructions to Item 403:* 1. The percentages are to be calculated on the basis of the amount of outstanding securities, excluding securities held by or for the account of the registrant or its subsidiaries, plus securities deemed outstanding pursuant to Rule 13d-

3(d)(1) under the Exchange Act 17 (CFR 240.13d-3(d)(1)). For purposes of paragraph (b), if the percentage of shares beneficially owned by any director or nominee, or by all directors and officers of the registrant as a group, does not exceed one percent of the class so owned, the registrant may, in lieu of furnishing a precise percentage, indicate this fact by means of an asterisk and explanatory footnote or other similar means.

2. For the purposes of this Item, beneficial ownership shall be determined in accordance with Rule 13d-3 under the Exchange Act (§240.13d-3 of this chapter). Include such additional subcolumns or other appropriate explanation of column (3) necessary to reflect amounts as to which the beneficial owner has (A) sole voting power, (B) shared voting power, (C) sole investment power, or (D) shared investment power.

3. The registrant shall be deemed to know the contents of any statements filed with the Commission pursuant to section 13(d) or 13(g) of the Exchange Act. When applicable, a registrant may rely upon information set forth in such statements unless the registrant knows or has reason to believe that such information is not complete or accurate or that a statement or amendment should have been filed and was not.

4. For purposes of furnishing information pursuant to paragraph (a) of this Item, the registrant may indicate the source and date of such information.

5. Where more than one beneficial owner is known to be listed for the same securities, appropriate disclosure should be made to avoid confusion. For purposes of paragraph (b), in computing the aggregate number of shares owned by directors and officers of the registrant as a group, the same shares shall not be counted more than once.

6. Paragraph (c) of this Item does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the registrant.

7. Where the holder(s) of voting securities reported pursuant to paragraph (a) hold more than five percent of any class of voting securities of the registrant pursuant to any voting trust or similar agreement, state the title of such securities, the amount held or to be held pursuant to the trust or agreement (if not clear from the table) and the duration of the agreement. Give the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the trust or agreement.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 55665, Dec. 13, 1982; 51 FR 42056, Nov. 20, 1986; 57 FR 48158, Oct. 21, 1992]

### § 229.404 (Item 404) Certain relationships and related transactions.

(a) *Transactions with management and others.* Describe briefly any transaction, or series of similar transactions, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, or series of similar transactions, to which the registrant or any of its subsidiaries was or is to be a party, in which the amount involved exceeds \$60,000 and in which any of the following persons had, or will have, a direct or indirect material interest, naming such person and indicating the person's relationship to the registrant, the nature of such person's interest in the transaction(s), the amount of such transaction(s) and, where practicable, the amount of such person's interest in the transaction(s):

(1) Any director or executive officer of the registrant;

(2) Any nominee for election as a director;

(3) Any security holder who is known to the registrant to own of record or beneficially more than five percent of any class of the registrant's voting securities; and

(4) Any member of the immediate family of any of the foregoing persons.

*Instructions to Paragraph (a) of Item 404:* 1. The materiality of any interest is to be determined on the basis of the significance of the information to investors in light of all the circumstances of the particular case. The importance of the interest to the person having the interest, the relationship of the parties to the transaction with each other and the amount involved in the transactions are among the factors to be considered in determining the significance of the information to investors.

2. For purposes of paragraph (a), a person's immediate family shall include such person's spouse; parents; children; siblings; mothers and fathers-in-law; sons and daughters-in-law; and brothers and sisters-in-law.

3. In computing the amount involved in the transaction or series of similar transactions, include all periodic installments in the case of any lease or other agreement providing for periodic payments or installments.

4. The amount of the interest of any person specified in paragraphs (a) (1) through (4) shall be computed without regard to the amount of the profit or loss involved in the transaction(s).

5. In describing any transaction involving the purchase or sale of assets by or to the

registrant or any of its subsidiaries, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within two years prior to the transaction, the cost thereof to the seller. Indicate the principle followed in determining the registrant's purchase or sale price and the name of the person making such determination.

6. Information shall be furnished in answer to paragraph (a) with respect to transactions that involve remuneration from the registrant or its subsidiaries, directly or indirectly, to any of the persons specified in paragraphs (a) (1) through (4) for services in any capacity unless the interest of such person arises solely from the ownership individually and in the aggregate of less than ten percent of any class of equity securities of another corporation furnishing the services to the registrant or its subsidiaries.

7. No information need be given in answer to paragraph (a) as to any transactions where:

A. The rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

B. The transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture, or similar services; or

C. The interest of the person specified in paragraphs (a) (1) through (4) arises solely from the ownership of securities of the registrant and such person receives no extra or special benefit not shared on a pro rata basis.

8. Paragraph (a) requires disclosure of indirect, as well as direct, material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the registrant or its subsidiaries may have an indirect interest in such transaction by reason of such position or relationship. Such an interest, however, shall not be deemed "material" within the meaning of paragraph (a) where:

A. The interest arises only: (i) From such person's position as a director of another corporation or organization which is a party to the transaction; or (ii) from the direct or indirect ownership by such person and all other persons specified in paragraphs (a) (1) through (4), in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or (iii) from both such position and ownership;

B. The interest arises only from such person's position as a limited partner in a partnership in which the person and all other persons specified in paragraphs (a) (1)

through (4) have an interest of less than ten percent; or

C. The interest of such person arises solely from the holding of an equity interest (including a limited partnership interest, but excluding a general partnership interest) or a creditor interest in another person that is a party to the transaction with the registrant or any of its subsidiaries, and the transaction is not material to such other person.

9. There may be situations where, although these instructions do not expressly authorize nondisclosure, the interest of a person specified in paragraphs (a) (1) through (4) in a particular transaction or series of transactions is not a direct or indirect material interest. In that case, information regarding such interest and transaction is not required to be disclosed in response to this paragraph.

(b) *Certain business relationships.* Describe any of the following relationships regarding directors or nominees for director that exist, or have existed during the registrant's last fiscal year, indicating the identity of the entity with which the registrant has such a relationship, the name of the nominee or director affiliated with such entity and the nature of such nominee's or director's affiliation, the relationship between such entity and the registrant and the amount of the business done between the registrant and the entity during the registrant's last full fiscal year or proposed to be done during the registrant's current fiscal year:

(1) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business or professional entity that has made during the registrant's last full fiscal year, or proposes to make during the registrant's current fiscal year, payments to the registrant or its subsidiaries for property or services in excess of five percent of (i) the registrant's consolidated gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(2) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business

or professional entity to which the registrant or its subsidiaries has made during the registrant's last full fiscal year, or proposes to make during the registrant's current fiscal year, payments for property or services in excess of five percent of (i) the registrant's consolidated gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(3) If the nominee or director is, or during the last fiscal year has been, an executive officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of ten percent equity interest in, any business or professional entity to which the registrant or its subsidiaries was indebted at the end of the registrant's last full fiscal year in an aggregate amount in excess of five percent of the registrant's total consolidated assets at the end of such fiscal year;

(4) If the nominee or director is, or during the last fiscal year has been, a member of, or of counsel to, a law firm that the issuer has retained during the last fiscal year or proposes to retain during the current fiscal year; *Provided, however*, that the dollar amount of fees paid to a law firm by the registrant need not be disclosed if such amount does not exceed five percent of the law firm's gross revenues for that firm's last full fiscal year;

(5) If the nominee or director is, or during the last fiscal year has been, a partner or executive officer of any investment banking firm that has performed services for the registrant, other than as a participating underwriter in a syndicate, during the last fiscal year or that the registrant proposes to have perform services during the current year; *Provided, however*, That the dollar amount of compensation received by an investment banking firm need not be disclosed if such amount does not exceed five percent of the investment banking firm's consolidated gross revenues for that firm's last full fiscal year; or

(6) Any other relationships that the registrant is aware of between the nominee or director and the registrant that are substantially similar in nature and scope to those relationships listed in paragraphs (b) (1) through (5).

*Instructions to Paragraph (b) of Item 404:* 1. In order to determine whether payments or indebtedness exceed five percent of the consolidated gross revenues of any entity, other than the registrant, it is appropriate to rely on information provided by the nominee or director.

2. In calculating payments for property and services the following may be excluded:

A. Payments where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

B. Payments that arise solely from the ownership of securities of the registrant and no extra or special benefit not shared on a pro rata basis by all holders of the class of securities is received; or

C. Payments made or received by subsidiaries other than significant subsidiaries as defined in Rule 1-02(w) of Regulation S-X [§210.1-02(w) of this chapter], provided that all such subsidiaries making or receiving payments, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1-02(w).

3. In calculating indebtedness the following may be excluded:

A. Debt securities that have been publicly offered, admitted to trading on a national securities exchange, or quoted on the automated quotation system of a registered securities association;

B. Amounts due for purchases subject to the usual trade terms; or

C. Indebtedness incurred by subsidiaries other than significant subsidiaries as defined in Rule 1-02(w) of Regulation S-X [§210.1-02(w) of this chapter], provided that all such subsidiaries incurring indebtedness, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1-02(w).

4. No information called for by paragraph (b) need be given respecting any director who is no longer a director at the time of filing the registration statement or report containing such disclosure. If such information is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

(c) *Indebtedness of management.* If any of the following persons has been indebted to the registrant or its subsidiaries at any time since the beginning of the registrant's last fiscal year in an amount in excess of \$60,000, indicate the name of such person, the nature of the person's relationship by reason of

which such person's indebtedness is required to be described, the largest aggregate amount of indebtedness outstanding at any time during such period, the nature of the indebtedness and of the transaction in which it was incurred, the amount thereof outstanding as of the latest practicable date and the rate of interest paid or charged thereon:

(1) Any director or executive officer of the registrant;

(2) Any nominee for election as a director;

(3) Any member of the immediate family of any of the persons specified in paragraph (c) (1) or (2);

(4) Any corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which any of the persons specified in paragraph (c) (1) or (2) is an executive officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of equity securities; and

(5) Any trust or other estate in which any of the persons specified in paragraph (c) (1) or (2) has a substantial beneficial interest or as to which such person serves as a trustee or in a similar capacity.

*Instructions to Paragraph (c), of Item 404:* 1. For purposes of paragraph (c), the members of a person's immediate family are those persons specified in Instruction 2 to Item 404(a).

2. Exclude from the determination of the amount of indebtedness all amounts due from the particular person for purchases subject to usual trade terms, for ordinary travel and expense payments and for other transactions in the ordinary course of business.

3. If the lender is a bank, savings and loan association, or broker-dealer extending credit under Federal Reserve Regulation T [12 CFR part 220] and the loans are not disclosed as nonaccrual, past due, restructured or potential problems (see Item III.C. 1. and 2. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies), disclosure may consist of a statement, if such is the case, that the loans to such persons (A) were made in the ordinary course of business, (B) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (C) did not involve more than the normal risk of collectibility or present other unfavorable features.

4. If any indebtedness required to be described arose under section 16(b) of the Ex-

change Act and has not been discharged by payment, state the amount of any profit realized, that such profit will inure to the benefit of the registrant or its subsidiaries and whether suit will be brought or other steps taken to recover such profit. If, in the opinion of counsel, a question reasonably exists as to the recoverability of such profit, it will suffice to state all facts necessary to describe the transactions, including the prices and number of shares involved.

(d) *Transactions with promoters.* Registrants that have been organized within the past five years and that are filing a registration statement on Form S-1 under the Securities Act (§239.11 of this chapter) or on Form 10 and Form 10-SB under the Exchange Act (§239.210 of this chapter) shall:

(1) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the registrant and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(2) As to any assets acquired or to be acquired by the registrant from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount and identify the persons making the determination and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the registrant, also state the cost thereof to the promoter.

*Instructions to Item 404:* 1. No information need be given in response to any paragraph of Item 404 as to any compensation or other transaction reported in response to any other paragraph of Item 404 or to Item 402 of Regulation S-K (§229.402 of this chapter) or as to any compensation with respect to which information may be omitted pursuant to Item 402.

2. If the information called for by Item 404 is being presented in a registration statement filed pursuant to the Securities Act or the Exchange Act, information shall be given for the periods specified in the Item and, in addition, for the two fiscal years preceding the registrant's last fiscal year.

## Securities and Exchange Commission

## § 229.501

3. A foreign private issuer will be deemed to comply with Item 404 if it provides the information required by Item 7.B of Form 20-F (17 CFR 249.220f).

[47 FR 55665, Dec. 13, 1982, as amended at 48 FR 37612, Aug. 19, 1983; 48 FR 44475, Sept. 29, 1983; 56 FR 30053, 30054, July 1, 1991; 59 FR 65637, Dec. 20, 1994; 64 FR 53909, Oct. 5, 1999]

### § 229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.

Every registrant having a class of equity securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l), every closed-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), and every holding company registered pursuant to the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) shall:

(a) Based solely upon a review of Forms 3 (§249.103) and 4 (§249.104) and amendments thereto furnished to the registrant pursuant to §240.16a-3(e) during its most recent fiscal year and Forms 5 and amendments thereto (§249.105) furnished to the registrant with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this Item.

(1) Under the caption "Section 16(a) Beneficial Ownership Reporting Compliance," identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 of the Exchange Act, or any other person subject to section 16 of the Exchange Act with respect to the registrant because of the requirements of section 30 of the Investment Company Act or section 17 of the Public Utility Holding Company Act ("reporting person") that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting per-

sons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

NOTE: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item 405 with respect to the most recently concluded fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item:

(1) A form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission by the required filing date.

(2) If the registrant (i) receives a written representation from the reporting person that no Form 5 is required; and (ii) maintains the representation for two years, making a copy available to the Commission or its staff upon request, the registrant need not identify such reporting person pursuant to paragraph (a) of this Item as having failed to file a Form 5 with respect to that fiscal year.

[56 FR 7265, Feb. 21, 1991, as amended at 61 FR 30391, June 14, 1996]

### Subpart 229.500—Registration Statement and Prospectus Provisions

#### § 229.501 (Item 501) Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

The registrant must furnish the following information in plain English. See §230.421(d) of Regulation C of this chapter.

(a) *Front cover page of the registration statement.* Where appropriate, include the delaying amendment legend from §230.473 of Regulation C of this chapter.

(b) *Outside front cover page of the prospectus.* Limit the outside cover page to

one page. If the following information applies to your offering, disclose it on the outside cover page of the prospectus.

(1) *Name.* The registrant's name. A foreign registrant must give the English translation of its name.

*Instruction to paragraph 501(b)(1):* If your name is the same as that of a company that is well known, include information to eliminate any possible confusion with the other company. If your name indicates a line of business in which you are not engaged or you are engaged only to a limited extent, include information to eliminate any misleading inference as to your business. In some circumstances, disclosure may not be sufficient and you may be required to change your name. You will not be required to change your name if you are an established company, the character of your business has changed, and the investing public is generally aware of the change and the character of your current business.

(2) *Title and amount of securities.* The title and amount of securities offered. Separately state the amount of securities offered by selling security holders, if any. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Give a brief description of the securities except where the information is clear from the title of the security. For example, you are not required to describe common stock that has full voting, dividend and liquidation rights usually associated with common stock.

(3) *Offering price of the securities.* Where you offer securities for cash, the price to the public of the securities, the underwriter's discounts and commissions, the net proceeds you receive, and any selling shareholder's net proceeds. Show this information on both a per share or unit basis and for the total amount of the offering. If you make the offering on a minimum/maximum basis, show this information based on the total minimum and total maximum amount of the offering. You may present the information in a table, term sheet format, or other clear presentation. You may present the infor-

mation in any format that fits the design of the cover page so long as the information can be easily read and is not misleading:

*Instructions to paragraph 501(b)(3):* 1. If a preliminary prospectus is circulated and you are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, provide, as applicable:

(A) A bona fide estimate of the range of the maximum offering price and the maximum number of securities offered; or

(B) A bona fide estimate of the principal amount of the debt securities offered.

2. If it is impracticable to state the price to the public, explain the method by which the price is to be determined. If the securities are to be offered at the market price, or if the offering price is to be determined by a formula related to the market price, indicate the market and market price of the securities as of the latest practicable date.

3. If you file a registration statement on Form S-8, you are not required to comply with this paragraph (b)(3).

(4) *Market for the securities.* Whether any national securities exchange or the Nasdaq Stock Market lists the securities offered, naming the particular market(s), and identifying the trading symbol(s) for those securities;

(5) *Risk factors.* A cross-reference to the risk factors section, including the page number where it appears in the prospectus. Highlight this cross-reference by prominent type or in another manner;

(6) *State legend.* Any legend or statement required by the law of any state in which the securities are to be offered. You may combine this with any legend required by the SEC, if appropriate;

(7) *Commission legend.* A legend that indicates that neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosures in the prospectus and that any contrary representation is a criminal offense. You may use one of the following or other clear, plain language:

*Example A:* Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

*Example B:* Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(8) *Underwriting.* (i) Name(s) of the lead or managing underwriter(s) and an identification of the nature of the underwriting arrangements;

(ii) If the offering is not made on a firm commitment basis, a brief description of the underwriting arrangements. You may use any clear, concise, and accurate description of the underwriting arrangements. You may use the following descriptions of underwriting arrangements where appropriate:

*Example A: Best efforts offering.* The underwriters are not required to sell any specific number or dollar amount of securities but will use their best efforts to sell the securities offered.

