

Securities and Exchange Commission

§ 228.303

Item 402(a)(5)(ii) of Regulation S-B (§228.402(a)(5)(ii)).

3. If more than one class of equity security is issued under its equity compensation plans, a small business issuer should aggregate plan information for each class of security.

4. A small business issuer may aggregate information regarding individual compensation arrangements with the plan information required under paragraph (d)(1)(i) and (ii) of this item, as applicable.

5. A small business issuer may aggregate information regarding a compensation plan assumed in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make subsequent grants or awards of its equity securities with the plan information required under paragraph (d)(1)(i) and (ii) of this Item, as applicable. A small business issuer shall disclose on an aggregated basis in a footnote to the table the information required under paragraph (d)(2)(i) and (ii) of this Item with respect to any individual options, warrants or rights assumed in connection with a merger, consolidation or other acquisition transaction.

6. To the extent that the number of securities remaining available for future issuance disclosed in column (c) includes securities available for future issuance under any compensation plan or individual compensation arrangement other than upon the exercise of an option, warrant or right, disclose the number of securities and type of plan separately for each such plan in a footnote to the table.

7. If the description of an equity compensation plan set forth in a small business issuer's financial statements contains the disclosure required by paragraph (d)(3) of this Item, a cross-reference to such description will satisfy the requirements of paragraph (d)(3) of this Item.

8. If an equity compensation plan contains a formula for calculating the number of securities available for issuance under the plan, including, without limitation, a formula that automatically increases the number of securities available for issuance by a percentage of the number of outstanding securities of the small business issuer, a description of this formula shall be disclosed in a footnote to the table.

9. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

Instruction: Canadian issuers should, in addition to the information called for by this Item, provide the information in Item

201(a)(1)(iv) of Regulation S-K and Instruction 4 thereto.

[57 FR 36449, Aug. 13, 1992, as amended at 67 FR 245, Jan. 2, 2002; 71 FR 53228, Sept. 8, 2006]

§ 228.202 (Item 202) Description of Securities.

(a) *Common or Preferred Stock.* (1) If the small business issuer is offering common equity, describe any dividend, voting and preemption rights.

(2) If the small business issuer is offering preferred stock, describe the dividend, voting, conversion and liquidation rights as well as redemption or sinking fund provisions.

(3) Describe any other material rights of common or preferred stockholders.

(4) Describe any provision in the charter or by-laws that would delay, defer or prevent a change in control of the small business issuer.

(b) *Debt Securities.* (1) If the small business issuer is offering debt securities, describe the maturity date, interest rate, conversion or redemption features and sinking fund requirements.

(2) Describe all other material provisions giving or limiting the rights of debtholders. For example, describe subordination provisions, limitations on the declaration of dividends, restrictions on the issuance of additional debt, maintenance of asset ratios, etc.

(3) Give the name of any trustee(s) designated by the indenture and describe the circumstances under which the trustee must act on behalf of the debtholders.

(4) Discuss the tax effects of any securities offered at an "original issue discount."

(c) *Other Securities To Be Registered.* If the small business issuer is registering other securities, provide similar information concerning the material provisions of those securities.

§ 228.303 (Item 303) Management's Discussion and Analysis or Plan of Operation.

Small business issuers that have not had revenues from operations in each of the last two fiscal years, or the last fiscal year and any interim period in the current fiscal year for which financial statements are furnished in the disclosure document, shall provide the

information in paragraphs (a) and (c) of this Item. All other issuers shall provide the information in paragraphs (b) and (c) of this Item.

(a) *Plan of Operation.* (1) Describe the small business issuer's plan of operation for the next twelve months. This description should include such matters as:

- (i) a discussion of how long the small business issuer can satisfy its cash requirements and whether it will have to raise additional funds in the next twelve months;
- (ii) a summary of any product research and development that the small business issuer will perform for the term of the plan;
- (iii) any expected purchase or sale of plant and significant equipment; and
- (iv) any expected significant changes in the number of employees.

