

SEC Regulations Committee
October 14, 2008 - Joint Meeting with SEC Staff
SEC Offices – Washington DC

Discussion Document G

Topic: Application of S-K, Item 302(a), *Selected Quarterly Financial Data*, to a private company in a Form S-4

Background: Item 17 of the instructions to Form S-4 state, in part:

“(b) If the company being acquired is not subject to the reporting 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; furnish the information that would be required by the following if securities of such company were being registered...(4) Item 302 of Regulation S-K, supplementary financial information.”

S-K Item 302(a) states that

“registrants specified in paragraph (a)(5) of this Item shall provide...(1) Disclosure...of net sales, gross profit..., 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 required to be included by Article 3 of Regulation S-X.”

Paragraph (a)(5) of S-K Item 302 states that the requirement to present quarterly financial data “**applies to any registrant**, except a foreign private issuer, **that has securities registered** pursuant to sections 12(b) (other than mutual life insurance companies) or 12(g) of the Exchange Act.” [emphasis added]

At the March 2001 SEC Regulations Committee Meeting (Issue B), the SEC staff stated that a company is not required to furnish quarterly financial data information pursuant to S-K Item 302(a) in its **initial** registration statement. This conclusion was based on the guidance in paragraph (a)(5) of S-K Item 302, that is, since the company does not have any securities registered under sections 12(b) or 12(g) of the Exchange Act until the initial registration statement is declared effective, it is exempt from the disclosure requirements of Item 302.

At the June 2004 SEC Regulations Committee meeting, the Committee and the SEC staff discussed whether S-K Item 302 quarterly financial data is required to be furnished in a Form S-4 for a private company that is being acquired by a registrant. The SEC staff took the view that “Disclosure of quarterly financial data information is required pursuant to S-K Item 302 notwithstanding the fact that the company being acquired is a private company.”

The Committee requests that the SEC staff reconsider its view, since it is unclear why the quarterly information is more meaningful in a Form S-4 than in an IPO registration statement on Form S-1.

Question: Is S-K Item 302 quarterly financial data information required to be furnished in a Form S-4 for a private company that is being acquired by a registrant?

View A – No. Paragraph (a)(5) of S-K Item 302 states that a company that does not have securities registered pursuant to sections 12(b) or 12(g) of the Exchange Act is exempt from the requirement to furnish quarterly financial data information. Also, for the reasons stated above, there should be no difference between the requirements for a Form S-1 filing and a Form S-4.

View B – Yes. Disclosure of quarterly financial data information is required pursuant to S-K Item 302 notwithstanding the fact that the company being acquired is a private company.

SEC Staff Response: The staff does not object to View A. This view would also apply to initial registrations filed on Form 10 as well as proxy materials filed under Item 14(c)(2) of Schedule 14A.