*Example B: Best efforts, minimum-maximum offering.* The underwriters must sell the minimum number of securities offered (*insert number*) if any are sold. The underwriters are required to use only their best efforts to sell the maximum number of securities offered (*insert number*).

(iii) If you offer the securities on a best efforts or best efforts minimum/maximum basis, the date the offering will end, any minimum purchase requirements, and any arrangements to place the funds in an escrow, trust, or similar account. If you have not made any of these arrangements, state this fact and describe the effect on investors;

(9) *Date of prospectus.* The date of the prospectus;

(10) *Prospectus "Subject to Completion" legend.* If you use the prospectus before the effective date of the registration statement, a prominent statement that:

(i) The information in the prospectus will be amended or completed;

(ii) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(iii) The securities may not be sold until the registration statement becomes effective; and

(iv) The prospectus is not an offer to sell the securities and it is not solic-

iting an offer to buy the securities in any state where offers or sales are not permitted. The legend may be in the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(11) If you use § 230.430A of this chapter to omit pricing information and the prospectus is used before you determine the public offering price, the information and legend in paragraph (b)(10) of this section.

[63 FR 6381, Feb. 6, 1998]

**§ 229.502 (Item 502) Inside front and outside back cover pages of prospectus.**

The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Table of contents.* On either the inside front or outside back cover page of the prospectus, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include a specific listing of the risk factors section required by Item 503 of this Regulation S-K (17 CFR 229.503). You must include the table of contents immediately following the cover page in any prospectus you deliver electronically.

(b) *Dealer prospectus delivery obligation.* On the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Securities Act (15 U.S.C. 77d(3)) and § 230.174 of this chapter. If you do not know the expiration date on the effective date of the registration statement, include the expiration date in the copy of the prospectus you file under § 230.424(b) of this chapter. You do not have to include this information if dealers are not required to deliver a prospectus under § 230.174 of this chapter or Section 24(d) of the Investment Company

## § 229.503

## 17 CFR Ch. II (4-1-01 Edition)

Act (15 U.S.C. 80a-24). You may use the following or other clear, plain language:

### DEALER PROSPECTUS DELIVERY OBLIGATION

Until (*insert date*), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

[63 FR 6383, Feb. 6, 1998]

### § 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Prospectus summary.* Provide a summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful. The summary should be brief. The summary should not contain, and is not required to contain, all of the detailed information in the prospectus. If you provide summary business or financial information, even if you do not caption it as a summary, you still must provide that information in plain English.

*Instruction to paragraph 503(a):* The summary should not merely repeat the text of the prospectus but should provide a brief overview of the key aspects of the offering. Carefully consider and identify those aspects of the offering that are the most significant and determine how best to highlight those points in clear, plain language.

(b) *Address and telephone number.* Include, either on the cover page or in the summary section of the prospectus, the complete mailing address and telephone number of your principal executive offices.

(c) *Risk factors.* Where appropriate, provide under the caption "Risk Factors" a discussion of the most significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption

that adequately describes the risk. The risk factor discussion must immediately follow the summary section. If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on § 230.430A(a) of this chapter. The risk factors may include, among other things, the following:

- (1) Your lack of an operating history;
- (2) Your lack of profitable operations in recent periods;
- (3) Your financial position;
- (4) Your business or proposed business; or
- (5) The lack of a market for your common equity securities or securities convertible into or exercisable for common equity securities.

(d) *Ratio of earnings to fixed charges.* If you register debt securities, show a ratio of earnings to fixed charges. If you register preference equity securities, show the ratio of combined fixed charges and preference dividends to earnings. Present the ratio for each of the last five fiscal years and the latest interim period for which financial statements are presented in the document. If you will use the proceeds from the sale of debt or preference securities to repay any of your outstanding debt or to retire other securities and the change in the ratio would be ten percent or greater, you must include a ratio showing the application of the proceeds, commonly referred to as the pro forma ratio.

*Instructions to paragraph 503(d):* 1. *Definitions.* In calculating the ratio of earnings to fixed charges, you must use the following definitions:

(A) *Fixed charges.* The term "fixed charges" means the sum of the following: (a) interest expensed and capitalized, (b) amortized premiums, discounts and capitalized expenses related to indebtedness, (c) an estimate of the interest within rental expense, and (d) preference security dividend requirements of consolidated subsidiaries.

(B) *Preference security dividend.* The term "preference security dividend" is the amount of pre-tax earnings that is required to pay the dividends on outstanding preference securities. The dividend requirement must be

computed as the amount of the dividend divided by (1 minus the effective income tax rate applicable to continuing operations).

(C) *Earnings*. The term "earnings" is the amount resulting from adding and subtracting the following items. Add the following: (a) Pre-tax income from continuing operations before adjustment for minority interests in consolidated subsidiaries or income or loss from equity investees, (b) fixed charges, (c) amortization of capitalized interest, (d) distributed income of equity investees, and (e) your share of pre-tax losses of equity investees for which charges arising from guarantees are included in fixed charges. From the total of the added items, subtract the following: (a) interest capitalized, (b) preference security dividend requirements of consolidated subsidiaries, and (c) the minority interest in pre-tax income of subsidiaries that have not incurred fixed charges. Equity investees are investments that you account for using the equity method of accounting. Public utilities following SFAS 71 should not add amortization of capitalized interest in determining earnings, nor reduce fixed charges by any allowance for funds used during construction.

2. *Disclosure*. Disclose the following information when showing the ratio of earnings to fixed charges:

(A) *Deficiency*. If a ratio indicates less than one-to-one coverage, disclose the dollar amount of the deficiency.

(B) *Pro forma ratio*. You may show the pro forma ratio only for the most recent fiscal year and the latest interim period. Use the net change in interest or dividends from the refinancing to calculate the pro forma ratio.

(C) *Foreign private issuers*. A foreign private issuer must show the ratio based on the figures in the primary financial statement. A foreign private issuer must show the ratio based on the figures resulting from the reconciliation to U.S. generally accepted accounting principles if this ratio is materially different.

(D) *Summary Section*. If you provide a summary or similar section in the prospectus, show the ratios in that section.

3. *Exhibit*. File an exhibit to the registration statement to show the figures used to calculate the ratios. See paragraph (b)(12) of Item 601 of Regulation S-K (17 CFR 229.601(b)(12)).

[63 FR 6383, Feb. 6, 1998]

#### § 229.504 (Item 504) Use of proceeds.

State the principal purposes for which the net proceeds to the registrant from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose. Where registrant has no current specific plan for the pro-

ceeds, or a significant portion thereof, the registrant shall so state and discuss the principal reasons for the offering.

*Instructions to Item 504*: 1. Where less than all the securities to be offered may be sold and more than one use is listed for the proceeds, indicate the order of priority of such purposes and discuss the registrant's plans if substantially less than the maximum proceeds are obtained. Such discussion need not be included if underwriting arrangements with respect to such securities are such that, if any securities are sold to the public, it reasonably can be expected that the actual proceeds will not be substantially less than the aggregate proceeds to the registrant shown pursuant to Item 501 of Regulation S-K (§229.501).

2. Details of proposed expenditures need not be given; for example, there need be furnished only a brief outline of any program of construction or addition of equipment. Consideration should be given as to the need to include a discussion of certain matters addressed in the discussion and analysis of registrant's financial condition and results of operations, such as liquidity and capital expenditures.

3. If any material amounts of other funds are necessary to accomplish the specified purposes for which the proceeds are to be obtained, state the amounts and sources of such other funds needed for each such specified purpose and the sources thereof.

4. If any material part of the proceeds is to be used to discharge indebtedness, set forth the interest rate and maturity of such indebtedness. If the indebtedness to be discharged was incurred within one year, describe the use of the proceeds of such indebtedness other than short-term borrowings used for working capital.

5. If any material amount of the proceeds is to be used to acquire assets, otherwise than in the ordinary course of business, describe briefly and state the cost of the assets and, where such assets are to be acquired from affiliates of the registrant or their associates, give the names of the persons from whom they are to be acquired and set forth the principle followed in determining the cost to the registrant.

6. Where the registrant indicates that the proceeds may, or will, be used to finance acquisitions of other businesses, the identity of such businesses, if known, or, if not known, the nature of the businesses to be sought, the status of any negotiations with respect to the acquisition, and a brief description of such business shall be included. Where, however, pro forma financial statements reflecting such acquisition are not required by Regulation S-X to be included, in the registration statement, the possible terms of any transaction, the identification of the parties

## § 229.505

thereto or the nature of the business sought need not be disclosed, to the extent that the registrant reasonably determines that public disclosure of such information would jeopardize the acquisition. Where Regulation S-X (17 CFR 210) would require financial statements of the business to be acquired to be included, the description of the business to be acquired shall be more detailed.

7. The registrant may reserve the right to change the use of proceeds, provided that such reservation is due to certain contingencies that are discussed specifically and the alternatives to such use in that event are indicated.

### § 229.505 (Item 505) Determination of offering price.

(a) *Common equity.* Where common equity is being registered for which there is no established public trading market for purposes of paragraph (a) of Item 201 of Regulation S-K (§229.201(a)) or where there is a material disparity between the offering price of the common equity being registered and the market price of outstanding shares of the same class, describe the various factors considered in determining such offering price.

(b) *Warrants, rights and convertible securities.* Where warrants, rights or convertible securities exercisable for common equity for which there is no established public trading market for purposes of paragraph (a) of Item 201 of Regulation S-K (§229.201(a)) are being registered, describe the various factors considered in determining their exercise or conversion price.

### § 229.506 (Item 506) Dilution.

Where common equity securities are being registered and there is substantial disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons of common equity acquired by them in transactions during the past five years, or which they have the right to acquire, and the registrant is not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately prior to filing of the registration statement, there shall be included a comparison of the public contribution under the proposed public offering and the effective cash contribution of such persons. In such cases, and in other instances where common equity securities are being

## 17 CFR Ch. II (4-1-01 Edition)

registered by a registrant that has had losses in each of its last three fiscal years and there is a material dilution of the purchasers' equity interest, the following shall be disclosed:

(a) The net tangible book value per share before and after the distribution;

(b) The amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and

(c) The amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

### § 229.507 (Item 507) Selling security holders.

If any of the securities to be registered are to be offered for the account of security holders, name each such security holder, indicate the nature of any position, office, or other material relationship which the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder prior to the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after completion of the offering.

### § 229.508 (Item 508) Plan of distribution.

(a) *Underwriters and underwriting obligation.* If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the registrant and state the nature of the relationship. State briefly the nature of the obligation of the underwriter(s) to take the securities.

*Instruction to Paragraph 508(a):* All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take and to pay for all of the securities if any are taken, or whether it is merely an agency or the type of *best efforts* arrangement under which the underwriters are required to take and to pay for only such securities as they may sell to the

public. Conditions precedent to the underwriters' taking the securities, including *market-outs*, need not be described except in the case of an agency or *best efforts* arrangement.

(b) *New underwriters.* Where securities being registered are those of a registrant that has not previously been required to file reports pursuant to section 13(a) or 15(d) of the Exchange Act, or where a prospectus is required to include reference on its cover page to material risks pursuant to Item 501 of Regulation S-K (§229.501), and any one or more of the managing underwriter(s) (or where there are no managing underwriters, a majority of the principal underwriters) has been organized, reactivated, or first registered as a broker-dealer within the past three years, these facts concerning such underwriter(s) shall be disclosed in the prospectus together with, where applicable, the disclosures that the principal business function of such underwriter(s) will be to sell the securities to be registered, or that the promoters of the registrant have a material relationship with such underwriter(s). Sufficient details shall be given to allow full appreciation of such underwriter(s) experience and its relationship with the registrant, promoters and their controlling persons.

(c) *Other distributions.* Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.

(1) If any securities are to be offered pursuant to a dividend or interest reinvestment plan the terms of which provide for the purchase of some securities on the market, state whether the registrant or the participant pays fees, commissions, and expenses incurred in connection with the plan. If the participant will pay such fees, commissions and expenses, state the anticipated cost to participants by transaction or other convenient reference.

(2) If the securities are to be offered through the selling efforts of brokers or dealers, describe the plan of distribution and the terms of any agreement, arrangement, or understanding entered into with broker(s) or dealer(s) prior to the effective date of the registration statement, including volume limitations on sales, parties to the

agreement and the conditions under which the agreement may be terminated. If known, identify the broker(s) or dealer(s) which will participate in the offering and state the amount to be offered through each.

(3) If any of the securities being registered are to be offered otherwise than for cash, state briefly the general purposes of the distribution, the basis upon which the securities are to be offered, the amount of compensation and other expenses of distribution, and by whom they are to be borne. If the distribution is to be made pursuant to a plan of acquisition, reorganization, readjustment or succession, describe briefly the general effect of the plan and state when it became or is to become operative. As to any material amount of assets to be acquired under the plan, furnish information corresponding to that required by Instruction 5 of Item 504 of Regulation S-K (§229.504).

(d) *Offerings on exchange.* If the securities are to be offered on an exchange, indicate the exchange. If the registered securities are to be offered in connection with the writing of exchange-traded call options, describe briefly such transactions.

(e) *Underwriter's compensation.* Provide a table that sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter for each security and in total. The table must show the separate amounts to be paid by the company and the selling shareholders. In addition, include in the table all other items considered by the National Association of Securities Dealers to be underwriting compensation for purposes of that Association's Rules of Fair Practice.

*Instructions to paragraph 508(e):* 1. The term "commissions" is defined in paragraph (17) of Schedule A of the Securities Act. Show separately in the table the cash commissions paid by the registrant and selling security holders. Also show in the table commissions paid by other persons. Disclose any finder's fee or similar payments in the table.

2. Disclose the offering expenses specified in Item 511 of Regulation S-K (17 CFR 229.511).

3. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may

purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Where the underwriter has such an arrangement, present maximum-minimum information in a separate column to the table, based on the purchase of all or none of the shares subject to the arrangement. Describe the key terms of the arrangement in the narrative.

(f) *Underwriter's representative on board of directors.* Describe any arrangement whereby the underwriter has the right to designate or nominate a member or members of the board of directors of the registrant. The registrant shall disclose the identity of any director so designated or nominated, and indicate whether or not a person so designated or nominated, or allowed to be designated or nominated by the underwriter is or may be a director, officer, partner, employee or affiliate of the underwriter.

(g) *Indemnification of underwriters.* If the underwriting agreement provides for indemnification by the registrant of the underwriters or their controlling persons against any liability arising under the Securities Act, furnish a brief description of such indemnification provisions.

(h) *Dealers' compensation.* State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other considerations to be received by any dealer in connection with the sale of the securities. If any dealers are to act in the capacity of sub-underwriters and are to be allowed or paid any additional discounts or commissions for acting in such capacity, a general statement to that effect will suffice without giving the additional amounts to be sold.

(i) *Finders.* Identify any finder and, if applicable, describe the nature of any material relationship between such finder and the registrant, its officers, directors, principal stockholders, finders or promoters or the principal underwriter(s), or if there is a managing underwriter(s), the managing underwriter(s), (including, in each case, affiliates or associates thereof).

(j) *Discretionary accounts.* If the registrant was not, immediately prior to the filing of the registration state-

ment, subject to the requirements of section 13(a) or 15(d) of the Exchange Act, identify any principal underwriter that intends to sell to any accounts over which it exercises discretionary authority and include an estimate of the amount of securities so intended to be sold. The response to this paragraph shall be contained in a pre-effective amendment which shall be circulated if the information is not available when the registration statement is filed.

(k) *Passive market making.* If the underwriters or any selling group members intend to engage in passive market making transactions as permitted by Rule 103 of Regulation M (§ 242.103 of this chapter), indicate such intention and briefly describe passive market making.

(1) *Stabilization and other transactions.*

(1) Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought and the period within which they were bought. If you use § 230.430A of this chapter, the prospectus you file under § 230.424(b) of this chapter or include in a post-effective amendment must contain information on the stabilizing transactions that took place before the determination of the public offering price; and

(3) If you are making a warrants or rights offering of securities to existing security holders and any securities not purchased by existing security holders are to be reoffered to the public, disclose in a supplement to the prospectus

## Securities and Exchange Commission

## § 229.510

or in the prospectus used in connection with the reoffering:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities subscribed for by the underwriter during the offering period;

(iv) The amount of the offered securities sold during the offering period by the underwriter and the price or price ranges at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the public offering price.

[47 FR 11401, Mar. 16, 1982, as amended at 58 FR 19606, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6384, Feb. 6, 1998]

### § 229.509 (Item 509) Interests of named experts and counsel.

If (a) any expert named in the registration statement as having prepared or certified any part thereof (or is named as having prepared or certified a report or valuation for use in connection with the registration statement), or (b) counsel for the registrant, underwriters or selling security holders named in the prospectus as having given an opinion upon the validity of the securities being registered or upon other legal matters in connection with the registration or offering of such securities, was employed for such purpose on a contingent basis, or at the time of such preparation, certification or opinion or at any time thereafter, through the date of effectiveness of the registration statement or that part of the registration statement to which such preparation, certification or opinion relates, had, or is to receive in connection with the offering, a substantial interest, direct or indirect, in the registrant or any of its parents or subsidiaries or was connected with the registrant or any of its parents or subsidiaries as a promoter, managing underwriter (or any principal underwriter, if there are no managing underwriters) voting trustee, director, officer, or em-

ployee, furnish a brief statement of the nature of such contingent basis, interest, or connection.

