

§ 228.406

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(2) 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 section as having failed to file a Form 5 with respect to that fiscal year.

[57 FR 36449, Aug. 13, 1992, as amended at 61 FR 30391, June 14, 1996; 70 FR 46088, Aug. 9, 2005]

§ 228.406 (Item 406) Code of ethics.

(a) Disclose whether the small business issuer has adopted a code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the small business issuer has not adopted such a code of ethics, explain why it has not done so.

(b) For purposes of this Item 406, the term *code of ethics* means written standards that are reasonably designed to deter wrongdoing and to promote:

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a small business issuer files with, or submits to, the Commission and in other public communications made by the small business issuer;

(3) Compliance with applicable governmental laws, rules and regulations;

(4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

(5) Accountability for adherence to the code.

(c) The small business issuer must:

(1) File with the Commission a copy of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, as an exhibit to its annual report;

(2) Post the text of such code of ethics on its Internet website and disclose, in its annual report, its Internet ad-

dress and the fact that it has posted such code of ethics on its Internet website; or

(3) Undertake in its annual report filed with the Commission to provide to any person without charge, upon request, a copy of such code of ethics and explain the manner in which such request may be made.

(d) If the small business issuer intends to satisfy the disclosure requirement under Item 10 of Form 8-K regarding an amendment to, or a waiver from, a provision of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in paragraph (b) of this Item by posting such information on its Internet website, disclose the small business issuer's Internet address and such intention.

Instructions to Item 406. 1. A small business issuer may have separate codes of ethics for different types of officers. Furthermore, a *code of ethics* within the meaning of paragraph (b) of this Item may be a portion of a broader document that addresses additional topics or that applies to more persons than those specified in paragraph (a). In satisfying the requirements of paragraph (c), a small business issuer need only file, post or provide the portions of a broader document that constitutes a *code of ethics* as defined in paragraph (b) and that apply to the persons specified in paragraph (a).

2. If a small business issuer elects to satisfy paragraph (c) of this Item by posting its code of ethics on its website pursuant to paragraph (c)(2), the code of ethics must remain accessible on its website for as long as the small business issuer remains subject to the requirements of this Item and chooses to comply with this Item by posting its code on its Web site pursuant to paragraph (c)(2).

[68 FR 5126, Jan. 31, 2003, as amended at 70 FR 1593, Jan. 7, 2005]

§ 228.407 (Item 407) Corporate governance.

(a) *Director independence.* Identify each director and, when the disclosure called for by this paragraph is being presented in a proxy or information statement relating to the election of directors, each nominee for director,

that is independent under the independence standards applicable to the small business issuer under paragraph (a)(1) of this Item. In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such committee independence standards. If the small business issuer does not have a separately designated audit, nominating or compensation committee or committee performing similar functions, the small business issuer must provide the disclosure of directors that are not independent with respect to all members of the board of directors applying such committee independence standards.

(1) In determining whether or not the director or nominee for director is independent for the purposes of paragraph (a) of this Item, the small business issuer shall use the applicable definition of independence, as follows:

(i) If the small business issuer is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the small business issuer's definition of independence that it uses for determining if a majority of the board of directors is independent in compliance with the listing standards applicable to the small business issuer. When determining whether the members of a committee of the board of directors are independent, the small business issuer's definition of independence that it uses for determining if the members of that specific committee are independent in compliance with the independence standards applicable for the members of the specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the small business issuer uses for determining if a majority of the board of directors are independent. If the small business issuer does not have independence standards for a committee, the independence standards for that specific committee in the listing standards of the national securities exchange or

inter-dealer quotation system that the small business issuer uses for determining if a majority of the board of directors are independent.

(ii) If the small business issuer is not a listed issuer, a definition of independence of a national securities exchange or of an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, and state which definition is used. Whatever such definition the small business issuer chooses, it must use the same definition with respect to all directors and nominees for director. When determining whether the members of a specific committee of the board of directors are independent, if the national securities exchange or national securities association whose standards are used has independence standards for the members of a specific committee, use those committee specific standards.

