

SEC Regulations Committee
April 17, 2007 - Joint Meeting with SEC Staff
SEC Offices – Washington DC

Discussion Document H

**Topic: Timeliness of Executive Compensation Disclosures in the Form S-4
Registration Statement of a Well-Known Seasoned Issuer**

Issue:

When a well-known seasoned issuer (WKSI) files a Form S-4 before filing its definitive proxy statement with executive compensation disclosures for the most recent fiscal year, for what period must the Form S-4 provide Regulation S-K Item 402 disclosures?

Background:

Generally, an SEC registration statement must provide executive compensation disclosures for the registrant's most recently completed fiscal year. When a Form S-1 registration statement is filed or declared effective after a registrant's fiscal year-end, the Form S-1 generally must include executive compensation disclosures for that most recently completed fiscal year. For example, in the SEC Division of Corporation Finance's *Compliance and Disclosure Interpretations – Item 402 of Regulation S-K – Executive Compensation (Last Updated: February 12, 2007)* (<http://www.sec.gov/divisions/corpfin/guidance/execcomp402interp.pdf>), the SEC staff response in Section 4.01 on page 17 indicates a filing made by a calendar year company on January 2 must include compensation information for the previous year ended December 31 when compensation information may not be incorporated by reference into the filing.

Separately, in Section H.6. of the SEC Division of Corporation Finance's *Manual of Publicly Available Telephone Interpretations* (http://www.sec.gov/interps/telephone/cftelinterps_forms-3.pdf), the SEC staff provided its views when a registrant files a Form S-3 after filing its annual report on Form 10-K, which omits the disclosures otherwise required in Part III, because the registrant expects to file those disclosures in its definitive proxy statement within 120 days after its fiscal year end. In that circumstance, the SEC staff concluded that the registrant must either file the definitive proxy statement or update the Form 10-K to include the required information prior to the Form S-3 becoming effective.

However, we understand that the SEC staff not objected if a WKSI files an automatic shelf registration statement on Form S-3 that incorporates by reference the most recent Form 10-K and executive compensation disclosures filed by the WKSI. That is, a WKSI's automatic shelf registration statement on Form S-3 could become effective even if it had not yet filed its definitive proxy statement with the disclosures otherwise omitted from Part III of its Form 10-K. In this situation, we understand that the SEC staff has emphasized that such a WKSI must conclude that the registration statement and related prospectus satisfy the Securities Act requirements.

In a follow-up question to Discussion Document A from the April 2004 meeting, the SEC staff concurred that, unlike other registrations statements such as Forms S-3 and S-4, a registration statement on Form S-8 could be filed and become effective even if the registrant's Form 10-K that is incorporated by reference omits the Part III disclosures.

Form S-4 allows incorporation by reference if the registrant is Form S-3 eligible. Item 13 of Form S-4 requires the registrant to incorporate by reference its latest Form 10-K filed with the SEC. Items 18 and 19 of Form S-4 also require the disclosures specified in Item 402 of

Regulation S-K with respect to each person who will serve as a director or an executive officer of the surviving or acquiring company.

Question:

In the Form S-4 of a WKSI, for what period must the Regulation S-K Item 402 disclosures be provided?

View A: The most recently completed year. Similar to a Form S-1 registration statement, any Regulation S-K Item 402 disclosures required in response to Items 18 and 19 of Form S-4 of Form S-4 must be provided for the most recently completed year.

View B: The most recent fiscal year for which Form 10-K has been filed. Because a WKSI is Form S-3 eligible, its Form S-4 would only be required to provide disclosures as current as those that would be required in a Form S-3. Until the WKSI files its Form 10-K for the most recently completed fiscal year, its Form S-4 could become effective without Regulation S-K Item 402 disclosures for the most recently completed year. Once the WKSI files its Form 10-K for the most recently completed fiscal year, its Form S-4 must provide Regulation S-K Item 402 disclosures for the most recently completed year. If the WKSI's Form 10-K omitted the disclosures otherwise required in Part III, it must either file the definitive proxy statement or update the Form 10-K to include the required information prior to the Form S-4 becoming effective. The WKSI could, however, file a preliminary Form S-4 before the time that the Part III information is filed, as long as the Part III information is filed before the S-4 becomes effective.

View C: The most recent fiscal year for which Regulation S-K Item 402 disclosures have been filed (either in the Form 10-K or a definitive proxy statement). Unlike other Form S-3 eligible registrants, a WKSI need not update its Regulation S-K Item 402 disclosures in its Form S-4 once it files the Form 10-K for its most recently completed fiscal year. Similar to an automatic registration statement on Form S-3, the Form S-4 of a WKSI could become effective even if the WKSI had not yet filed its definitive proxy statement with the disclosures otherwise omitted from Part III of its Form 10-K, provided that the WKSI concludes that the Form S-4 and related prospectus/proxy statement satisfy the Securities Act requirements.

Committee Recommendation: The Committee Supports View B.

SEC Staff Response: The SEC staff noted that the WKSI position outlined above is largely based on the fact that the Form S-3 was automatically effective upon filing, which is not the case with Form S-4. Therefore, while the staff leans toward supporting View B, the answer may depend on the nature of the Form S-4. For example, View B may not be appropriate for an S-4 that relates to a proxy solicitation that includes the election of directors or the approval of matters related to executive compensation.