*Instructions to Item 509:* 1. The interest of an expert (other than an accountant) or counsel will not be deemed substantial and need not be disclosed if the interest, including the fair market value of all securities of the registrant owned, received and to be received, or subject to options, warrants or rights received or to be received by the expert or counsel does not exceed \$50,000. For the purpose of this Instruction, the term *expert* or counsel includes the firm, corporation, partnership or other entity, if any, by which such expert or counsel is employed or of which he is a member or of counsel to and all attorneys in the case of counsel, and all nonclerical personnel in the case of named experts, participating in such matter on behalf of such firm, corporation, partnership or entity.

2. Accountants, providing a report on the financial statements, presented or incorporated by reference in the registration statement, should note §210.2-01 of Regulation S-X (17 CFR 210) for the Commission's requirements regarding "Qualification of Accountants" which discusses disqualifying interests.

### § 229.510 (Item 510) Disclosure of Commission position on indemnification for Securities Act liabilities.

In addition to the disclosure prescribed by Item 702 of Regulation S-K (§229.702), if the undertaking required by paragraph (h) of Item 512 of Regulation S-K (§229.512) is not required to be included in the registration statement because acceleration of the effective date of the registration statement is not being requested, and if waivers have not been obtained comparable to those specified in paragraph (h), a brief description of the indemnification provisions relating to directors, officers and controlling persons of the registrant against liability arising under the Securities Act (including any provision of the underwriting agreement which relates to indemnification of the underwriter or its controlling persons by the registrant against such liabilities where a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter) shall be included in the prospectus, together with a statement in substantially the following form:

## § 229.511

## 17 CFR Ch. II (4-1-01 Edition)

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers or persons controlling the registrant pursuant to the foregoing provisions, the registrant has been informed that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is therefore unenforceable.

[47 FR 11401, Mar. 16, 1982, as amended at 56 FR 48103, Sept. 24, 1991]

### § 229.511 (Item 511) Other expenses of issuance and distribution.

Furnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities to be registered, other than underwriting discounts and commissions. If any of the securities to be registered are to be offered for the account of security holders, indicate the portion of such expenses to be borne by such security holder.

*Instruction to Item 511:* Insofar as practicable, registration fees, Federal taxes, States taxes and fees, trustees' and transfer agents' fees, costs of printing and engraving, and legal, accounting, and engineering fees shall be itemized separately. Include as a separate item any premium paid by the registrant or any selling security holder on any policy obtained in connection with the offering and sale of the securities being registered which insures or indemnifies directors or officers against any liabilities they may incur in connection with the registration, offering, or sale of such securities. The information may be given as subject to future contingencies. If the amounts of any items are not known, estimates, identified as such, shall be given.

### § 229.512 (Item 512) Undertakings.

Include each of the following undertakings that is applicable to the offering being registered.

(a) *Rule 415 Offering.*<sup>1</sup> Include the following if the securities are registered pursuant to Rule 415 under the Securities Act (§ 230.415 of this chapter):

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

<sup>1</sup> Paragraph (a) reflects proposals made in Securities Act Release No. 6334 (Aug. 6, 1981).

(i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§ 230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

*Provided, however,* That paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is on Form S-3 (§ 239.13 of this chapter), Form S-8 (§ 239.16b of this chapter) or Form F-3 (§ 239.33 of this chapter), and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(4) If the registrant is a foreign private issuer, to file a post-effective amendment to the registration statement to include any financial statements required by “Item 8.A. of Form 20-F (17 CFR 249.220f)” at the start of any delayed offering or throughout a continuous offering. Financial statements and information otherwise required by Section 10(a)(3) of the Act need not be furnished, *provided* that the registrant includes in the prospectus, by means of a post-effective amendment, financial statements required pursuant to this paragraph (a)(4) and other information necessary to ensure that all other information in the prospectus is at least as current as the date of those financial statements. Notwithstanding the foregoing, with respect to registration statements on Form F-3 (§239.33 of this chapter), a post-effective amendment need not be filed to include financial statements and information required by Section 10(a)(3) of the Act or §210.3-19 of this chapter if such financial statements and information are contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Form F-3.

(b) *Filings incorporating subsequent Exchange Act documents by reference.* Include the following if the registration statement incorporates by reference any Exchange Act document filed subsequent to the effective date of the registration statement:

The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant’s annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan’s annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of

such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) *Warrants and rights offerings.* Include the following, with appropriate modifications to suit the particular case, if the securities to be registered are to be offered to existing security holders pursuant to warrants or rights and any securities not taken by security holders are to be reoffered to the public:

The undersigned registrant hereby undertakes to supplement the prospectus, after the expiration of the subscription period, to set forth the results of the subscription offer, the transactions by the underwriters during the subscription period, the amount of unsubscribed securities to be purchased by the underwriters, and the terms of any subsequent reoffering thereof. If any public offering by the underwriters is to be made on terms differing from those set forth on the cover page of the prospectus, a post-effective amendment will be filed to set forth the terms of such offering.

(d) *Competitive bids.* Include the following, with appropriate modifications to suit the particular case, if the securities to be registered are to be offered at competitive bidding:

The undersigned registrant hereby undertakes (1) to use its best efforts to distribute prior to the opening of bids, to prospective bidders, underwriters, and dealers, a reasonable number of copies of a prospectus which at that time meets the requirements of section 10(a) of the Act, and relating to the securities offered at competitive bidding, as contained in the registration statement, together with any supplements thereto, and (2) to file an amendment to the registration statement reflecting the results of bidding, the terms of the reoffering and related matters to the extent required by the applicable form, not later than the first use, authorized by the issuer after the opening of bids, of a prospectus relating to the securities offered at competitive bidding, unless no further public offering of such securities by the issuer and no reoffering of such securities by the purchasers is proposed to be made.

(e) *Incorporated annual and quarterly reports.* Include the following if the registration statement specifically incorporates by reference (other than by indirect incorporation by reference through a Form 10-K and Form 10-KSB (§249.310 of this chapter) report) in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a-3 or Rule

14c-3 under the Exchange Act) §§ 240.14a-3 and 240.14c-3 of this chapter):

The undersigned registrant hereby undertakes to deliver or cause to be delivered with the prospectus, to each person to whom the prospectus is sent or given, the latest annual report to security holders that is incorporated by reference in the prospectus and furnished pursuant to and meeting the requirements of Rule 14a-3 or Rule 14c-3 under the Securities Exchange Act of 1934; and, where interim financial information required to be presented by Article 3 of Regulation S-X are not set forth in the prospectus, to deliver, or cause to be delivered to each person to whom the prospectus is sent or given, the latest quarterly report that is specifically incorporated by reference in the prospectus to provide such interim financial information.

(f) *Equity offerings of nonreporting registrants.* Include the following if equity securities of a registrant that prior to the offering had no obligation to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act are being registered for sale in an underwritten offering:

The undersigned registrant hereby undertakes to provide to the underwriter at the closing specified in the underwriting agreements certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(g) *Registration on Form S-4 or F-4 of securities offered for resale.* Include the following if the securities are being registered on Form S-4 or F-4 (§ 239.25, or 34 of this chapter) in connection with a transaction specified in paragraph (a) of Rule 145 (§ 230.145 of this chapter).

(1) The undersigned registrant hereby undertakes as follows: That prior to any public reoffering of the securities registered hereunder through use of a prospectus which is a part of this registration statement, by any person or party who is deemed to be an underwriter within the meaning of Rule 145(c), the issuer undertakes that such reoffering prospectus will contain the information called for by the applicable registration form with respect to reofferings by persons who may be deemed underwriters, in addition to the information called for by the other Items of the applicable form.

(2) The registrant undertakes that every prospectus (i) that is filed pursuant to paragraph (h)(1) immediately preceding, or (ii) that purports to meet the requirements of section 10(a)(3) of the Act and is used in connection with an offering of securities subject to Rule 415 (§ 230.415 of this chapter), will be filed as a part of an amendment to the registration statement and will not be used until such amendment is effective, and that, for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(h) *Request for acceleration of effective date or filing of registration statement on Form S-8.* Include the following if acceleration is requested of the effective date of the registration statement pursuant to Rule 461 under the Securities Act (§ 230.461 of this chapter), or if the registration statement is filed on Form S-8, and:

(1) Any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Securities Act, or

(2) The underwriting agreement contains a provision whereby the registrant indemnifies the underwriter or controlling persons of the underwriter against such liabilities and a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter, and

(3) The benefits of such indemnification are not waived by such persons:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a

claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

(i) Include the following in a registration statement permitted by Rule 430A under the Securities Act of 1933 (§ 230.430A of this chapter):

The undersigned registrant hereby undertakes that:

(1) For purposes of determining any liability under the Securities Act of 1933, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b) (1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.

(2) For the purpose of determining any liability under the Securities Act of 1933, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(j) *Qualification of trust indentures under the Trust Indenture Act of 1939 for delayed offerings.* Include the following if the registrant intends to rely on section 305(b)(2) of the Trust Indenture Act of 1939 for determining the eligibility of the trustee under indentures for securities to be issued, offered, or sold on a delayed basis by or on behalf of the registrant:

The undersigned registrant hereby undertakes to file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of section 310 of the Trust Indenture Act ("Act") in accordance with the rules and regulations prescribed by

the Commission under section 305(b)(2) of the Act.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 39803, Sept. 10, 1982; 47 FR 54769, Dec. 6, 1982; 50 FR 18999, May 6, 1985; 52 FR 21260, June 5, 1987; 52 FR 21939, June 10, 1987; 52 FR 30145, Aug. 13, 1987; 55 FR 23922, June 13, 1990; 56 FR 22319, May 15, 1991; 58 FR 60306, Nov. 15, 1993; 59 FR 21649, Apr. 26, 1994; 60 FR 26615, May 17, 1995; 64 FR 53909, Oct. 5, 1999]

### Subpart 229.600—Exhibits

#### § 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required.* (1) Subject to Rule 411(c) (§ 230.411(c) of this chapter) under the Securities Act and Rule 12b-32 (§ 240.12b-32 of this chapter) under the Exchange Act regarding incorporation of exhibits by reference, the exhibits required in the exhibit table shall be filed as indicated, as part of the registration statement or report. Financial Data Schedules required by paragraph (b)(27) of this Item shall be submitted pursuant to the provisions of paragraph (c) of this Item. Notwithstanding the provisions of paragraphs (b)(27) and (c) of this Item, registered investment companies and business development companies filing on forms available solely to investment companies shall be subject to the provisions of rule 483 under the Securities Act of 1933 (§ 230.483 of this chapter), and any provision or instruction therein shall be controlling with respect to registered investment companies and business development companies unless otherwise specifically provided in rules or instructions pertaining to the submission of a specific form.

(2) Each registration statement or report shall contain an exhibit index, which shall precede immediately the exhibits filed with such registration statement. For convenient reference, each exhibit shall be listed in the exhibit index according to the number assigned to it in the exhibit table. The exhibit index shall indicate, by handwritten, typed, printed, or other legible form of notation in the manually signed original registration statement or report, the page number in the sequential numbering system where such

## § 229.601

exhibit can be found. Where exhibits are incorporated by reference, this fact shall be noted in the exhibit index referred to in the preceding sentence. Further, the first page of the manually signed registration statement shall list the page in the filing where the exhibit index is located. For a description of each of the exhibits included in the exhibit table, see paragraph (b) of this section.

(3) This Item applies only to the forms specified in the exhibit table. With regard to forms not listed in that table, reference shall be made to the appropriate form for the specific exhibit filing requirements applicable thereto.

(4) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period reflected by a Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB, it shall be filed as an exhibit to the Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB filed for the corresponding period. Any amendment or modification to a previously filed exhibit to a Form 10 and Form 10-SB, 10-K or 10-Q document shall be filed as an exhibit to a Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB. Such amendment or modification need not be filed where such previously filed exhibit would not be currently required.

*Instructions to Item 601:* 1. If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only (A) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement or a prospectus filed pursuant to Rule 424(b) under the Securities Act (§ 230.424(b) of this chapter), or (B) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding

## 17 CFR Ch. II (4-1-01 Edition)

any contrary requirement of any rule or form, the registrant need not refile such exhibit as so amended. Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.

2. In any case where two or more indentures, contracts, franchises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, the registrant need file a copy of only one of such documents, with a schedule identifying the other documents omitted and setting forth the material details in which such documents differ from the document a copy of which is filed. The Commission may at any time in its discretion require filing of copies of any documents so omitted.

3. Only copies, rather than originals, need be filed of each exhibit required except as otherwise specifically noted.

4. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§ 232.201 and 232.202 of this chapter), the letter "P" (paper) shall be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule. Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§ 232.201 or § 232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation "CE" (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

### EXHIBIT TABLE

#### *Instructions to the Exhibit Table*

1. The exhibit table indicates those documents that must be filed as exhibits to the respective forms listed.

2. The "X" designation indicates the documents which are required to be filed with each form even if filed previously with another document, *Provided, However*, that such previously filed documents may be incorporated by reference to satisfy the filing requirements.

3. The number used in the far left column of the table refers to the appropriate subsection in paragraph (b) where a description of the exhibit can be found. Whenever necessary, alphabetical or numerical subparts may be used.

Securities and Exchange Commission

§ 229.601

EXHIBIT TABLE

	Securities Act Forms										Exchange Act Forms			
	S-1	S-2	S-3	S-4 <sup>3</sup>	S-8	S-11	F-1	F-2	F-3	F-4 <sup>3</sup>	10	8-K	10-Q	10-K
(1) Underwriting agreement	X	X	X	X	----	X	X	X	X	X	----	X	----	----
(2) Plan of acquisition, reorganization, arrangement, liquidation, or succession	X	X	X	X	----	X	X	X	X	X	X	X	X	X
(3) (i) Articles of incorporation	X	----	----	X	----	X	X	----	----	X	X	----	X	X
(ii) By-laws	X	----	----	X	----	X	X	----	----	X	X	----	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	X	X	----	----	----	----
(6) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion re tax matters	X	X	X	X	----	X	X	X	X	X	----	----	----	----
(9) Voting trust agreement	X	----	----	X	----	X	X	----	----	X	X	----	----	X
(10) Material contracts	X	X	----	X	----	X	X	X	----	X	X	----	X	X
(11) Statement re computation of per share earnings	X	X	----	X	----	X	X	X	----	X	X	----	X	X
(12) Statements re computation of ratios	X	X	X	X	----	X	X	X	----	X	X	----	----	X
(13) Annual report to security holders, Form 10-Q or quarterly report to security holders <sup>1</sup>	----	X	----	X	----	----	----	----	----	----	----	----	----	X
(14) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	X	X	N/A	N/A	N/A	N/A
(16) Letter re change in certifying accountant <sup>4</sup>	X	X	----	X	----	X	----	----	----	----	X	X	----	X
(17) Letter re director resignation	----	----	----	----	----	----	----	----	----	----	----	X	----	----
(18) Letter re change in accounting principles	----	----	----	----	----	----	----	----	----	----	----	----	X	X
(19) Report furnished to security holders	----	----	----	----	----	----	----	----	----	----	----	X	----	----
(20) Other documents or statements to security holders	----	----	----	----	----	----	----	----	----	----	----	X	----	----
(21) Subsidiaries of the registrant	X	----	----	X	----	X	X	----	----	X	X	----	----	X
(22) Published report regarding matters submitted to vote of security holders	----	----	----	----	----	----	----	----	----	----	----	----	X	X
(23) Consent of experts and counsel	X	X	X	X	X	X	X	X	X	X	----	X <sup>2</sup>	X <sup>2</sup>	X <sup>2</sup>
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X	----	X	X	X	X	X	----	----	----	----
(26) Invitations for competitive bids	X	X	X	X	----	----	X	X	X	X	----	----	----	----
(27) Financial Data Schedule <sup>5</sup>	X	X	X	X	----	X	----	----	----	----	X	X	X	X
(28) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(29) through (98) [Reserved]	----	----	----	----	----	----	----	----	----	----	----	----	----	----
(99) Additional Exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X	X

<sup>1</sup> Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10-K, where the annual report to security holders is incorporated by reference into the text of the Form 10-K.

<sup>2</sup> Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

<sup>3</sup> An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Forms S-4 or F-4 to provide information about such company at a level prescribed by Forms S-2, S-3, F-2 or F-3 and (2) the form, the level of which has been elected under Forms S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

<sup>4</sup> If required pursuant to Item 304 of Regulation S-K.

<sup>5</sup> Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S-K.

(b) *Description of exhibits.* Set forth below is a description of each document listed in the exhibit tables.

(1) *Underwriting agreement.* Each underwriting contract or agreement with a principal underwriter pursuant to

which the securities being registered are to be distributed; if the terms of such documents have not been determined, the proposed forms thereof. Such agreement may be filed as an exhibit to a report on Form 8-K (§ 249.308

of this chapter) which is incorporated by reference into a registration statement subsequent to its effectiveness.