(iii) If the information called for by paragraph (a) of this Item is being presented in a registration statement on Form S-1 (§239.11 of this chapter) or Form SB-2 (§239.10 of this chapter) under the Securities Act or on a Form 10 (§249.210 of this chapter) or Form 10-SB (§249.210b of this chapter) under the Exchange Act where the small business issuer has applied for listing with a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the definition of independence that the small business issuer uses for determining if a majority of the board of directors is independent, and the definition of independence that the small business issuer uses for determining if members of the specific committee of the board of directors are independent, that is in compliance with the independence listing standards of the national securities exchange or inter-dealer quotation system on which it has applied for listing, or if the small business issuer has not adopted such definitions, the independence standards for determining if the majority of the board of directors is independent and if members of the committee of the board of directors are independent of that national securities exchange or inter-dealer quotation system.

(2) If the small business issuer uses its own definitions for determining whether its directors and nominees for director, and members of specific committees of the board of directors, are independent, disclose whether these definitions are available to security holders on the small business issuer's Web site. If so, provide the small business issuer's Web site address. If not, include a copy of these policies in an appendix to the small business issuer's proxy statement or information statement that is provided to security holders at least once every three fiscal years or if the policies have been materially amended since the beginning of the small business issuer's last fiscal year. If a current copy of the policies is not available to security holders on the small business issuer's Web site, and is not included as an appendix to the small business issuer's proxy statement or information statement, identify the most recent fiscal year in which the policies were so included in satisfaction of this requirement.

(3) For each director and nominee for director that is identified as independent, describe, by specific category or type, any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) (§228.404(a)) that were considered by the board of directors under the applicable independence definitions in determining that the director is independent.

Instructions to Item 407(a). 1. If the small business issuer is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, and also has exemptions to those requirements (for independence of a majority of the board of directors or committee member independence) upon which the small business issuer relied, disclose the exemption relied upon and explain the basis for the small business issuer's conclusion that such exemption is applicable. The same disclosure should be provided if the small business issuer is not a listed issuer and the national securities exchange or inter-dealer quotation system selected by the small business issuer has exemptions that are applicable to the small business issuer. Any national securities exchange or inter-dealer quotation system which has requirements that at least 50 percent of the members of a small business issuer's board of directors must be inde-

pendent shall be considered a national securities exchange or inter-dealer quotation system which has requirements that a majority of the board of directors be independent for the purposes of the disclosure required by paragraph (a) of this Item.

2. Small business issuers shall provide the disclosure required by paragraph (a) of this Item for any person who served as a director during any part of the last completed fiscal year, except that no information called for by paragraph (a) of this Item need be given in a registration statement filed at a time when the small business issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a), or 78o(d)) respecting any director who is no longer a director at the time of effectiveness of the registration statement.

3. The description of the specific categories or types of transactions, relationships or arrangements required by paragraph (a)(3) of this Item must be provided in such detail as is necessary to fully describe the nature of the transactions, relationships or arrangements.

(b) *Board meetings and committees; annual meeting attendance.* (1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

(i) The total number of meetings of the board of directors (held during the period for which he has been a director); and

(ii) The total number of meetings held by all committees of the board on which he served (during the periods that he served).

(2) Describe the small business issuer's policy, if any, with regard to board members' attendance at annual meetings of security holders and state the number of board members who attended the prior year's annual meeting.

Instruction to Item 407(b)(2). In lieu of providing the information required by paragraph (b)(2) of this Item in the proxy statement, the small business issuer may instead provide the small business issuer's Web site address where such information appears.

(3) State whether or not the small business issuer has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions.

If the small business issuer has such committees, however designated, identify each committee member, state the number of committee meetings held by each such committee during the last fiscal year and describe briefly the functions performed by each such committee. Such disclosure need not be provided to the extent it is duplicative of disclosure provided in accordance with paragraph (c), (d) or (e) of this Item.

