

Discussion Document D

Topic: Application of Rule 3-10 of Regulation S-X When a Subsidiary Issuer Files a Form 15 (Follow-up to Discussion Document B from the March 12, 2002 Committee Meeting)

Background:

Discussion Document B from the March 12, 2002 Committee meeting raised the following question: Is it permissible for the parent to discontinue reporting condensed consolidating information under SX 3-10 when a subsidiary (as either the issuer of debt or guarantor) files a Form 15, but the parent (whether the guarantor or issuer) continues its reporting with the SEC?

Discussion Document B identified the following two scenarios:

One: Assume a registrant-parent guarantees the registered debt of a subsidiary/issuer and that the parent has relied on the relief provided by 3-10(c) (i.e., the parent files condensed consolidating financial information in its periodic reports). Further assume that the registrant-parent is also a registrant because it has publicly traded equity securities outstanding. If the subsidiary-issuer files a Form 15 relating to the debt that is guaranteed by the registrant-parent, must the parent file a Form 15 relating to its guarantee (which is a separately registered security)? If the parent cannot or does not file a Form 15, does the registrant-parent have to continue to report the condensed consolidating financial information specified by S-X 3-10(c) after the subsidiary-issuer's Form 15 is filed?

Two: Parent is the issuer of a debt security and its subsidiaries guarantee the debt. Even though the parent has less than 300 debt holders, the trust indenture requires reporting with the SEC until the debt matures. Heretofore, the parent has presented condensed consolidating financial information under Rule 3-10 of Regulation S-X in lieu of its subsidiaries filing separate audited financial statements. The subsidiary guarantors file a Form 15 relating to their guarantees as required by section 15d-6 of the Exchange Act Rule because there are less than 300 debt holders. Following the Form 15 filings by all subsidiary guarantors, must the parent-issuer continue to report the condensed consolidating financial information specified by S-X 3-10(c)?

The SEC staff concluded the following (View A in Discussion Document B):

A parent should continue to provide the condensed consolidating information under S-X Rule 3-10 for as long as the debt is outstanding. The August 2000 adopting release (No. 33-7878) that amended Rule 3-10 states "the parent company periodic reports must include the modified financial information permitted by paragraphs (b) through (f) of Rule 3-10 . . . for as long as the subject securities are outstanding." In the first case above, whether or not the parent files a Form 15 with respect to its guarantee of its subsidiary's debt, the parent-guarantor continues to have an Exchange Act reporting requirement as a result of its publicly traded equity securities. As a result, the parent's financial statements

must comply fully with SX, including Rule 3-10 as long as the subsidiary's debt is outstanding. Similarly in the second case, the parent-issuer has Exchange Act reporting requirements from both its registered debt securities and its publicly traded equity securities. Therefore, the parent's financial statements should continue to include the condensed consolidating financial information under Rule 3-10 as long as its guaranteed debt is outstanding.

The Committee would like the SEC Staff to consider the application of Rule 3-10 of Regulation S-X after a subsidiary issuer files a Form 15 and condensed consolidating information had not been previously filed under Rule 3-10.

Consider the following scenario:

Company X is a calendar year-end SEC registrant with a reporting obligation under Section 12 of the Exchange Act. In May 2004, Company X's subsidiary (Subsidiary F) sold \$100 million of senior debt in a transaction that was exempt from the registration requirements of the Securities Act (under Rule 144A). Subsidiary F's debt is fully and unconditionally guaranteed by Company X and Company X is the only guarantor. Subsidiary F is not 100% owned because certain voting preferred shares are held by a third party.

Pursuant to a registration rights agreement entered into with the initial purchasers of the exempt securities, in July 2004 Company X and Subsidiary F filed a joint registration statement on Form S-4 to register their offer to exchange all of the exempt debt and the guarantees for debt and guarantees with substantially identical terms (without the restrictions otherwise required in a sale made under Rule 144A). The registration statement on Form S-4 included the financial statements required by Regulation S-X for Company X as well as the financial statements required by Regulation S-X of Subsidiary F (because Subsidiary F was not eligible to rely on Rule 3-10(b) or (c)). The registration statement on Form S-4 was declared effective in September 2004. The debt is not listed on an exchange.

Company X and Subsidiary F each filed a quarterly report on Form 10-Q for the quarterly period ended September 30, 2004. Additionally, they each filed an annual report on Form 10-K for the year ended December 31, 2004.

As of January 1, 2005, there were less than 300 holders of the registered debt (and consequently the guarantees). Accordingly, Subsidiary F's reporting obligation was automatically suspended under Section 15(d) of the Exchange Act. Pursuant to Exchange Act Rule 15d-6, Subsidiary F filed a Form 15 to notify the Commission of the suspension. Company X also filed a Form 15 with respect to its guarantee of the debt.

Question: Is a registrant (and former parent guarantor) required to continue to include the separate financial statements of its subsidiary issuer under Rule 3-10(a) of Regulation S-X in the parent's periodic reports for as long as the subsidiary's previously registered debt is outstanding?

View A: No. The concept of “as long as the debt is outstanding” was intended to be a condition for receiving relief under Rule 12h-5. Since Subsidiary F did not qualify for relief under that rule, the “as long as the debt is outstanding” concept is not applicable to Subsidiary F. The adopting release for FRR 55 states:

“The parent company periodic reports must include the modified financial information permitted by paragraphs (b) through (f) of Rule 3-10. The parent company periodic reports must contain this information for as long as the subject securities are outstanding.”

Since Subsidiary F was not eligible to use the modified financial reporting requirements provided by Rule 3-10, Company X never provided any such information in its periodic reports. Since Subsidiary F’s Exchange Act reporting obligation was automatically suspended on January 1, 2005, Company X is not obligated to include the financial statements of Subsidiary F in its periodic reports for as long as the debt remains outstanding.

View B: Yes. Consistent with the concept set forth in FRR-55 Company X must include financial statements of Subsidiary F in its (Company X’s) periodic reports for as long as the debt is outstanding. Since Subsidiary F complied with Rule 3-10 via Rule 3-10(a), it must continue to do so for as long as the debt is outstanding.

Committee Recommendation: The Committee supports View A. The Committee believes that the “as long as the debt is outstanding” concept only applies in situations in which relief from separate Exchange Act reporting for subsidiary issuers and subsidiary guarantors was obtained under Exchange Act Rule 12h-5.

SEC Staff Response: The staff agrees with View A and agrees that the concept of “as long as the debt is outstanding” only applies in situations in which relief from separate Exchange Act reporting for subsidiary issuers and subsidiary guarantors was obtained under Exchange Act Rule 12h-5.