(2) *Plan of acquisition, reorganization, arrangement, liquidation or succession.* Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement and any amendments thereto described in the statement or report. Schedules (or similar attachments) to these exhibits shall not be filed unless such schedules contain information which is material to an investment decision and which is not otherwise disclosed in the agreement or the disclosure document. The plan filed shall contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

(3)(i) *Articles of incorporation.* The articles of incorporation of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed. Where it is impracticable for the registrant to file a charter amendment authorizing new securities with the appropriate state authority prior to the effective date of the registration statement registering such securities, the registrant may file as an exhibit to the registration statement the form of amendment to be filed with the state authority; and in such a case, if material changes are made after the copy is filed, the registrant must also file the changed copy.

(ii) *By-laws.* The by-laws of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amendments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including indentures.* (i) All instruments defining the rights of holders of the equity or debt securities being registered including, where applicable, the relevant portion of the articles of incorporation or by-laws of the registrant.

(ii) Except as set forth in paragraph (b)(4)(iii) of this section for filings on Forms S-1, S-4, S-11, S-14 and F-4 under the Securities Act (§§ 239.1, and 25, 18, 23 and 34 of this chapter) and Forms 10 and Form 10-SB and 10-K and Form 10-KSB (§§ 249.210 and 310 of this chapter) under the Exchange Act all instruments defining the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed.

(iii) Where the instrument defines the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed, there need not be filed:

(A) Any instrument with respect to long-term debt not being registered if the total amount of securities authorized thereunder does not exceed 10 percent of the total assets of the registrant and its subsidiaries on a consolidated basis and if there is filed an agreement to furnish a copy of such agreement to the Commission upon request;

(B) Any instrument with respect to any class of securities if appropriate steps to assure the redemption or retirement of such class will be taken prior to or upon delivery by the registrant of the securities being registered; or

(C) Copies of instruments evidencing scrip certificates for fractions of shares.

(iv) If any of the securities being registered are, or will be, issued under an indenture to be qualified under the Trust Indenture Act, the copy of such indenture which is filed as an exhibit shall include or be accompanied by:

(A) A reasonably itemized and informative table of contents; and

(B) A cross-reference sheet showing the location in the indenture of the provisions inserted pursuant to sections 310 through 318(a) inclusive of the Trust Indenture Act of 1939.

(v) With respect to Forms 8-K and 10-Q and 10-QSB under the Exchange Act which are filed and which disclose, in the text of the Form 10-Q and Form 10-QSB, the interim financial statements,

or the footnotes thereto the creation of a new class of securities or indebtedness or the modification of existing rights of security holders, file all instruments defining the rights of holders of these securities or indebtedness. However, there need not be filed any instrument with respect to long-term debt not being registered which meets the exclusion set forth above in paragraph (b)(4)(iii)(A).

*Instruction 1 to paragraph (b)(4):* There need not be filed any instrument which defines the rights of participants (not as security holders) pursuant to an employee benefit plan.

*Instruction 2 to paragraph (b)(4) (for electronic filings):* If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S-T (§232.304 of this chapter).

(5) *Opinion re legality.* (i) An opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.

(ii) If the securities being registered are issued under a plan and the plan is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance of the provisions of the written documents constituting the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code; or

(iii) If the securities being registered are issued under a plan which is subject to the requirements of ERISA and the plan has been amended subsequent to the filing of paragraph (b)(5)(i) (A) or (B) above, furnish either:

(A) An opinion of counsel which confirms compliance of the amended provisions of the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the

amended plan is qualified under section 401 of the Internal Revenue Code.

NOTE: Attention is directed to Item 8 of Form S-8 for exemptions to this exhibit requirement applicable to that Form.

(6)-(7) [Reserved]

(8) *Opinion re tax matters.* For filings on Form S-11 under the Securities Act (§239.18) or those to which Securities Act Industry Guide 5 applies, an opinion of counsel or of an independent public or certified public accountant or, in lieu thereof, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders as described in the filing when such tax matters are material to the transaction for which the registration statement is being filed. This exhibit otherwise need only be filed with the other applicable registration forms where the tax consequences are material to an investor and a representation as to tax consequences is set forth in the filing. If a tax opinion is set forth in full in the filing, an indication that such is the case may be made in lieu of filing the otherwise required exhibit. Such tax opinions may be conditioned or may be qualified, so long as such conditions and qualifications are adequately described in the filing.

(9) *Voting trust agreement.* Any voting trust agreements and amendments thereto.

(10) *Material contracts.* (i) Every contract not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing. Only contracts need be filed as to which the registrant or subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

(ii) If the contract is such as ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries, it will be deemed to have been made in the ordinary course of business and need not be filed unless it falls within one or more of the following categories, in which case it

**§ 229.601**

**17 CFR Ch. II (4-1-01 Edition)**

shall be filed except where immaterial in amount or significance:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the registrant's business is substantially dependent, as in the case of continuing contracts to sell the major part of registrant's products or services or to purchase the major part of registrant's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which registrant's business depends to a material extent;

(C) Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15 percent of such fixed assets of the registrant on a consolidated basis; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the registrant.

(iii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the registrant, as defined by Item 402(a)(3) (§229.402(a)(3)), participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Notwithstanding paragraph (b)(10)(iii)(A) above, the following management contracts or compensatory plans, contracts or arrangements need not be filed:

(1) Ordinary purchase and sales agency agreements.

(2) Agreements with managers of stores in a chain organization or similar organization.

(3) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such.

(4) Any compensatory plan, contract or arrangement which pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants.

(5) Any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information on an aggregate basis as permitted by General Instruction 1 to Item 402 (§229.402) or by Item 6.B of Form 20-F (§249.220f of this chapter).

(6) Any compensatory plan, contract, or arrangement if the registrant is a wholly owned subsidiary of a company that has a class of securities registered pursuant to section 12 or files reports pursuant to section 15(d) of the Exchange Act and is filing a report on Form 10-K and Form 10-KSB or registering debt instruments or preferred stock which are not voting securities on Form S-2.

*Instruction 1 to paragraph (b)(10):* With the exception of management contracts, in order to comply with paragraph (iii) above, registrants need only file copies of the various compensatory plans and need not file each individual director's or executive officer's personal agreement under the plans unless there are particular provisions in such personal agreements whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.

*Instruction 2 to paragraph (b)(10):* If a material contract is executed or becomes effective during the reporting period reflected by a Form 10-Q or Form 10-K, it shall be filed as an exhibit to the Form 10-Q or Form 10-K filed for the corresponding period. See paragraph (a)(4) of this Item. With respect to quarterly reports on Form 10-Q, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re computation of per share earnings.* A statement setting

forth in reasonable detail the computation of per share earnings, unless the computation can be clearly determined from the material contained in the registration statement or report. The information with respect to the computation of per share earnings on both primary and fully diluted basis, presented by exhibit or otherwise, must be furnished even though the amounts of per share earnings on the fully diluted bases are not required to be presented in the income statement under the provisions of Accounting Principles Board Opinion No. 15. That Opinion provides that any reduction of less than 3% need not be considered as dilution (see footnote to paragraph 14 of the Opinion) and that a computation on the fully diluted basis which results in improvement of earnings per share not be taken into account (see paragraph 40 of the Opinion).

(12) *Statements re computation of ratios.* A statement setting forth in reasonable detail the computation of any ratio of earnings to fixed charges, any ratio of earnings to combined fixed charges and preferred stock dividends or any other ratios which appear in the registration statement or report. See Item 503(d) of Regulation S-K (§ 229.503(d)).

(13) *Annual report to security holders, Form 10-Q and Form 10-QSB or quarterly report to security holders.* (i) The registrant's annual report to security holders for its last fiscal year, its Form 10-Q and Form 10-QSB (if specifically incorporated by reference in the prospectus) or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing. Such report, except for those portions thereof which are expressly incorporated by reference in the filing, is to be furnished for the information of the Commission and is not to be deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411(b) of this chapter).

(ii) Electronic filings. If all, or any portion, of the annual or quarterly report to security holders is incorporated by reference into any electronic filing,

all, or such portion of the annual or quarterly report to security holders so incorporated, shall be filed in electronic format as an exhibit to the filing.

(14) [Reserved]

(15) *Letter re unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information which pursuant to Rule 436(c) under the Securities Act (§ 230.436(c) of this chapter) is not considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of that Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10-Q and Form 10-QSB which is incorporated by reference into the registration statement.

(16) *Letter re change in certifying accountant.* A letter from the registrant's former independent accountant regarding its concurrence or disagreement with the statements made by the registrant in the current report concerning the resignation or dismissal as the registrant's principal accountant.

(17) *Letter re director resignation.* Any letter from a former director which sets forth a description of a disagreement with the registrant that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter re change in accounting principles.* Unless previously filed, a letter from the registrant's independent accountant indicating whether any change in accounting principles or practices followed by the registrant, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is reasonably certain to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be

filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders.* If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10-Q and Form 10-QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10-Q and Form 10-QSB report.

(20) *Other documents or statements to security holders.* If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of this form the information called for may be incorporated by reference to such published document or statement provided copies thereof are filed as an exhibit to the report on this form.

(21) *Subsidiaries of the registrant.* (i) List all subsidiaries of the registrant, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business. This list may be incorporated by reference from a document which includes a complete and accurate list.

(ii) The names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by this report. (See the definition of "significant subsidiary" in Rule 1-02(w) (17 CFR 210.1-02(w)) of Regulation S-X.) The names of consolidated wholly-owned multiple subsidiaries carrying on the same line of business, such as chain stores or small loan companies, may be omitted, provided the name of the immediate parent, the line of busi-

ness, the number of omitted subsidiaries operating in the United States and the number operating in foreign countries are given. This instruction shall not apply, however, to banks, insurance companies, savings and loan associations or to any subsidiary subject to regulation by another Federal agency.

(22) *Published report regarding matters submitted to vote of security holders.* Published reports containing all of the information called for by Item 4 of Part II of Form 10-Q and Form 10-QSB or Item 4 of Part I of Form 10-K and Form 10-KSB which is referred to therein in lieu of providing disclosure in Form 10-Q and Form 10-QSB or 10-K and Form 10-KSB, which are required to be filed as exhibits by Rule 12b-23(a)(3) under the Exchange Act (§240.12b-23(a)(3) of this chapter).

(23) *Consents of experts and counsel—*(i) *Securities Act filings.* All written consents required to be filed shall be dated and manually signed. Where the consent of an expert or counsel is contained in his report or opinion or elsewhere in the registration statement or document filed therewith, a reference shall be made in the index to the report, the part of the registration statement or document or opinion, containing the consent.

(ii) *Exchange Act reports.* Where the filing of a written consent is required with respect to material incorporated by reference in a previously filed registration statement under the Securities Act, such consent may be filed as exhibit to the material incorporated by reference. Such consents shall be dated and manually signed.

(24) *Power of attorney.* If any name is signed to the registration statement or report pursuant to a power of attorney, manually signed copies of such power of attorney shall be filed. Where the power of attorney is contained elsewhere in the registration statement or documents filed therewith a reference shall be made in the index to the part of the registration statement or document containing such power of attorney. In addition, if the name of any officer signing on behalf of the registrant is signed pursuant to a power of attorney, certified copies of a resolution of

the registrant's board of directors authorizing such signature shall also be filed. A power of attorney that is filed with the Commission shall relate to a specific filing or an amendment thereto, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§230.462(b) of this chapter). A power of attorney that confers general authority shall not be filed with the Commission.

(25) *Statement of eligibility of trustee.*

(i) A statement of eligibility and qualification of each person designated to act as trustee under an indenture to be qualified under the Trust Indenture Act of 1939. Such statement of eligibility shall be bound separately from the other exhibits.

(ii) *Electronic filings.* The requirement to bind separately the statement of eligibility and qualification of each person designated to act as a trustee under the Trust Indenture Act of 1939 from other exhibits shall not apply to statements submitted in electronic format. Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by §260.5b-1 through §260.5b-3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities to be offered at competitive bidding, any form of communication which is an invitation for competitive bid which will be sent or given to any person shall be filed.

(27) through (98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits which the registrant may wish to file shall be so marked as

to indicate clearly the subject matters to which they refer.

(ii) Any document (except for an exhibit) or part thereof which is incorporated by reference in the filing and is not otherwise required to be filed by this Item or is not a Commission filed document incorporated by reference in a Securities Act registration statement.

(iii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by "other methods" than those specified in paragraphs (a) or (b) of §230.158 of this chapter, it must be filed as an exhibit to the Form 10-Q or the Form 10-K, as appropriate, covering the period in which the earnings statement was released.

[47 FR 11401, Mar. 16, 1982]

EDITORIAL NOTE: 1. For FEDERAL REGISTER citations affecting §229.601, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

2. At 65 FR 24799, Apr. 27, 2000, in §229.601, paragraph (a), the table was amended by removing the entries for exhibits (27) and (28) and footnote 5, however, this is a photographed table, thus the entries could not be removed.

### Subpart 229.700—Miscellaneous

#### § 229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Furnish the following information as to all securities of the registrant sold by the registrant within the past three years which were not registered under the Securities Act. Include sales of reacquired securities, as well as new issues, securities issued in exchange for property, services, or other securities, and new securities resulting from the modification of outstanding securities.

(a) *Securities sold.* Give the date of sale and the title and amount of securities sold.

(b) *Underwriters and other purchasers.* Give the names of the principal underwriters, if any. As to any such securities not publicly offered, name the persons or identify the class of persons to whom the securities were sold.

(c) *Consideration.* As to securities sold for cash, state the aggregate offering price and the aggregate underwriting discounts or commissions. As to any securities sold otherwise than for cash, state the nature of the transaction and the nature and aggregate amount of consideration received by the registrant.

(d) *Exemption from registration claimed.* Indicate the section of the Securities Act or the rule of the Commission under which exemption from registration was claimed and state briefly the facts relied upon to make the exemption available.

(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.

(f) *Use of proceeds.* As required by § 230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)) after effectiveness of its Securities Act registration statement, and thereafter on each of its subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act through the later of disclosure of the application of all the offering proceeds, or disclosure of the termination of the offering. If a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer, the successor issuer shall provide such a report. The information provided pursuant to paragraphs (f)(2) through (f)(4) of this Item need only be provided with

respect to the first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act after effectiveness of the registration statement filed under the Securities Act. Subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act need only provide the information required in paragraphs (f)(2) through (f)(4) of this Item if any of such required information has changed since the last periodic report filed. In disclosing the use of proceeds in the first periodic report filed pursuant to the Exchange Act, the issuer or successor issuer should include the following information:

(1) The effective date of the Securities Act registration statement for which the use of proceeds information is being disclosed and the Commission file number assigned to the registration statement;

(2) If the offering has commenced, the offering date, and if the offering has not commenced, an explanation why it has not;

(3) If the offering terminated before any securities were sold, an explanation for such termination; and

(4) If the offering did not terminate before any securities were sold, disclose:

(i) Whether the offering has terminated and, if so, whether it terminated before the sale of all securities registered;

(ii) The name(s) of the managing underwriter(s), if any;

(iii) The title of each class of securities registered and, where a class of convertible securities is being registered, the title of any class of securities into which such securities may be converted;

(iv) For each class of securities (other than a class of securities into which a class of convertible securities registered may be converted without additional payment to the issuer) the following information, provided for both the account of the issuer and the account(s) of any selling security holder(s): the amount registered, the aggregate price of the offering amount registered, the amount sold and the aggregate offering price of the amount sold to date;

(v) From the effective date of the Securities Act registration statement to

the ending date of the reporting period, the amount of expenses incurred for the issuer's account in connection with the issuance and distribution of the securities registered for underwriting discounts and commissions, finders' fees, expenses paid to or for underwriters, other expenses and total expenses. Indicate if a reasonable estimate for the amount of expenses incurred is provided instead of the actual amount of expense. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others;

(vi) The net offering proceeds to the issuer after deducting the total expenses described in paragraph (f)(4)(v) of this Item;

(vii) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of net offering proceeds to the issuer used for construction of plant, building and facilities; purchase and installation of machinery and equipment; purchases of real estate; acquisition of other business(es); repayment of indebtedness; working capital; temporary investments (which should be specified); and any other purposes for which at least five (5) percent of the issuer's total offering proceeds or \$100,000 (whichever is less) has been used (which should be specified). Indicate if a reasonable estimate for the amount of net offering proceeds applied is provided instead of the actual amount of net offering proceeds used. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others; and

(viii) If the use of proceeds in paragraph (f)(4)(vii) of this Item represents a material change in the use of proceeds described in the prospectus, the

issuer should describe briefly the material change.

*Instructions.* 1. Information required by this Item 701 need not be set forth as to notes, drafts, bills of exchange, or bankers' acceptances which mature not later than one year from the date of issuance.

2. If the sales were made in a series of transactions, the information may be given by such totals and periods as will reasonably convey the information required.

[47 FR 11401, Mar. 16, 1982, as amended at 61 FR 54508, Oct. 18, 1996; 62 FR 39762, July 24, 1997]

#### § 229.702 (Item 702) Indemnification of directors and officers.

State the general effect of any statute, charter provisions, by-laws, contract or other arrangements under which any controlling persons, director or officer of the registrant is insured or indemnified in any manner against liability which he may incur in his capacity as such.