(c) *Nominating committee.* (1) If the small business issuer does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a committee and identify each director who participates in the consideration of director nominees.

(2) Provide the following information regarding the small business issuer's director nomination process:

(i) State whether or not the nominating committee has a charter. If the nominating committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the nominating committee charter;

(ii) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

(iii) If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, state that fact and state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a policy;

(iv) If the nominating committee will consider candidates recommended by security holders, describe the procedures to be followed by security holders in submitting such recommendations;

(v) Describe any specific minimum qualifications that the nominating committee believes must be met by a

nominating committee-recommended nominee for a position on the small business issuer's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the small business issuer's directors to possess;

(vi) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;

(vii) With regard to each nominee approved by the nominating committee for inclusion on the small business issuer's proxy card (other than nominees who are executive officers or who are directors standing for re-election), state which one or more of the following categories of persons or entities recommended that nominee: Security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other specified source;

(viii) If the small business issuer pays a fee to any third party or parties to identify or evaluate or assist in identifying or evaluating potential nominees, disclose the function performed by each such third party; and

(ix) If the small business issuer's nominating committee received, by a date not later than the 120th calendar day before the date of the small business issuer's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the small business issuer's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the small business issuer's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identify the candidate and the security holder or security holder group that recommended the candidate and disclose

whether the nominating committee chose to nominate the candidate, *provided, however*, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

Instructions to Item 407(c)(2)(ix). 1. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a nominating security holder may be determined using information set forth in the small business issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the party relying on such report knows or has reason to believe that the information contained therein is inaccurate.

2. For purposes of the small business issuer's obligation to provide the disclosure specified in paragraph (c)(2)(ix) of this Item, where the date of the annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the obligation under that Item will arise where the small business issuer receives the security holder recommendation a reasonable time before the small business issuer begins to print and mail its proxy materials.

3. For purposes of paragraph (c)(2)(ix) of this Item, the percentage of securities held by a recommending security holder, as well as the holding period of those securities, may be determined by the small business issuer if the security holder is the registered holder of the securities. If the security holder is not the registered owner of the securities, he or she can submit one of the following to the small business issuer to evidence the required ownership percentage and holding period:

a. A written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

b. If the security holder has filed a Schedule 13D (§240.13d-101 of this chapter), Schedule 13G (§240.13d-102 of this chapter), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter), and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the securities for the one-year period as of the date of the recommendation.

4. For purposes of the small business issuer's obligation to provide the disclosure

specified in paragraph (c)(2)(ix) of this Item, the security holder or group must have provided to the small business issuer, at the time of the recommendation, the written consent of all parties to be identified and, where the security holder or group members are not registered holders, proof that the security holder or group satisfied the required ownership percentage and holding period as of the date of the recommendation.

Instruction to Item 407(c)(2). For purposes of paragraph (c)(2) of this Item, the term *nominating committee* refers not only to nominating committees and committees performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

(3) Describe any material changes to the procedures by which security holders may recommend nominees to the small business issuer's board of directors, where those changes were implemented after the small business issuer last provided disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item.

Instructions to Item 407(c)(3). 1. The disclosure required in paragraph (c)(3) of this Item need only be provided in a small business issuer's quarterly or annual reports.

2. For purposes of paragraph (c)(3) of this Item, adoption of procedures by which security holders may recommend nominees to the small business issuer's board of directors, where the small business issuer's most recent disclosure in response to the requirements of paragraph (c)(2)(iv) of this Item, or paragraph (c)(3) of this Item, indicated that the small business issuer did not have in place such procedures, will constitute a material change.

(d) *Audit committee.* (1) State whether or not the audit committee has a charter. If the audit committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the audit committee charter.

(2) If a listed issuer's board of directors determines, in accordance with the listing standards applicable to the issuer, to appoint a director to the audit committee who is not independent (apart from the requirements in §240.10A-3 of this chapter), including as a result of exceptional or limited or similar circumstances, disclose the nature of the relationship that makes that individual not independent and

the reasons for the board of directors' determination.