(2) [Reserved]

(b) *Management's Discussion and Analysis of Financial Condition and Results of Operations—(1) Full fiscal years.* Discuss the small business issuer's financial condition, changes in financial condition and results of operations for each of the last two fiscal years. This discussion should address the past and future financial condition and results of operation of the small business issuer, with particular emphasis on the prospects for the future. The discussion should also address those key variable and other qualitative and quantitative factors which are necessary to an understanding and evaluation of the small business issuer. If material, the small business issuer should disclose the following:

- (i) Any known trends, events or uncertainties that have or are reasonably likely to have a material impact on the small business issuer's short-term or long-term liquidity;
- (ii) Internal and external sources of liquidity;
- (iii) Any material commitments for capital expenditures and the expected sources of funds for such expenditures;
- (iv) Any known trends, events or uncertainties that have had or that are reasonably expected to have a material impact on the net sales or revenues or income from continuing operations;
- (v) Any significant elements of income or loss that do not arise from the

small business issuer's continuing operations;

(vi) The causes for any material changes from period to period in one or more line items of the small business issuer's financial statements; and

(vii) Any seasonal aspects that had a material effect on the financial condition or results of operation.

(2) *Interim Periods.* If the small business issuer must include interim financial statements in the registration statement or report, provide a comparable discussion that will enable the reader to assess material changes in financial condition and results of operations since the end of the last fiscal year and for the comparable interim period in the preceding year.

(c) *Off-balance sheet arrangements.* (1) In a separately-captioned section, discuss the small business issuer's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the small business issuer's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The disclosure shall include the items specified in paragraphs (c)(1)(i), (ii), (iii) and (iv) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the small business issuer believes is necessary for such an understanding.

(i) The nature and business purpose to the small business issuer of such off-balance sheet arrangements;

(ii) The importance to the small business issuer of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits;

(iii) The amounts of revenues, expenses and cash flows of the small business issuer arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the small business issuer in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the small business issuer arising from such

arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and

(iv) Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the small business issuer, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the small business issuer has taken or proposes to take in response to any such circumstances.

(2) As used in paragraph (c) of this Item, the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the small business issuer is a party, under which the small business issuer has:

(i) Any obligation under a guarantee contract that has any of the characteristics identified in paragraph 3 of FASB Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) ("FIN 45"), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FIN 45 pursuant to paragraphs 6 or 7 of that Interpretation;

(ii) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(iii) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the small business issuer's own stock and classified in stockholders' equity in the small business issuer's statement of financial position, and therefore excluded from the scope of FASB Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998), pursuant to paragraph 11(a) of that Statement, as may be modified or supplemented; or

(iv) Any obligation, including a contingent obligation, arising out of a

variable interest (as referenced in FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the small business issuer, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the small business issuer.

Instructions to paragraph (c) of Item 303. 1. No obligation to make disclosure under paragraph (c) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

2. Small business issuers should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.

3. For purposes of paragraph (c) of this Item only, contingent liabilities arising out of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.

4. Generally, the disclosure required by paragraph (c) of this Item shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure.

5. In satisfying the requirements of paragraph (c) of this Item, the discussion of off-balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the footnotes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.

(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 to forward-looking information provided pursuant to paragraph (c) of this Item, 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 only:

(i) All information required by paragraph (c) of this Item is deemed to be a “forward looking statement” as that term is defined in the statutory safe harbors, except for historical facts.

(ii) With respect to paragraph (c) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a small business issuer satisfies all requirements of that same paragraph (c) of this Item.

Instructions to Item 303: 1. 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.

2. Small business issuers are encouraged, but not required, to supply forward looking information. This is 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.

[57 FR 36449, Aug. 13, 1992, as amended at 68 FR 5998, Feb. 5, 2003]

§ 228.304 (Item 304) Changes In and Disagreements With Accountants on Accounting and Financial Disclosure.

(a)(1) If, during the small business issuer’s two most recent fiscal years or any later interim period, the principal independent accountant or a significant subsidiary’s independent accountant on whom the principal accountant expressed reliance in its report, resigned (or declined to stand for re-election) or was dismissed, then the small business issuer shall state:

(i) Whether the former accountant resigned, declined to stand for re-election or was dismissed and the date;

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

(iii) Whether the decision to change accountants was recommended or approved by the board of directors or an audit or similar committee of the board of directors; and

(iv)(A) Whether there were any disagreements with the former accountant, whether or not resolved, on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which, if not resolved to the former accountant’s satisfaction, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report; or

(B) The following information only if applicable. Indicate whether the former accountant advised the small business issuer that:

(1) internal controls necessary to develop reliable financial statements did not exist; or

(2) information has come to the attention of the former accountant which made the accountant unwilling to rely on management’s representations, or unwilling to be associated with the financial statements prepared by management; or

(3) the scope of the audit should be expanded significantly, or information has come to the accountant’s attention that the accountant has concluded will, or if further investigated might, materially impact the fairness or reliability of 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 audited financial statements (including information that might preclude the issuance of an unqualified audit report), and the issue was not resolved to the accountant’s