### Subpart 229.800—List of Industry Guides

#### § 229.801 Securities Act industry guides.

(a) [Reserved]

(b) *Guide 2.* Disclosure of oil and gas operations.

(c) *Guide 3.* Statistical disclosure by bank holding companies.

(d) *Guide 4.* Prospectuses relating to interests in oil and gas programs.

(e) *Guide 5.* Preparation of registration statements relating to interests in real estate limited partnerships.

(f) *Guide 6.* Disclosures concerning unpaid claims and claim adjustment expenses of property-casualty insurance underwriters.

(g) *Guide 7.* Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations.

(Secs. 6, 7, 8, 10, 19(a) and Schedule A (25) and (26) (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77aa (25) and (26), Securities Act of 1933; secs. 12, 13, 14, 15(d) and 23(a) (15 U.S.C. 78(l), 78m, 78n, 78o(d), 78w, Securities Exchange Act of 1934)

[47 FR 11401, Mar. 16, 1982, and 49 FR 47600, Dec. 6, 1984, as amended at 57 FR 36466, Aug. 13, 1992; 61 FR 30401, June 14, 1996]

#### § 229.802 Exchange Act industry guides.

(a) [Reserved]

## § 229.901

## 17 CFR Ch. II (4-1-01 Edition)

(b) *Guide 2*. Disclosure of oil and gas operations.

(c) *Guide 3*. Statistical disclosure by bank holding companies.

(d) *Guide 4*. Disclosures concerning unpaid claims and claim adjustment expenses of property-casualty underwriters.

(e) [Reserved]

(f) [Reserved]

(g) *Guide 7*. Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations.

(Secs. 6, 7, 8, 10, 19(a) and Schedule A (25) and (26) (15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77aa (25) and (26), Securities Act of 1933; secs. 12, 13, 14, 15(d) and 23(a) (15 U.S.C. 78(l), 78m, 78n, 78o(d), 78w, Securities Exchange Act of 1934)

[47 FR 11401, Mar. 16, 1982, as amended at 49 FR 47600, Dec. 6, 1984; 57 FR 36468, Aug. 13, 1992; 61 FR 30401, June 14, 1996]

### Subpart 229.900—Roll-Up Transactions

SOURCE: 56 FR 57247, Nov. 8, 1991, unless otherwise noted.

#### § 229.901 (Item 901) Definitions.

For the purposes of this subpart 229.900:

(a) *General partner* means the person or persons responsible under state law for managing or directing the management of the business and affairs of a partnership that is the subject of a roll-up transaction including, but not limited to, the general partner(s), board of directors, board of trustees, or other person(s) having a fiduciary duty to such partnership.

(b)(1) *Partnership* means any:

- (i) Finite-life limited partnership; or
- (ii) Other finite-life entity.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this Item (§ 229.901(b)(2)(ii)), a limited partnership or other entity is “finite-life” if:

(A) It operates as a conduit vehicle for investors to participate in the ownership of assets for a limited period of time; and

(B) It has as a policy or purpose distributing to investors proceeds from the sale, financing or refinancing of assets or cash from operations, rather than reinvesting such proceeds or cash in the business (whether for the term of the entity or after an initial period

of time following commencement of operations).

(ii) A real estate investment trust as defined in I.R.C. section 856 is not *finite-life* solely because of the distribution to investors of net income as provided by the I.R.C. if its policies or purposes do not include the distribution to investors of proceeds from the sale, financing or refinancing of assets, rather than the reinvestment of such proceeds in the business.

(3) *Partnership* does not include any entity registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or any Business Development Company as defined in section 2(a)(48) of that Act (15 U.S.C. 80a-2(a)(48)).

(c)(1) Except as provided in paragraph (c)(2) or (c)(3) of this Item, (§ 229.901(c)(2) or (c)(3)) *roll-up transaction* means a transaction involving the combination or reorganization of one or more partnerships, directly or indirectly, in which some or all of the investors in any of such partnerships will receive new securities, or securities in another entity.

(2) Notwithstanding paragraph (c)(1) of this Item, (§ 229.901(c)(1)) *roll-up transaction* shall not include:

(i) A transaction wherein the interests of all of the investors in each of the partnerships are repurchased, recalled, or exchanged in accordance with the terms of the preexisting partnership agreement for securities in an operating company specifically identified at the time of the formation of the original partnership;

(ii) A transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.);

(iii) A transaction that involves only issuers that are not required to register or report under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), both before and after the transaction;

(iv) A transaction that involves the combination or reorganization of one or more partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if:

(A) Such action is approved by not less than 66% of the outstanding

## Securities and Exchange Commission

## § 229.902

units of each of the participating partnerships; and

(B) As a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting partnership agreements;

(v) A transaction in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k-1), if:

(A) Such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(B) The securities of that entity issued to investors in the transaction do not exceed 20% of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity; and

(C) For purposes of paragraph (c)(2)(v) of this Item (§229.901(c)(2)(v)), a *regularly traded* security means any security with a minimum closing price of \$2.00 or more for a majority of the business days during the preceding three-month period and a six-month minimum average daily trading volume of 1,000 shares;

(vi) A transaction in which all of the investors' partnership securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k-1) and such investors receive new securities or securities in another entity that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k-1), except that, for purposes of this paragraph, securities that are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under Section 11A of the Securities Exchange Act of 1934 shall not include securities listed on the

American Stock Exchange's Emerging Company Marketplace;

(vii) A transaction in which the investors in any of the partnerships involved in the transaction are not subject to a significant adverse change with respect to voting rights, the terms of existence of the entity, management compensation or investment objectives; or

(viii) A transaction in which all investors are provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

(3) The Commission, upon written request or upon its own motion, may exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the definition of roll-up transaction or the requirements imposed on roll-up transactions by Items 902-915 of Regulation S-K (§§ 229.902-229.915), if it finds such action to be consistent with the public interest and the protection of investors.

(d) *Sponsor* means the person proposing the roll-up transaction.

(e) *Successor* means the surviving entity after completion of the roll-up transaction or the entity whose securities are being offered or sold to, or acquired by, limited partners of the partnerships or the limited partnerships to be combined or reorganized.

*Instruction to Item 901.* If a transaction is a roll-up transaction as defined in Item 901(c) of this subpart (§229.901(c)), the requirements of this subpart apply to each entity proposed to be included in the roll-up transaction, whether or not the entity is a "partnership" as defined in Item 901(b) of this subpart (§229.901(b)).

[56 FR 57247, Nov. 8, 1991, as amended at 59 FR 63682, Dec. 8, 1994]

### § 229.902 (Item 902) Individual partnership supplements.

(a) If two or more entities are proposed to be included in the roll-up transaction, provide the information specified in this Item (§229.902) in a separate supplement to the disclosure document for each entity.

(b) The separate supplement required by paragraph (a) of this Item (§229.902)

**§ 229.902**

**17 CFR Ch. II (4-1-01 Edition)**

shall be filed as part of the registration statement, shall be delivered with the prospectus to investors in the partnership covered thereby, and shall include:

(1) A statement in the forefront of the supplement to the effect that:

(i) Supplements have been prepared for each partnership;

(ii) The effects of the roll-up transaction may be different for investors in the various partnerships; and

(iii) Upon receipt of a written request by an investor or his representative who has been so designated in writing, a copy of any supplement will be transmitted promptly, without charge, by the general partner or sponsor.

This statement must include the name and address of the person to whom investors should make their request.

(2) A brief description of each material risk and effect of the roll-up transaction, including, but not limited to, federal income tax consequences, for investors in the partnership, with appropriate cross references to the discussions of the risks, effects and tax consequences of the roll-up transaction required in the principal disclosure document pursuant to Items 904 and 915 of this subpart (§ 229.904 and § 229.915). Such discussion shall address the effect of the roll-up transaction on the partnership's financial condition and results of operations.

(3) A statement concerning whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors in the partnership, together with a brief discussion of the bases for such belief, with appropriate cross references to the discussion of the fairness of the roll-up transaction required in the principal disclosure document pursuant to Item 910 of this subpart (§ 229.910). If there are material differences between the fairness analysis for the partnership and for the other partnerships, such differences shall be described briefly in the supplement.

(4) A brief, narrative description of the method of calculating the value of the partnership and allocating interests in the successor to the partnership, and a table showing such calculation and allocation. Such table shall include the following information (or other information of a comparable

character necessary to a thorough understanding of the calculation and allocation):

(i) The appraised value of each separately appraised significant asset (as defined in Item 911(c)(5) of this subpart (§ 229.911(c)(5))) held by the partnership, or, if appraisals have not been obtained for each significant asset, the value assigned for purposes of the valuation of the partnership to each significant asset for which an appraisal has not been obtained;

(ii) The dollar amount of any mortgages or other similar liabilities to which each of such assets is subject;

(iii) Cash and cash equivalent assets held by the partnership;

(iv) Other assets held by the partnership;

(v) Other liabilities of the partnership;

(vi) The value assigned to the partnership;

(vii) The value assigned to the partnership per interest held by investors in the partnership (on an equivalent interest basis, such as per \$1,000 original investment);

(viii) The aggregate number of interests in the successor to be allocated to the partnership and the percentage of the total interests of the successor;

(ix) The number of interests in the successor to be allocated to investors in the partnership for each interest held by such investors (on an equivalent interest basis, such as per \$1,000 original investment); and

(x) The value assigned to the general partner's interest in the partnership, and the number of interests in the successor or other consideration to be allocated in the roll-up transaction to the general partner for such general partnership interest or otherwise as compensation or reimbursement for claims against or interests in the partnership, such as foregone fees, unearned fees and for fees to be earned on the sale or refinancing of an asset.

(5) The amounts of compensation paid, and cash distributions made, to the general partner and its affiliates by the partnership for the last three fiscal years and the most recently completed interim period and the amounts that would have been paid if the compensation and distributions structure to be

in effect after the roll-up transaction had been in effect during such period. If any proposed change(s) in the business or operations of the successor after the roll-up transaction would change materially the compensation and distributions that would have been paid by the successor (e.g., if properties will be sold or purchased after the roll-up transaction and no properties were sold or purchased during the period covered by the table), describe such changes and the effects thereof on the compensation and distributions to be paid by the successor.

(6) Cash distributions made to investors during each of the last five fiscal years and most recently completed interim period, identifying any such distributions which represent a return of capital.

(7) An appropriate cross reference to selected financial information concerning the partnership and the pro forma financial statements included in the principal disclosure document in response to Item 914(b)(2) of this subpart (§ 229.914(b)(2)).

**§ 229.903 (Item 903) Summary.**

(a) Provide in the forepart of the disclosure document a clear, concise and comprehensible summary of the roll-up transaction.

(b) The summary required by paragraph (a) of this Item (§ 229.903) shall include a summary description of each of the following items, as well as any other material terms or consequences of the roll-up transaction necessary to an understanding of such transaction:

(1) Each material risk and effect on investors, including, but not limited to:

(i) Changes in the business plan, voting rights, cash distribution policies, form of ownership interest or management compensation;

(ii) The general partner's conflicts of interest in connection with the roll-up transaction and in connection with the successor's future operations; and

(iii) The likelihood that securities received by investors in the roll-up transaction will trade at prices substantially below the value assigned to such securities in the roll-up transaction and/or the value of the successor's assets;

(2) The material terms of the roll-up transaction, including the valuation method used to allocate securities in the successor to investors in the partnerships;

(3) Whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors in each partnership, including a brief discussion of the bases for such belief;

(4) Any opinion from an outside party concerning the fairness of the roll-up transaction, including whether the opinion addresses the fairness of all possible combinations of partnerships or portions of partnerships, and contacts with any outside party concerning fairness opinions, valuations or reports in connection with the roll-up transaction required to be disclosed pursuant to Item 911(a)(5) of this subpart (§ 229.911(a)(5));

(5) The background of and reasons for the roll-up transaction, as well as alternatives to the roll-up transaction described in response to Item 908(b) of this subpart (§ 229.908(b));

(6) Rights of investors to exercise dissenters' or appraisal rights or similar rights and to obtain a list of investors in the partnership in which the investor holds an interest; and

(7) If any affiliates of the general partner or the sponsor may participate in the business of the successor or receive compensation from the successor, an organizational chart showing the relationships between the general partner, the sponsor and their affiliates.

*Instruction to Item 903.* The description of the material risks and effects of the roll-up transaction required by paragraph (b)(1) of this Item (§ 229.903) must be presented prominently in the forepart of the summary.

**§ 229.904 (Item 904) Risk factors and other considerations.**

(a) Immediately following the summary required by Item 903 of this subpart (§ 229.903), describe in reasonable detail each material risk and effect of the roll-up transaction on investors in each partnership, including, but not limited to:

(1) The potential risks, adverse effects and benefits of the roll-up transaction for investors and for the general partner, including those which result from each matter described in response

**§ 229.905**

**17 CFR Ch. II (4-1-01 Edition)**

to Item 905 of this subpart (§ 229.905), with appropriate cross references to the comparative information required by Item 905;

(2) The material risks arising from an investment in the successor; and

(3) The likelihood that securities of the successor received by investors in the roll-up transaction will trade in the securities markets at a price substantially below the value assigned to such securities in the roll-up transaction and/or the value of the assets of the successor, and the effects on investors of such a trading market discount.

(b) Quantify each risk or effect to the extent practicable.

(c) State whether any of such risks or effects may be different for investors in any partnership and, if so, identify such partnership(s) and describe such difference(s).

*Instruction to Item 904.* The requirement to quantify the effects of the roll-up transaction shall include, but not be limited to:

(i) If cost savings resulting from combined administration of the partnerships is identified as a potential benefit of the roll-up transaction, the amount of cost savings and a comparison of such amount to the costs of the roll-up transaction; and

(ii) If there may be a material conflict of interest of the sponsor or general partner arising from its receipt of payments or other consideration as a result of the roll-up transaction, the amount of such payments and other consideration to be obtained in the roll-up transaction and a comparison of such amounts to the amounts to which the sponsor or general partner would be entitled without the roll-up transaction.

**§ 229.905 (Item 905) comparative information.**

(a)(1) Describe the voting and other rights of investors in the successor under the successor's governing instruments and under applicable law. Compare such rights to the voting and other rights of investors in each partnership subject to the transaction under the partnerships' governing instruments and under applicable law. Describe the effects of the change(s) in such rights.

(2) Describe the duties owed by the general partner of the successor to investors in the successor under the successor's governing instruments and under applicable law. Compare such duties to the duties owed by the general

partner of each partnership to investors in the partnership under the partnership's governing instruments and under applicable law. Describe the effects of the change(s) in such duties.

(b)(1) Describe each item of compensation (including reimbursement of expenses) payable by the successor after the roll-up transaction to the general partner and its affiliates or to any affiliate of the successor. Compare such compensation to the compensation currently payable to the general partner and its affiliates by each partnership. Describe the effects of the change(s) in compensation arrangements.

(2) Describe each instance in which cash or other distributions may be made by the successor to the general partner and its affiliates or to any affiliate of the successor. Compare such distributions to the distributions currently paid or payable to the general partner and its affiliates by each partnership. Describe the effects of the change(s) in distribution arrangements. If distributions similar to those currently paid or payable by any partnership to the general partner or its affiliates will not be made by the successor, state whether or not other compensation arrangements with the successor described in response to paragraph (b)(1) of this Item (§ 229.905) (e.g., incentive fees payable upon sale of a property) will, in effect, replace such distributions.

(3) Provide a table demonstrating the changes in such compensation and distributions setting forth among other things:

(i) The actual amounts of compensation and distributions, separately identified, paid by the partnerships on a combined basis to the general partner and its affiliates for the partnerships' last three fiscal years and most recently ended interim periods; and

(ii) The amounts of compensation and distributions that would have been paid if the compensation and distributions structure to be in effect after the roll-up transaction had been in effect during such period.

(4) If any proposed change(s) in the business or operations of the successor after the roll-up transaction would change materially the compensation

and distributions that would have been paid by the successor from that shown in the table provided in response to paragraph (b)(3)(ii) of this Item (§229.905) (e.g., if properties will be sold or purchased after the roll-up transaction and no properties were sold or purchased during the period covered by the table), describe such changes and the effects thereof on the compensation and distributions to be paid by the successor.

(5) Describe the material conflicts that may arise between the interests of the sponsor or general partner and the interests of investors in the successor as a result of the compensation and distribution arrangements described in response to paragraphs (b)(1) and (2) of this Item (§229.905) and describe any steps that will be taken to resolve any such conflicts.

(c) Describe any provisions in the governing instruments of the successor and any policies of the general partner of the successor relating to distributions to investors of cash from operations, proceeds from the sale, financing or refinancing of assets, and any other distributions. Compare such provisions and policies to those of each of the partnerships. Describe the effects of any change(s) in such provisions or policies.

(d)(1) Describe each material investment policy of the successor, including, without limitation, policies with respect to borrowings by the successor. Compare such investment policies to the investment policies of each of the partnerships. Describe the effects of any change(s) in such policies.

(2) Describe any plans of the general partner, sponsor or of any person who will be an affiliate of the successor with respect to:

(i) A sale of any material assets of the partnerships;

(ii) A purchase of any material assets; and

(iii) Borrowings.

(3)(i) State whether or not specific assets have been identified for sale, financing, refinancing or purchase following the roll-up transaction.