(3)(i) The audit committee must state whether:

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

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the statement on Auditing Standards No. 61, as amended (AICPA, *Professional Standards*, Vol. 1, AU section 380),¹ as adopted by the Public Company Accounting Oversight Board in Rule 3200T;

(C) 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*),² as adopted by the Public Company Accounting Oversight Board in Rule 3600T, and has discussed with the independent accountant the independent accountant's independence; and

(D) Based on the review and discussions referred to in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this Item, the audit committee recommended to the board of directors that the audited financial statements be included in the company's annual report on Form 10-KSB (17 CFR 249.310b) for the last fiscal year for filing with the Commission.

(ii) 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 paragraph (d)(3)(i) of this Item.

(4)(i) If the small business issuer meets the following requirements, provide the disclosure in paragraph (d)(4)(ii) of this Item:

(A) The small business issuer is a listed issuer, as defined in §240.10A-3 of this chapter;

(B) The small business issuer is filing either an annual report on Form 10-KSB (17 CFR 249.310b), or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a *et seq.*) if action is to be taken with respect to the election of directors; and

(C) The small business issuer is neither:

(I) A subsidiary of another listed issuer that is relying on the exemption in §240.10A-3(c)(2) of this chapter; nor

(2) Relying on any of the exemptions in §240.10A-3(c)(4) through (c)(7) of this chapter.

(ii)(A) State whether or not the small business issuer has a separately-designated standing audit committee established in accordance with section 3(a)(58)(A) of the Exchange Act (15 U.S.C. 78c(a)(58)(A)), or a committee performing similar functions. If the small business issuer has such a committee, however designated, identify each committee member. If the entire board of directors is acting as the small business issuer's audit committee as specified in section 3(a)(58)(B) of the Exchange Act (15 U.S.C. 78c(a)(58)(B)), so state.

(B) If applicable, provide the disclosure required by §240.10A-3(d) of this chapter regarding an exemption from the listing standards for audit committees.

(5) *Audit committee financial expert.*

(i)(A) Disclose that the small business issuer's board of directors has determined that the small business issuer either:

(I) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the small business issuer provides the disclosure required by paragraph (d)(5)(i)(A)(I) of this Item, it must disclose the name of the audit committee financial expert and whether that person is *independent*, as independence for audit committee members is defined in the listing standards applicable to the listed issuer.

¹ Available at http://www.pcaobus.org/standards/interim_standards/auditing_standards/index_au.asp?series=300§ion=300.

² Available at http://www.pcaobus.org/Standards/Interim_Standards/Independence_Standards/ISB1.pdf.

(C) If the small business issuer provides the disclosure required by paragraph (d)(5)(i)(A)(2) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to Item 407(d)(5)(i). If the small business issuer's board of directors has determined that the small business issuer has more than one audit committee financial expert serving on its audit committee, the small business issuer may, but is not required to, disclose the names of those additional persons. A small business issuer choosing to identify such persons must indicate whether they are independent pursuant to paragraph (d)(5)(i)(B) of this Item.

(ii) For purposes of this Item, an *audit committee financial expert* means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the small business issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal control over financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(D) Other relevant experience.

(iv) *Safe harbor.* (A) A person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for purposes of section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item 407 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 407(d)(5). 1. The disclosure under paragraph (d)(5) of this Item is required only in a small business issuer's annual report. The small business issuer need not provide the disclosure required by paragraph (d)(5) of this Item in a proxy or information statement unless that small business issuer is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to General Instruction E(3) to Form 10-KSB (17 CFR 249.310b).

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (d)(5)(iii)(D) of this Item, the small business issuer shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under Item 401(a)(4) (§228.401(a)(4)).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of paragraph (d)(5) of this Item, the term *board of directors* means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term *generally accepted accounting principles* in paragraph (d)(5)(ii)(A) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. Following the effective date of the first registration statement filed under the Securities Act (15 U.S.C. 77a *et seq.*) or Exchange Act (15 U.S.C. 78a *et seq.*) by a small business issuer, the small business issuer or successor

issuer need not make the disclosures required by this Item in its first annual report filed pursuant to section 13(a) or 15(d) (15 U.S.C. 78m(a) or 78o(d)) of the Exchange Act after effectiveness.