(ii) If specific assets have been so identified, describe the assets and the proposed transaction.

(e) Describe any other similar terms or policies of the successor that are material to an investment in the successor. Compare any such terms or policies to those of each of the partnerships. Describe the effects of any change(s) in any such terms or policies.

*Instructions to Item 905:* (1) The information provided in response to this Item (§229.905) should be illustrated in tables or other readily understandable formats, which should be included together with the disclosures required by this Item.

(2) The information required by this Item (§229.905) shall be set forth in appropriate separate sections of the principal disclosure document.

**§ 229.906 (Item 906) Allocation of roll-up consideration.**

(a) Describe in reasonable detail the method used to allocate interests in the successor to investors in the partnerships and the reasons why such method was used.

(b) Provide a table showing the calculation of the valuation of each partnership and the allocation of interests in the successor to investors. Such table shall include for each partnership the following information (or other information of a comparable character necessary to an understanding of the calculation and allocation):

(1) The value assigned to each significant category of assets of the partnership and the total value assigned to the partnership;

(2) The total value assigned to all partnerships;

(3) The aggregate amount of interests in the successor to be allocated to each partnership and the percentage of the total amount of all such interests represented thereby; and

(4) The amount of interests of the successor to be issued to investors per interest held in each partnership (on an equivalent interest basis, such as per \$1,000 invested).

(c) If interests in the successor will be allocated to the general partner in exchange for its general partner interest or otherwise or if the general partner will receive other consideration in connection with the roll-up transaction:

(1) Describe in reasonable detail the method used to allocate interests in the successor to the general partner or

**§ 229.907**

to determine the amount of consideration payable to the general partner and the reasons such method(s) was used; and

(2) Identify the consideration paid by the general partner for interests in the partnerships that will be exchanged in the roll-up transaction.

**§ 229.907 (Item 907) Background of the roll-up transaction.**

(a)(1) Furnish a summary of the background of the transaction. Such summary shall include, but not be limited to, a description of any contacts, negotiations or transactions concerning any of the following matters:

(i) A merger, consolidation, or combination of any of the partnerships;

(ii) An acquisition of any of the partnerships or a material amount of any of their assets;

(iii) A tender offer for or other acquisition of securities of any class issued by any of the partnerships; or

(iv) A change in control of any of the partnerships.

(2) The summary required by paragraph (a)(1) of this Item shall:

(i) Cover the period beginning with each partnership's second full fiscal year preceding the date of the filing of the roll-up transaction;

(ii) Include contacts, negotiations or transactions between the general partner or its affiliates and any person who would have a direct interest in the matters listed in paragraphs (a)(1)(i)-(iv) of this Item; and

(iii) Identify the person who initiated such contacts, negotiations or transactions.

(b) Briefly describe the background of each partnership, including, but not limited to:

(1) The amount of capital raised from investors, the extent to which net proceeds from the original offering of interests have been invested, the extent to which funds have been invested as planned and the amount not yet invested; and

(2) The partnership's investment objectives and the extent to which the partnership has achieved its investment objectives.

(c) Discuss whether the general partner (including any affiliated person materially dependent on the general

**17 CFR Ch. II (4-1-01 Edition)**

partner's compensation arrangement with the partnership) or any partnership has experienced since the commencement of the most recently completed fiscal year or is likely to experience any material adverse financial developments. If so, describe such developments and the effect of the transaction on such matters.

**§ 229.908 (Item 908) Reasons for and alternatives to the roll-up transaction.**

(a) Describe the reason(s) for the roll-up transaction.

(b)(1) If the general partner or sponsor considered alternatives to the roll-up transaction being proposed, describe such alternative(s) and state the reason(s) for their rejection.

(2) Whether or not described in response to paragraph (b)(1) of this Item (§229.908), describe in reasonable detail the potential alternative of continuation of the partnerships in accordance with their existing business plans, including the effects of such continuation and the material risks and benefits that likely would arise in connection therewith, and, if applicable, the general partner's reasons for not considering such alternative.

(3) Whether or not described in response to paragraph (b)(1) of this Item (§229.908), describe in reasonable detail the potential alternative of liquidation of the partnerships, the procedures required to accomplish liquidation, the effects of liquidation, the material risks and benefits that likely would arise in connection with liquidation, and, if applicable, the general partner's reasons for not considering such alternative.

(c) State the reasons for the structure of the roll-up transaction and for undertaking such transaction at this time.

(d) State whether the general partner initiated the roll-up transaction and, if not, whether the general partner participated in the structuring of the transaction.

(e) State whether the general partner recommends the roll-up transaction and briefly describe the reasons for such recommendation.

## Securities and Exchange Commission

## § 229.910

### § 229.909 (Item 909) Conflicts of interest.

(a) Briefly describe the general partner's fiduciary duties to each partnership subject to the roll-up transaction and each actual or potential material conflict of interest between the general partner and the investors relating to the roll-up transaction.

(b)(1) State whether or not the general partner has retained an unaffiliated representative to act on behalf of investors for purposes of negotiating the terms of the roll-up transaction. If no such representative has been retained, describe the reasons therefor and the risks arising from the absence of separate representation.

(2) If an unaffiliated representative has been retained to represent investors:

(i) Identify such unaffiliated representative;

(ii) Briefly describe the representative's qualifications, including a brief description of any other transaction similar to the roll-up transaction in which the representative has served in a similar capacity within the past five years;

(iii) Describe the method of selection of such representative, including a statement as to whether or not any investors were consulted in the selection of the representative and, if so, the names of such investors;

(iv) Describe the scope and terms of the engagement of the representative, including, but not limited to, what party will be responsible for paying the representative's fees and whether such fees are contingent upon the outcome of the roll-up transaction;

(v) Describe any material relationship between the representative or its affiliates and:

(A) The general partner, sponsor, any affiliate of the general partner or sponsor; or

(B) Any other person having a material interest in the roll-up transaction, which existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of such relationship;

(vi) Describe in reasonable detail the actions taken by the representative on behalf of investors; and

(vii) Describe the fiduciary duties or other legal obligations of the representative to investors in each of the partnerships.

### § 229.910 (Item 910) Fairness of the transaction.

(a) State whether the general partner reasonably believes that the roll-up transaction is fair or unfair to investors and the reasons for such belief. Such discussion must address the fairness of the roll-up transaction to investors in each of the partnerships and as a whole. If the roll-up transaction may be completed with a combination of partnerships consisting of less than all partnerships, or with portions of partnerships, the belief stated must address each possible combination.

(b) Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this Item (§229.910) is based and, to the extent practicable, the weight assigned to each such factor. Such discussion should include an analysis of the extent, if any, to which such belief is based on the factors set forth in Instructions (2) and (3) to this Item (§229.910), paragraph (b)(1) of Item 909 of this subpart (§229.909(b)(1)) and Item 911 of this subpart (§229.911). This discussion also must:

(1) Compare the value of the consideration to be received in the roll-up transaction to the value of the consideration that would be received pursuant to each of the alternatives discussed in response to Item 908(b) of this subpart (§229.908(b)); and

(2) Describe any material differences among the partnerships (e.g., different types of assets or different investment objectives) relating to the fairness of the transaction.

(c) If any offer of the type described in Instruction (2)(viii) to this Item (§229.910) has been received, describe such offer and state the reason(s) for its rejection.

(d) Describe any factors known to the general partner that may affect materially the value of the consideration to be received by investors in the roll-up transaction, the values assigned to the partnerships for purposes of the comparisons to alternatives required by paragraph (b) of this Item (§229.910) and

## § 229.911

## 17 CFR Ch. II (4-1-01 Edition)

the fairness of the transaction to investors.

(e) State whether the general partner's statements in response to paragraphs (a) and (b) of this Item (§ 229.910) are based, in whole or in part, on any report, opinion or appraisal described in response to Item 911 of this subpart (§ 229.911). If so, describe any material uncertainties known to the general partner that relate to the conclusions in any such report, opinion or appraisal including, but not limited to, developments or trends that have affected or are reasonably likely to affect materially such conclusions.

*Instructions to Item 910:* (1) A statement that the general partner has no reasonable belief as to the fairness of the roll-up transaction to investors will not be considered sufficient disclosure in response to paragraph (a) of this Item (§ 229.910(a)).

(2) The factors which are important in determining the fairness of a roll-up transaction to investors and the weight, if any, which should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraph (b)(1) of Item 909 (§ 229.909(b)(1)) and whether the consideration offered to investors constitutes fair value in relation to:

- (i) Current market prices, if any;
- (ii) Historic market prices, if any;
- (iii) Net book value;
- (iv) Going concern value;
- (v) Liquidation value;

(vi) Purchases of limited partnership interests by the general partner or sponsor or their affiliates since the commencement of the partnership's second full fiscal year preceding the date of filing of the disclosure document for the roll-up transaction;

(vii) Any report, opinion, or appraisal described in Item 911 of this subpart (§ 229.911); and

(viii) Offers of which the general partner or sponsor is aware made during the preceding eighteen months for a merger, consolidation, or combination of any of the partnerships; an acquisition of any of the partnerships or a material amount of their assets; a tender offer for or other acquisition of securities of any class issued by any of the partnerships; or a change in control of any of the partnerships.

(3) The discussion concerning fairness should specifically address material terms of the transaction including whether the consideration offered to investors constitutes fair value in relation to:

(i) The form and amount of consideration to be received by investors and the sponsor in the roll-up transaction;

(ii) The methods used to determine such consideration; and

(iii) The compensation to be paid to the sponsor in the future.

(4) Conclusory statements, such as "The roll-up transaction is fair to investors in relation to net book value, going concern value, liquidation value and future prospects of the partnership," will not be considered sufficient disclosure in response to paragraph (b) of this Item (§ 229.910(b)).

(5) Consideration should be given to presenting the comparative numerical data as to the value of the consideration being received by investors, liquidation value and other values in a tabular format. Financial and other information concerning the partnerships should be prepared based upon the most recent available information, such as, in the case of financial information, the periods covered by interim selected financial information included in the prospectus in accordance with Item 914 of this subpart (§ 229.914).

### § 229.911 (Item 911) Reports, opinions and appraisals.

(a)(1) *All material reports, opinions or appraisals.* State whether or not the general partner or sponsor has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party which is materially related to the roll-up transaction including, but not limited to, any such report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to investors in connection with the roll-up transaction or the fairness of such transaction to the general partner or investors.

(2) With respect to any report, opinion or appraisal described in paragraph (a)(1) of this Item (§ 229.911);

- (i) Identify such outside party;
- (ii) Briefly describe the qualifications of such outside party;
- (iii) Describe the method of selection of such outside party;
- (iv) Describe any material relationship between:

(A) The outside party or its affiliates; and

(B) The general partner, sponsor, the successor or any of their affiliates,

which existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of such relationship;

## Securities and Exchange Commission

## § 229.911

(v) If such report, opinion or appraisal relates to the fairness of the consideration, state whether the general partner, sponsor or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid.

(vi) Furnish a summary concerning such report, opinion or appraisal which shall include, but not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the general partner, sponsor or its affiliates; and any limitation imposed by the general partner, sponsor or affiliate on the scope of the investigation. If any limitation was imposed by the general partner, sponsor or affiliate on the scope of the investigation, including, but not limited to, access to its personnel, premises, and relevant books and records, state the reasons therefor.

(vii) State whether any compensation paid to such outside party is contingent on the approval or completion of the roll-up transaction and, if so, the reasons for compensating such parties on a contingent basis.

(3) Furnish a statement to the effect that upon written request by an investor or his representative who has been so designated in writing, a copy of any such report, opinion or appraisal shall be transmitted promptly, without charge, by the general partner or sponsor. The statement also must include the name and address of the person to whom investors or their representatives should make their request.

(4) All reports, opinions or appraisals referred to in paragraph (a)(1) of this Item (§ 229.911) shall be filed as exhibits to the registration statement.

(5)(i) Describe any contacts in connection with the roll-up transaction between the sponsor or the general partner and any outside party with respect to the preparation by such party of an opinion concerning the fairness of the roll-up transaction, a valuation of a partnership or its assets, or any other report with respect to the roll-up transaction. No description is required, however, of contacts with respect to reports, opinions or appraisals filed as

exhibits pursuant to paragraph (a)(4) of this Item (§ 229.911).

(ii) The description of contacts with any outside party required by paragraph (a)(5)(i) of this Item (§ 229.911) shall include the following:

(A) The identity of each such party;

(B) The nature of the contact;

(C) The actions taken by such party;

(D) Any views, preliminary or final, expressed on the proposed subject matter of the report, opinion or appraisal; and

(E) Any reasons such party did not provide a report, opinion or appraisal.

(b) *Fairness opinions*: (1) If any report, opinion or appraisal relates to the fairness of the roll-up transaction to investors in the partnerships, state whether or not the report, opinion or appraisal addresses the fairness of:

(i) The roll-up transaction as a whole and to investors in each partnership; and

(ii) All possible combinations of partnerships in the roll-up transaction (including portions of partnerships if the transaction is structured to permit portions of partnerships to participate). If all possible combinations are not addressed:

(A) Identify the combinations that are addressed;

(B) Identify the person(s) that determined which combinations would be addressed and state the reasons for the selection of the combinations; and

(C) State that if the roll-up transaction is completed with a combination of partnerships not addressed, no report, opinion or appraisal concerning the fairness of the roll-up transaction will have been obtained.

(2) If the sponsor or the general partner has not obtained any opinion on the fairness of the proposed roll-up transaction to investors in each of the affected partnerships, state the sponsor's or general partner's reasons for concluding that such an opinion is not necessary in order to permit the limited partners or shareholders to make an informed decision on the proposed transaction.

(c) *Appraisals*. If the report, opinion or appraisal consists of an appraisal of the assets of the partnerships:

(1) Describe the purpose(s) for which the appraisals were obtained and their

## § 229.912

## 17 CFR Ch. II (4-1-01 Edition)

use in connection with the roll-up transaction;

(2) Describe which assets are covered by the appraisals and state the aggregate appraised value of the assets covered by the appraisals (including such value net of associated indebtedness). Provide a description of, and valuation of, any assets subject to any material qualifications by the appraiser and a summary of such qualifications;

(3) Identify the date as of which the appraisals were prepared. State whether and in what circumstances the appraisals will be updated. State whether any events have occurred or conditions have changed since the date of the appraisals that may have caused a material change in the value of the assets;

(4) Include as an appendix to the prospectus one or more tables setting forth the following information:

(i) The appraised value of any separately appraised asset that is significant to the partnership holding such asset;

(ii) If the appraiser considered different valuation approaches in preparing the appraisals of the assets identified in response to paragraph (c)(4)(i) of this Item (§ 229.911(c)(4)(i)), the value of each such asset under each valuation approach considered by the appraiser, identifying the valuation approach used by the appraiser in determining the appraised value and the reason such approach was chosen; and

(iii) All material assumptions used by the appraiser in appraising the assets identified in response to paragraph (c)(4)(i) of this Item (§ 229.911(c)(4)(i)), and, if the appraiser used different assumptions for any of such assets, the reasons the different assumptions were chosen.

(5) For purposes of this Item and Item 902 of this subpart (§ 229.902), an asset is “significant” to a partnership if it represents more than 10% of the value of the partnership’s assets as of the end of the most recently-completed fiscal year or recently-completed interim period or if 10% or more of the partnership’s cash flow or net income for the most recently-completed fiscal year or most recently-completed subsequent interim period was derived from such asset.

*Instructions to Item 911:* (1) The reports, opinions and appraisals required to be identified in response to paragraph (a) of this Item (§ 229.911) include any reports, opinions and appraisals which materially relate to the roll-up transaction whether or not relied upon, such as reports or opinions regarding alternatives to the roll-up transaction whether or not the alternatives were rejected.

(2) The information called for by paragraph (a)(2) of this Item (§ 229.911) should be given with respect to the firm which provides the report, opinion or appraisal rather than the employees of such firm who prepared it.

(3) With respect to appraisals, a summary prepared by the appraisers should not be included in lieu of the description of the appraisals required by paragraph (c) of this Item (§ 229.911). A clear and concise summary description of the appraisals is required.

[56 FR 57247, Nov. 8, 1991, as amended at 59 FR 63683, Dec. 8, 1994]

### **§ 229.912 (Item 912) Source and amount of funds and transactional expenses.**

(a) State the source and total amount of funds or other consideration to be used in the roll-up transaction.

(b)(1) Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the roll-up transaction including, but not limited to, filing fees, legal, financial advisory, accounting and appraisal fees, solicitation expenses and printing costs. Identify the persons responsible for paying any or all of such expenses.

(2) State whether or not any partnership subject to the roll-up transaction will be, directly or indirectly, responsible for any or all of the expenses of the transaction. If any partnership will be so responsible, state the amount to be provided by each partnership and the sources of capital to finance such amount.

(c) If all or any part of the consideration to be used by the sponsor or successor in the roll-up transaction is expected to be, directly or indirectly, provided by any partnership, state the amount to be provided by each partnership and the sources of capital to finance such amount.

(d) If all or any part of the funds or other consideration is, or is expected to be, directly or indirectly borrowed by

the sponsor or successor for the purpose of the roll-up transaction:

(1) Provide a summary of each such loan agreement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions; and

(2) Briefly describe any plans or arrangements to finance or repay such borrowing, or, if no plans or arrangements have been made, make a statement to that effect.