Instructions to Item 407(d). 1. The information required by paragraphs (d)(1)–(3) 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 through 240.14b–2 or 240.14c–1 through 240.14c–101), 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 small business issuer 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. 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 small business issuer specifically incorporates it by reference.

2. The disclosure required by paragraphs (d)(1)–(3) of this Item need only be provided one time during any fiscal year.

3. The disclosure required by paragraph (d)(3) of this Item need not be provided in any filings other than a small business issuer’s 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).

(e) *Compensation committee.* (1) If the small business issuer does not have a standing compensation committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.

(2) State whether or not the compensation committee has a charter. If the compensation committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the compensation committee charter.

(3) Provide a narrative description of the small business issuer’s processes and procedures for the consideration and determination of executive and director compensation, including:

(i) (A) The scope of authority of the compensation committee (or persons performing the equivalent functions); and

(B) The extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority described in paragraph (e)(3)(i)(A) of this Item to other persons, specifying what authority may be so delegated and to whom;

(ii) Any role of executive officers in determining or recommending the amount or form of executive and director compensation; and

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.

(f) *Shareholder communications.* (1) State whether or not the small business issuer’s board of directors provides a process for security holders to send communications to the board of directors and, if the small business issuer does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is appropriate for the small business issuer not to have such a process.

(2) If the small business issuer has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the small business issuer’s process for determining which communications will be relayed to board members.

Instructions to Item 407(f). 1. In lieu of providing the information required by paragraph (f)(2) of this Item in the proxy statement, the small business issuer may instead provide the small business issuer’s Web site address where such information appears.

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2. For purposes of the disclosure required by paragraph (f)(2)(ii) of this Item, a small business issuer's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the small business issuer's process is approved by a majority of the independent directors.

3. For purposes of this paragraph, communications from an officer or director of the small business issuer will not be viewed as "security holder communications." Communications from an employee or agent of the small business issuer will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

4. For purposes of this paragraph, security holder proposals submitted pursuant to § 240.14a-8 of this chapter, and communications made in connection with such proposals, will not be viewed as "security holder communications."

Instructions to Item 407. 1. For purposes of this Item:

a. *Listed issuer* means a listed issuer as defined in § 240.10A-3 of this chapter;

b. *National securities exchange* means a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a));

c. *Inter-dealer quotation system* means an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)); and

d. *National securities association* means a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that has been approved by the Commission (as that definition may be modified or supplemented).

2. With respect to paragraphs (c)(2)(i), (d)(1) and (e)(2) of this Item, disclose whether a current copy of the applicable committee charter is available to security holders on the small business issuer's Web site, and if so, provide the small business issuer's Web site address. If a current copy of the charter is not available to security holders on the small business issuer's Web site, include a copy of the charter in an appendix to the small business issuer's proxy or information statement that is provided to security holders at least once every three fiscal years, or if the charter has been materially amended since the beginning of the small business issuer's last fiscal year. If a current copy of the charter is not available to security holders on the small business issuer's Web site, and is not included as an appendix to the small business issuer's proxy or information statement, identify in which of the prior fis-

cal years the charter was so included in satisfaction of this requirement.

[71 FR 53235, Sept. 8, 2006]

§ 228.501 (Item 501) Front of registration statement and front cover of prospectus.

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

(a) Limit the outside front cover page of the prospectus to one page and include the following information:

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

(2) The title, amount, and description of securities offered. 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;

(3) If there are selling security holders, a statement to that effect;

(4) 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) 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) Any legend or statement required by the law of any state in which the securities are offered;

(7) 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 on the adequacy or accuracy of the disclosures in the prospectus. Also make clear that any representation to the contrary 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