(e) If the source of all or any part of the funds to be used in the roll-up transaction is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Exchange Act and section 13(d) or 14(d) is applicable to such transaction, the name of such bank shall not be made available to the public if the person filing the statement so requests in writing and files such request, naming such bank, with the Secretary of the Commission.

**§ 229.913 (Item 913) Other provisions of the transaction.**

(a) State whether or not appraisal rights are provided under applicable state law, under the partnership's governing instruments or will be voluntarily accorded by the successor, the general partner or the sponsor (or any of their affiliates) in connection with the roll-up transaction. If so, summarize such appraisal rights. If appraisal rights will not be available to investors who object to the transaction, briefly outline the rights which may be available to such investors under such law.

(b) If any provision has been made to allow investors to obtain access to the books and records of the partnership or to obtain counsel or appraisal services at the expense of the successor, the general partner, the partnership, the sponsor (or any of their affiliates), describe such provision.

(c) Discuss the investors' rights under federal and state law to obtain a partnership's list of investors.

**§ 229.914 (Item 914) Pro forma financial statements: selected financial data.**

(a) In addition to the information required by Item 301 of Regulation S-K,

Selected Financial Data (§229.301), and Item 302 of Regulation S-K, Supplementary Financial Information (§229.302), for each partnership proposed to be included in a roll-up transaction provide: Ratio of earnings to fixed charges, cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners' equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital). This information should be provided for the same period(s) for which Selected Financial Data and Supplementary Financial Information are required to be provided. Additional or other information should be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction.

(b) Provide pro forma financial information (including oil and gas reserves and cash flow disclosure, if appropriate), assuming:

(1) All partnerships participate in the roll-up transaction; and

(2) Participation in a roll-up transaction of those partnerships that on a combined basis have the lowest combined net cash provided by operating activities for the last fiscal year of such partnerships, *provided* participation by such partnerships satisfies all conditions to consummation of the roll-up transaction. If the combination of all partnerships proposed to be included in a roll-up transaction results in such lowest combined net cash provided by operating activities, this shall be noted and no separate pro forma financial statements are required.

(c) The pro forma financial statements required by paragraph (b) of this Item (§229.914) shall disclose the effect of the roll-up transaction on the successor's:

(1) Balance sheet as of the later of the end of the most recent fiscal year or the latest interim period;

## § 229.915

(2) Statement of income (with separate line items to reflect income (loss) excluding and including the roll-up expenses and payments), earnings per share amounts, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period;

(3) Statement of cash flows for the most recent fiscal year and the latest interim period; and

(4) Book value per share as of the later of the end of the most recent fiscal year or the latest interim period.

*Instructions to Item 914.* (1) Notwithstanding the provisions of this Item (§ 229.914), any or all of the information required by paragraphs (b) and (c) of this Item (§ 229.914) that is not material for the exercise of prudent judgment in regard to the matter to be acted upon, may be omitted.

(2) If the roll-up transaction is structured to permit participation by portions of partnerships, consideration should be given to the effect of such participation in preparing the pro forma financial statements reflecting a partial roll-up.

### § 229.915 (Item 915) Federal income tax consequences.

(a) Provide a brief, clear and understandable summary of the material Federal income tax consequences of the roll-up transaction and an investment in the successor. Where a tax opinion has been provided, briefly summarize the substance of such opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine. If any of the material Federal income tax consequences are not expected to be the same for investors in all partnerships, the differences shall be described.

(b) State whether or not the opinion of counsel is included as an appendix to the prospectus. If filed as an exhibit to the registration statement and not included as an appendix to the prospectus, include a statement to the effect that, upon receipt of a written request by an investor or his representative who has been so designated in writing, a copy of the opinion of counsel will be transmitted promptly, without charge, by the general partner or sponsor. The statement should include the name and address of the person to whom investors should make their request.

## 17 CFR Ch. II (4-1-01 Edition)

### Subpart 229.1000—Mergers and Acquisitions (Regulation M-A)

SOURCE: 64 FR 61443, Nov. 10, 1999, unless otherwise noted.

#### § 229.1000 (Item 1000) Definitions.

The following definitions apply to the terms used in Regulation M-A (§§ 229.1000 through 229.1016), unless specified otherwise:

(a) *Associate* has the same meaning as in § 240.12b-2 of this chapter;

(b) *Instruction C* means General Instruction C to Schedule 13E-3 (§ 240.13e-100 of this chapter) and General Instruction C to Schedule TO (§ 240.14d-100 of this chapter);

(c) *Issuer tender offer* has the same meaning as in § 240.13e-4(a)(2) of this chapter;

(d) *Offeror* means any person who makes a tender offer or on whose behalf a tender offer is made;

(e) *Rule 13e-3 transaction* has the same meaning as in § 240.13e-3(a)(3) of this chapter;

(f) *Subject company* means the company or entity whose securities are sought to be acquired in the transaction (*e.g.*, the target), or that is otherwise the subject of the transaction;

(g) *Subject securities* means the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction; and

(h) *Third-party tender offer* means a tender offer that is not an issuer tender offer.

#### § 229.1001 (Item 1001) Summary term sheet.

*Summary term sheet.* Provide security holders with a summary term sheet that is written in plain English. The summary term sheet must briefly describe in bullet point format the most material terms of the proposed transaction. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the proposed transaction. The bullet points must cross-reference a more detailed discussion contained in the disclosure document that is disseminated to security holders.

## Securities and Exchange Commission

## § 229.1003

### *Instructions to Item 1001:*

1. The summary term sheet must not re-cite all information contained in the disclosure document that will be provided to security holders. The summary term sheet is intended to serve as an overview of all material matters that are presented in the accompanying documents provided to security holders.

2. The summary term sheet must begin on the first or second page of the disclosure document provided to security holders.

3. Refer to Rule 421(b) and (d) of Regulation C of the Securities Act (§230.421 of this chapter) for a description of plain English disclosure.

### **§ 229.1002 (Item 1002) Subject company information.**

(a) *Name and address.* State the name of the subject company (or the issuer in the case of an issuer tender offer), and the address and telephone number of its principal executive offices.

(b) *Securities.* State the exact title and number of shares outstanding of the subject class of equity securities as of the most recent practicable date. This may be based upon information in the most recently available filing with the Commission by the subject company unless the filing person has more current information.

(c) *Trading market and price.* Identify the principal market in which the subject securities are traded and state the high and low sales prices for the subject securities in the principal market (or, if there is no principal market, the range of high and low bid quotations and the source of the quotations) for each quarter during the past two years. If there is no established trading market for the securities (except for limited or sporadic quotations), so state.

(d) *Dividends.* State the frequency and amount of any dividends paid during the past two years with respect to the subject securities. Briefly describe any restriction on the subject company's current or future ability to pay dividends. If the filing person is not the subject company, furnish this information to the extent known after making reasonable inquiry.

(e) *Prior public offerings.* If the filing person has made an underwritten public offering of the subject securities for cash during the past three years that was registered under the Securities Act of 1933 or exempt from registration

under Regulation A (§230.251 through §230.263 of this chapter), state the date of the offering, the amount of securities offered, the offering price per share (adjusted for stock splits, stock dividends, etc. as appropriate) and the aggregate proceeds received by the filing person.

(f) *Prior stock purchases.* If the filing person purchased any subject securities during the past two years, state the amount of the securities purchased, the range of prices paid and the average purchase price for each quarter during that period. Affiliates need not give information for purchases made before becoming an affiliate.

### **§ 229.1003 (Item 1003) Identity and background of filing person.**

(a) *Name and address.* State the name, business address and business telephone number of each filing person. Also state the name and address of each person specified in Instruction C to the schedule (except for Schedule 14D-9 (§240.14d-101 of this chapter)). If the filing person is an affiliate of the subject company, state the nature of the affiliation. If the filing person is the subject company, so state.

(b) *Business and background of entities.* If any filing person (other than the subject company) or any person specified in Instruction C to the schedule is not a natural person, state the person's principal business, state or other place of organization, and the information required by paragraphs (c)(3) and (c)(4) of this section for each person.

(c) *Business and background of natural persons.* If any filing person or any person specified in Instruction C to the schedule is a natural person, provide the following information for each person:

(1) Current principal occupation or employment and the name, principal business and address of any corporation or other organization in which the employment or occupation is conducted;

(2) Material occupations, positions, offices or employment during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in

§ 229.1004

17 CFR Ch. II (4-1-01 Edition)

which the occupation, position, office or employment was carried on;

(3) A statement whether or not the person was convicted in a criminal proceeding during the past five years (excluding traffic violations or similar misdemeanors). If the person was convicted, describe the criminal proceeding, including the dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case;

(4) A statement whether or not the person was a party to any judicial or administrative proceeding during the past five years (except for matters that were dismissed without sanction or settlement) that resulted in a judgment, decree or final order enjoining the person from future violations of, or prohibiting activities subject to, federal or state securities laws, or a finding of any violation of federal or state securities laws. Describe the proceeding, including a summary of the terms of the judgment, decree or final order; and

(5) Country of citizenship.

(d) *Tender offer.* Identify the tender offer and the class of securities to which the offer relates, the name of the offeror and its address (which may be based on the offeror's Schedule TO (§240.14d-100 of this chapter) filed with the Commission).

*Instruction to Item 1003*

If the filing person is making information relating to the transaction available on the Internet, state the address where the information can be found.

**§ 229.1004 (Item 1004) Terms of the transaction.**

(a) *Material terms.* State the material terms of the transaction.

(1) *Tender offers.* In the case of a tender offer, the information must include:

(i) The total number and class of securities sought in the offer;

(ii) The type and amount of consideration offered to security holders;

(iii) The scheduled expiration date;

(iv) Whether a subsequent offering period will be available, if the transaction is a third-party tender offer;

(v) Whether the offer may be extended, and if so, how it could be extended;

(vi) The dates before and after which security holders may withdraw securities tendered in the offer;

(vii) The procedures for tendering and withdrawing securities;

(viii) The manner in which securities will be accepted for payment;

(ix) If the offer is for less than all securities of a class, the periods for accepting securities on a pro rata basis and the offeror's present intentions in the event that the offer is oversubscribed;

(x) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(xi) A brief statement as to the accounting treatment of the transaction, if material; and

(xii) The federal income tax consequences of the transaction, if material.

(2) *Mergers or similar transactions.* In the case of a merger or similar transaction, the information must include:

(i) A brief description of the transaction;

(ii) The consideration offered to security holders;

(iii) The reasons for engaging in the transaction;

(iv) The vote required for approval of the transaction;

(v) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(vi) A brief statement as to the accounting treatment of the transaction, if material; and

(vii) The federal income tax consequences of the transaction, if material.

*Instruction to Item 1004(a):*

If the consideration offered includes securities exempt from registration under the Securities Act of 1933, provide a description of the securities that complies with Item 202 of Regulation S-K (§229.202). This description is not required if the issuer of the securities meets the requirements of General Instructions I.A, I.B.1 or I.B.2, as applicable, or I.C. of Form S-3 (§239.13 of this chapter) and elects to furnish information by incorporation by reference; only capital stock is to be issued; and securities of the same class are registered under section 12 of the Exchange Act and either are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or are securities

## Securities and Exchange Commission

## § 229.1005

for which bid and offer quotations are reported in an automated quotations system operated by a national securities association.

(b) *Purchases.* State whether any securities are to be purchased from any officer, director or affiliate of the subject company and provide the details of each transaction.

(c) *Different terms.* Describe any term or arrangement in the Rule 13e-3 transaction that treats any subject security holders differently from other subject security holders.

(d) *Appraisal rights.* State whether or not dissenting security holders are entitled to any appraisal rights. If so, summarize the appraisal rights. If there are no appraisal rights available under state law for security holders who object to the transaction, briefly outline any other rights that may be available to security holders under the law.

(e) *Provisions for unaffiliated security holders.* Describe any provision made by the filing person in connection with the transaction to grant unaffiliated security holders access to the corporate files of the filing person or to obtain counsel or appraisal services at the expense of the filing person. If none, so state.

(f) *Eligibility for listing or trading.* If the transaction involves the offer of securities of the filing person in exchange for equity securities held by unaffiliated security holders of the subject company, describe whether or not the filing person will take steps to assure that the securities offered are or will be eligible for trading on an automated quotations system operated by a national securities association.

### § 229.1005 (Item 1005) Past contacts, transactions, negotiations and agreements.

(a) *Transactions.* Briefly state the nature and approximate dollar amount of any transaction, other than those described in paragraphs (b) or (c) of this section, that occurred during the past two years, between the filing person (including any person specified in Instruction C of the schedule) and:

(1) The subject company or any of its affiliates that are not natural persons if the aggregate value of the trans-

actions is more than one percent of the subject company's consolidated revenues for:

(i) The fiscal year when the transaction occurred; or

(ii) The past portion of the current fiscal year, if the transaction occurred in the current year; and

#### *Instruction to Item 1005(a)(1):*

The information required by this Item may be based on information in the subject company's most recent filing with the Commission, unless the filing person has reason to believe the information is not accurate.

(2) Any executive officer, director or affiliate of the subject company that is a natural person if the aggregate value of the transaction or series of similar transactions with that person exceeds \$60,000.

(b) *Significant corporate events.* Describe any negotiations, transactions or material contacts during the past two years between the filing person (including subsidiaries of the filing person and any person specified in Instruction C of the schedule) and the subject company or its affiliates concerning any:

- (1) Merger;
- (2) Consolidation;
- (3) Acquisition;

(4) Tender offer for or other acquisition of any class of the subject company's securities;

(5) Election of the subject company's directors; or

(6) Sale or other transfer of a material amount of assets of the subject company.

(c) *Negotiations or contacts.* Describe any negotiations or material contacts concerning the matters referred to in paragraph (b) of this section during the past two years between:

(1) Any affiliates of the subject company; or

(2) The subject company or any of its affiliates and any person not affiliated with the subject company who would have a direct interest in such matters.

#### *Instruction to paragraphs (b) and (c) of Item 1005*

Identify the person who initiated the contacts or negotiations.

(d) *Conflicts of interest.* If material, describe any agreement, arrangement

**§ 229.1006**

**17 CFR Ch. II (4-1-01 Edition)**

or understanding and any actual or potential conflict of interest between the filing person or its affiliates and:

(1) The subject company, its executive officers, directors or affiliates; or

(2) The offeror, its executive officers, directors or affiliates.

*Instruction to Item 1005(d)*

If the filing person is the subject company, no disclosure called for by this paragraph is required in the document disseminated to security holders, so long as substantially the same information was filed with the Commission previously and disclosed in a proxy statement, report or other communication sent to security holders by the subject company in the past year. The document disseminated to security holders, however, must refer specifically to the discussion in the proxy statement, report or other communication that was sent to security holders previously. The information also must be filed as an exhibit to the schedule.

(e) *Agreements involving the subject company's securities.* Describe any agreement, arrangement, or understanding, whether or not legally enforceable, between the filing person (including any person specified in Instruction C of the schedule) and any other person with respect to any securities of the subject company. Name all persons that are a party to the agreements, arrangements, or understandings and describe all material provisions.

*Instructions to Item 1005(e)*

1. The information required by this Item includes: the transfer or voting of securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss, or the giving or withholding of proxies, consents or authorizations.

2. Include information for any securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of the subject securities. No disclosure, however, is required about standard default and similar provisions contained in loan agreements.

**§ 229.1006 (Item 1006) Purposes of the transaction and plans or proposals.**

(a) *Purposes.* State the purposes of the transaction.

(b) *Use of securities acquired.* Indicate whether the securities acquired in the transaction will be retained, retired, held in treasury, or otherwise disposed of.

(c) *Plans.* Describe any plans, proposals or negotiations that relate to or would result in:

(1) Any extraordinary transaction, such as a merger, reorganization or liquidation, involving the subject company or any of its subsidiaries;

(2) Any purchase, sale or transfer of a material amount of assets of the subject company or any of its subsidiaries;

(3) Any material change in the present dividend rate or policy, or indebtedness or capitalization of the subject company;

(4) Any change in the present board of directors or management of the subject company, including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any existing vacancies on the board or to change any material term of the employment contract of any executive officer;

(5) Any other material change in the subject company's corporate structure or business, including, if the subject company is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by Section 13 of the Investment Company Act of 1940 (15 U.S.C. 80a-13);

(6) Any class of equity securities of the subject company to be delisted from a national securities exchange or cease to be authorized to be quoted in an automated quotations system operated by a national securities association;

(7) Any class of equity securities of the subject company becoming eligible for termination of registration under section 12(g)(4) of the Act (15 U.S.C. 78l);

(8) The suspension of the subject company's obligation to file reports under Section 15(d) of the Act (15 U.S.C. 78o);

(9) The acquisition by any person of additional securities of the subject company, or the disposition of securities of the subject company; or (10) Any changes in the subject company's charter, bylaws or other governing instruments or other actions that could impede the acquisition of control of the subject company.

(d) *Subject company negotiations.* If the filing person is the subject company:

(1) State whether or not that person is undertaking or engaged in any negotiations in response to the tender offer that relate to:

(i) A tender offer or other acquisition of the subject company's securities by the filing person, any of its subsidiaries, or any other person; or

(ii) Any of the matters referred to in paragraphs (c)(1) through (c)(3) of this section; and

(2) Describe any transaction, board resolution, agreement in principle, or signed contract that is entered into in response to the tender offer that relates to one or more of the matters referred to in paragraph (d)(1) of this section.

*Instruction to Item 1006(d)(1)*

If an agreement in principle has not been reached at the time of filing, no disclosure under paragraph (d)(1) of this section is required of the possible terms of or the parties to the transaction if in the opinion of the board of directors of the subject company disclosure would jeopardize continuation of the negotiations. In that case, disclosure indicating that negotiations are being undertaken or are underway and are in the preliminary stages is sufficient.

**§ 229.1007 (Item 1007) Source and amount of funds or other consideration.**

(a) *Source of funds.* State the specific sources and total amount of funds or other consideration to be used in the transaction. If the transaction involves a tender offer, disclose the amount of funds or other consideration required to purchase the maximum amount of securities sought in the offer.

(b) *Conditions.* State any material conditions to the financing discussed in response to paragraph (a) of this section. Disclose any alternative financing arrangements or alternative financing plans in the event the primary financing plans fall through. If none, so state.

(c) *Expenses.* Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the transaction including, but not limited to, filing, legal, accounting and appraisal fees, solicitation expenses and printing costs and state whether or not the subject

company has paid or will be responsible for paying any or all expenses.

(d) *Borrowed funds.* If all or any part of the funds or other consideration required is, or is expected, to be borrowed, directly or indirectly, for the purpose of the transaction:

(1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and any other material terms or conditions of the loan; and

(2) Briefly describe any plans or arrangements to finance or repay the loan, or, if no plans or arrangements have been made, so state.

*Instruction to Item 1007(d):*

If the transaction is a third-party tender offer and the source of all or any part of the funds used in the transaction is to come from a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act (15 U.S.C. 78c), the name of the bank will not be made available to the public if the filing person so requests in writing and files the request, naming the bank, with the Secretary of the Commission.

**§ 229.1008 (Item 1008) Interest in securities of the subject company.**

(a) *Securities ownership.* State the aggregate number and percentage of subject securities that are beneficially owned by each person named in response to Item 1003 of Regulation M-A (§ 229.1003) and by each associate and majority-owned subsidiary of those persons. Give the name and address of any associate or subsidiary.

*Instructions to Item 1008(a)*

1. For purposes of this section, beneficial ownership is determined in accordance with Rule 13d-3 (§ 240.13d-3 of this chapter) under the Exchange Act. Identify the shares that the person has a right to acquire.

2. The information required by this section may be based on the number of outstanding securities disclosed in the subject company's most recently available filing with the Commission, unless the filing person has more current information.

3. The information required by this section with respect to officers, directors and associates of the subject company must be given to the extent known after making reasonable inquiry.

(b) *Securities transactions.* Describe any transaction in the subject securities during the past 60 days. The description of transactions required must

**§ 229.1009**

include, but not necessarily be limited to:

- (1) The identity of the persons specified in the Instruction to this section who effected the transaction;
- (2) The date of the transaction;
- (3) The amount of securities involved;
- (4) The price per share; and
- (5) Where and how the transaction was effected.

*Instructions to Item 1008(b)*

1. Provide the required transaction information for the following persons:

- (a) The filing person (for all schedules);
- (b) Any person named in Instruction C of the schedule and any associate or majority-owned subsidiary of the issuer or filing person (for all schedules except Schedule 14D-9 (§240.14d-101 of this chapter));
- (c) Any executive officer, director, affiliate or subsidiary of the filing person (for Schedule 14D-9 (§240.14d-101 of this chapter));
- (d) The issuer and any executive officer or director of any subsidiary of the issuer or filing person (for an issuer tender offer on Schedule TO (§240.14d-100 of this chapter)); and
- (e) The issuer and any pension, profit-sharing or similar plan of the issuer or affiliate filing the schedule (for a going-private transaction on Schedule 13E-3 (§240.13e-100 of this chapter)).

2. Provide the information required by this Item if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not initially available, it must be obtained and filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided to maintain the confidentiality of information in order to avoid possible misuse of inside information.

**§ 229.1009 (Item 1009) Persons/assets, retained, employed, compensated or used.**

(a) *Solicitations or recommendations.* Identify all persons and classes of persons that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction. Provide a summary of all material terms of employment, retainer or other arrangement for compensation.

(b) *Employees and corporate assets.* Identify any officer, class of employees or corporate assets of the subject company that has been or will be employed

**17 CFR Ch. II (4-1-01 Edition)**

or used by the filing person in connection with the transaction. Describe the purpose for their employment or use.

*Instruction to Item 1009(b):*

Provide all information required by this Item except for the information required by paragraph (a) of this section and Item 1007 of Regulation M-A (§229.1007).

**§ 229.1010 (Item 1010) Financial statements.**

(a) *Financial information.* Furnish the following financial information:

(1) Audited financial statements for the two fiscal years required to be filed with the company's most recent annual report under sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m; 15 U.S.C. 78o);

(2) Unaudited balance sheets, comparative year-to-date income statements and related earnings per share data, statements of cash flows, and comprehensive income required to be included in the company's most recent quarterly report filed under the Exchange Act;

(3) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S-K (§229.503(d)), for the two most recent fiscal years and the interim periods provided under paragraph (a)(2) of this section; and

(4) Book value per share as of the date of the most recent balance sheet presented.

(b) *Pro forma information.* If material, furnish pro forma information disclosing the effect of the transaction on:

(1) The company's balance sheet as of the date of the most recent balance sheet presented under paragraph (a) of this section;

(2) The company's statement of income, earnings per share, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period provided under paragraph (a)(2) of this section; and

(3) The company's book value per share as of the date of the most recent balance sheet presented under paragraph (a) of this section.

(c) *Summary information.* Furnish a fair and adequate summary of the information specified in paragraphs (a)

## Securities and Exchange Commission

## § 229.1012

and (b) of this section for the same periods specified. A fair and adequate summary includes:

(1) The summarized financial information specified in § 210.1-02(bb)(1) of this chapter;

(2) Income per common share from continuing operations (basic and diluted, if applicable);

(3) Net income per common share (basic and diluted, if applicable);

(4) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S-K (§ 229.503(d));

(5) Book value per share as of the date of the most recent balance sheet; and

(6) If material, pro forma data for the summarized financial information specified in paragraphs (c)(1) through (c)(5) of this section disclosing the effect of the transaction.

### § 229.1011 (Item 1011) Additional information.

(a) *Agreements, regulatory requirements and legal proceedings.* If material to a security holder's decision whether to sell, tender or hold the securities sought in the tender offer, furnish the following information:

(1) Any present or proposed material agreement, arrangement, understanding or relationship between the offeror or any of its executive officers, directors, controlling persons or subsidiaries and the subject company or any of its executive officers, directors, controlling persons or subsidiaries (other than any agreement, arrangement or understanding disclosed under any other sections of Regulation M-A (§§ 229.1000 through 229.1016));

*Instruction to paragraph (a)(1):*

In an issuer tender offer disclose any material agreement, arrangement, understanding or relationship between the offeror and any of its executive officers, directors, controlling persons or subsidiaries.

(2) To the extent known by the offeror after reasonable investigation, the applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(3) The applicability of any anti-trust laws;

(4) The applicability of margin requirements under section 7 of the Act (15 U.S.C. 78g) and the applicable regulations; and

(5) Any material pending legal proceedings relating to the tender offer, including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties, and a brief summary of the proceedings and the relief sought.

*Instruction to Item 1011(a)(5):*

A copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding must be furnished promptly to the Commission staff on a supplemental basis.

(b) *Other material information.* Furnish such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

### § 229.1012 (Item 1012) The solicitation or recommendation.

(a) *Solicitation or recommendation.* State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the filing person is advising holders of the subject securities to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, describe the other action recommended. If the filing person is the subject company and is not making a recommendation, state whether the subject company is expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) *Reasons.* State the reasons for the position (including the inability to take a position) stated in paragraph (a) of this section. Conclusory statements such as "The tender offer is in the best interests of shareholders" are not considered sufficient disclosure.

(c) *Intent to tender.* To the extent known by the filing person after making reasonable inquiry, state whether the filing person or any executive officer, director, affiliate or subsidiary of the filing person currently intends to

## § 229.1013

tender, sell or hold the subject securities that are held of record or beneficially owned by that person.

(d) *Intent to tender or vote in a going-private transaction.* To the extent known by the filing person after making reasonable inquiry, state whether or not any executive officer, director or affiliate of the issuer (or any person specified in Instruction C to the schedule) currently intends to tender or sell subject securities owned or held by that person and/or how each person currently intends to vote subject securities, including any securities the person has proxy authority for. State the reasons for the intended action.

### *Instruction to Item 1012(d):*

Provide the information required by this section if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not available, it must be filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders.

(e) *Recommendations of others.* To the extent known by the filing person after making reasonable inquiry, state whether or not any person specified in paragraph (d) of this section has made a recommendation either in support of or opposed to the transaction and the reasons for the recommendation.

## § 229.1013 (Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.

(a) *Purposes.* State the purposes for the Rule 13e-3 transaction.

(b) *Alternatives.* If the subject company or affiliate considered alternative means to accomplish the stated purposes, briefly describe the alternatives and state the reasons for their rejection.

(c) *Reasons.* State the reasons for the structure of the Rule 13e-3 transaction and for undertaking the transaction at this time.

(d) *Effects.* Describe the effects of the Rule 13e-3 transaction on the subject company, its affiliates and unaffiliated security holders, including the federal tax consequences of the transaction.

### *Instructions to Item 1013:*

## 17 CFR Ch. II (4-1-01 Edition)

1. Conclusory statements will not be considered sufficient disclosure in response to this section.

2. The description required by paragraph (d) of this section must include a reasonably detailed discussion of both the benefits and detriments of the Rule 13e-3 transaction to the subject company, its affiliates and unaffiliated security holders. The benefits and detriments of the Rule 13e-3 transaction must be quantified to the extent practicable.

3. If this statement is filed by an affiliate of the subject company, the description required by paragraph (d) of this section must include, but not be limited to, the effect of the Rule 13e-3 transaction on the affiliate's interest in the net book value and net earnings of the subject company in terms of both dollar amounts and percentages.

## § 229.1014 (Item 1014) Fairness of the going-private transaction.

(a) *Fairness.* State whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders. If any director dissented to or abstained from voting on the Rule 13e-3 transaction, identify the director, and indicate, if known, after making reasonable inquiry, the reasons for the dissent or abstention.

(b) *Factors considered in determining fairness.* Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this section is based and, to the extent practicable, the weight assigned to each factor. The discussion must include an analysis of the extent, if any, to which the filing person's beliefs are based on the factors described in Instruction 2 of this section, paragraphs (c), (d) and (e) of this section and Item 1015 of Regulation M-A (§ 229.1015).

(c) *Approval of security holders.* State whether or not the transaction is structured so that approval of at least a majority of unaffiliated security holders is required.

(d) *Unaffiliated representative.* State whether or not a majority of directors who are not employees of the subject company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the Rule 13e-3 transaction and/or preparing a report concerning the fairness of the transaction.

(e) *Approval of directors.* State whether or not the Rule 13e-3 transaction was approved by a majority of the directors of the subject company who are not employees of the subject company.

(f) *Other offers.* If any offer of the type described in paragraph (viii) of Instruction 2 to this section has been received, describe the offer and state the reasons for its rejection.

*Instructions to Item 1014:*

1. A statement that the issuer or affiliate has no reasonable belief as to the fairness of the Rule 13e-3 transaction to unaffiliated security holders will not be considered sufficient disclosure in response to paragraph (a) of this section.

2. The factors that are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, that should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d) and (e) of this section and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:

- (i) Current market prices;
- (ii) Historical market prices;
- (iii) Net book value;
- (iv) Going concern value;
- (v) Liquidation value;
- (vi) Purchase prices paid in previous purchases disclosed in response to Item 1002(f) of Regulation M-A (§ 229.1002(f));
- (vii) Any report, opinion, or appraisal described in Item 1015 of Regulation M-A (§ 229.1015); and
- (viii) Firm offers of which the subject company or affiliate is aware made by any unaffiliated person, other than the filing persons, during the past two years for:
  - (A) The merger or consolidation of the subject company with or into another company, or *vice versa*;
  - (B) The sale or other transfer of all or any substantial part of the assets of the subject company; or
  - (C) A purchase of the subject company's securities that would enable the holder to exercise control of the subject company.

3. Conclusory statements, such as "The Rule 13e-3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer" will not be considered sufficient disclosure in response to paragraph (b) of this section.

3. Conclusory statements, such as "The Rule 13e-3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer" will not be considered sufficient disclosure in response to paragraph (b) of this section.

3. Conclusory statements, such as "The Rule 13e-3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer" will not be considered sufficient disclosure in response to paragraph (b) of this section.

**§ 229.1015 (Item 1015) Reports, opinions, appraisals and negotiations.**

(a) *Report, opinion or appraisal.* State whether or not the subject company or affiliate has received any report, opin-

ion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the Rule 13e-3 transaction, including, but not limited to: Any report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the transaction to the issuer or affiliate or to security holders who are not affiliates.

(b) *Preparer and summary of the report, opinion or appraisal.* For each report, opinion or appraisal described in response to paragraph (a) of this section or any negotiation or report described in response to Item 1014(d) of Regulation M-A (§ 229.1014) or Item 14(b)(6) of Schedule 14A (§ 240.14a-101 of this chapter) concerning the terms of the transaction:

(1) Identify the outside party and/or unaffiliated representative;

(2) Briefly describe the qualifications of the outside party and/or unaffiliated representative;

(3) Describe the method of selection of the outside party and/or unaffiliated representative;

(4) Describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between:

(i) The outside party, its affiliates, and/or unaffiliated representative; and

(ii) The subject company or its affiliates;

(5) If the report, opinion or appraisal relates to the fairness of the consideration, state whether the subject company or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid; and

(6) Furnish a summary concerning the negotiation, report, opinion or appraisal. The summary must include, but need not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the subject company or affiliate; and any limitation imposed by the subject company or affiliate on the scope of the investigation.

**§ 229.1016**

**17 CFR Ch. II (4-1-01 Edition)**

*Instruction to Item 1015(b):*

The information called for by paragraphs (b)(1), (2) and (3) of this section must be given with respect to the firm that provides the report, opinion or appraisal rather than the employees of the firm that prepared the report.

(c) *Availability of documents.* Furnish a statement to the effect that the report, opinion or appraisal will be made available for inspection and copying at the principal executive offices of the subject company or affiliate during its regular business hours by any interested equity security holder of the subject company or representative who has been so designated in writing. This statement also may provide that a copy of the report, opinion or appraisal will be transmitted by the subject company or affiliate to any interested equity security holder of the subject company or representative who has been so designated in writing upon written request and at the expense of the requesting security holder.

**§ 229.1016 (Item 1016) Exhibits.**

File as an exhibit to the schedule:

(a) Any disclosure materials furnished to security holders by or on behalf of the filing person, including:

(1) Tender offer materials (including transmittal letter);

(2) Solicitation or recommendation (including those referred to in Item 1012 of Regulation M-A (§ 229.1012));

(3) Going-private disclosure document;

(4) Prospectus used in connection with an exchange offer where securities are registered under the Securities Act of 1933; and

(5) Any other disclosure materials;

(b) Any loan agreement referred to in response to Item 1007(d) of Regulation M-A (§ 229.1007(d));

*Instruction to Item 1016(b):*

If the filing relates to a third-party tender offer and a request is made under Item 1007(d) of Regulation M-A (§ 229.1007(d)), the identity of the bank providing financing may be omitted from the loan agreement filed as an exhibit.

(c) Any report, opinion or appraisal referred to in response to Item 1014(d) or Item 1015 of Regulation M-A (§ 229.1014(d) or § 229.1015);

(d) Any document setting forth the terms of any agreement, arrangement, understanding or relationship referred to in response to Item 1005(e) or Item 1011(a)(1) of Regulation M-A (§ 229.1005(e) or § 229.1011(a)(1));

(e) Any agreement, arrangement or understanding referred to in response to § 229.1005(d), or the pertinent portions of any proxy statement, report or other communication containing the disclosure required by Item 1005(d) of Regulation M-A (§ 229.1005(d));

(f) A detailed statement describing security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in response to Item 1004(d) of Regulation M-A (§ 229.1004(d));

(g) Any written instruction, form or other material that is furnished to persons making an oral solicitation or recommendation by or on behalf of the filing person for their use directly or indirectly in connection with the transaction; and

(h) Any written opinion prepared by legal counsel at the filing person's request and communicated to the filing person pertaining to the tax consequences of the transaction.

EXHIBIT TABLE TO ITEM 1016 OF REGULATION M-A

	13E-3	TO	14D-9
Disclosure Material .....	X	X	X
Loan Agreement .....	X	X	.....
Report, Opinion or Appraisal .....	X	.....	.....
Contracts, Arrangements or Understandings .....	X	X	X
Statement re: Appraisal Rights .....	X	.....	.....
Oral Solicitation Materials .....	X	X	X
Tax Opinion .....	.....	X	.....