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Securities and Exchange Commission

17 CFR Parts 228, 229, 240, and 249
Disclosure of Equity Compensation Plan Information; Final Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240 and 249

[Release Nos. 33–8048, 34–45189; File No. S7–04–01]

RIN 3235–AI01

Disclosure of Equity Compensation Plan Information

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are adopting amendments to the Securities Exchange Act of 1934 disclosure requirements applicable to annual reports filed on Forms 10–K and 10–KSB and to proxy and information statements. The amendments will enhance disclosure of the number of outstanding options, warrants and rights granted by registrants to participants in equity compensation plans, as well as the number of securities remaining available for future issuance under these plans. The amendments require registrants to provide this information separately for equity compensation plans that have not been approved by their security holders, and to file with us copies of these plans unless immaterial in amount of significance.

DATES: Effective Date: February 1, 2002. *Compliance Dates:* Registrants must comply with the new disclosure requirements for their annual reports on Forms 10–K or 10–KSB to be filed for fiscal years ending on or after March 15, 2002 and for proxy and information statements for meetings of, or action by, security holders occurring on or after June 15, 2002. Registrants voluntarily may comply with the new disclosure requirements before the compliance dates.

Comments: Comments on the ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 should be received by February 1, 2002.

FOR FURTHER INFORMATION CONTACT: Mark A. Borges, Special Counsel, Office of Rulemaking, Division of Corporation Finance, by telephone at (202) 942–2910, or in writing at the Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Items 201 [1] and 601 [2] of Regulation S–B,[3] Items 201 [4] and 601 [5] of Regulation S–K [6] and Form 10–K, [7] Form 10–KSB [8] and Schedule 14A [9] under the Securities Exchange Act of 1934.[10] Schedule 14C [11] under the Exchange Act also is affected by the amendments.[12]

I. Introduction

As the use of equity compensation has increased during the last decade,[13] so have concerns about its impact on registrants and their security holders.[14] Equity compensation grants and awards may result in a significant reallocation of ownership between existing security holders and management and employees.[15] Our current rules do not require disclosure in a single location of the total number of securities that a registrant has remaining available for issuance under all of its equity compensation plans. Also, because these plans may be implemented without the approval of security holders, it is possible that investors may not be able to determine the total size of a registrant's equity compensation program.

In January 2001, we proposed amendments to our equity compensation disclosure rules, where our intent was to furnish investors with a more understandable presentation of a registrant's equity compensation program.[16] We received 31 comment letters in response to the proposals.[17] While a majority of commenters supported the proposals, several questioned the need for disclosure that was, in their view, substantially equivalent to disclosure already required in registrants' audited financial statements. In addition, many of the supportive commenters offered suggestions for refining the proposals to better accomplish the goal of assuring that all material information about a registrant's equity compensation program is fully and clearly disclosed. We have made a number of changes to the proposals in response to these comments. These changes are discussed in Section II of this release.

As a result of today's amendments, registrants must include a new table in their annual reports on Form 10–K,[18] as well as in their proxy statements [19] in years when they are submitting a compensation plan for security holder action. This table requires information about two categories of equity compensation plans: plans that have been approved by security holders and plans that have not been approved by security holders. With respect to each category, a registrant must disclose the number of securities to be issued upon the exercise, and the weighted-average exercise price, of all outstanding options, warrants and rights, as well as the number of securities remaining available for future issuance under the registrant's equity compensation plans.[20]

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[1] 17 CFR 228.201.

[2] 17 CFR 228.601.

[3] 17 CFR 228.10 *et seq.*

[4] 17 CFR 229.201.

[5] 17 CFR 229.601.

[6] 17 CFR 229.10 *et seq.*

[7] 17 CFR 249.310.

[8] 17 CFR 249.310b.

[9] 17 CFR 240.14a–101.

[10] 15 U.S.C. § 78a *et seq.*

[11] 17 CFR 240.14c–101.

[12] Item 1 of Schedule 14C requires that a registrant yfurnish the information called for by all of the items of Schedule 14A (other than Items 1(c), 2, 4 and 5) which would be applicable to any matter to be acted upon at the meeting if proxies were to be solicited in connection with the meeting.

[13] A study of stock-based pay practices at the nation's 200 largest corporations indicates that these companies allocated 15.2% of outstanding shares (calculated on a fully-diluted basis) for management and employee equity incentives in 2000, compared to only 6.9% in 1989. See Pearl Meyers & Partners, Inc., *2000 Equity Stake, Study of Management Equity Participation in the Top 200 Corporations* (2000).

[14] See Eric D. Roiter, *The NYSE Wrestles with Shareholder Approval of Stock Option Plans*, Corp. Gov. Adv., Vol. 8, No. 1 (Jan./Feb. 2000), at 1. See also, for example, Justin Fox, *The Amazing Stock Option Sleight of Hand*, Fortune, June 25, 2001, at 86.

[15] In its most recent study, the Investor Responsibility Research Center found that the average potential dilution for the 1,500 companies in the ''S&P Super 1,500'' (the combination of the S&P 500, the S&P MidCap 400 and the S&P SmallCap 600) was 14.6% in 2000, compared to 11.6% in 1997; an increase of approximately 26%. The increase was even greater for S&P 500 companies, with average potential dilution rising to 13.1% in 2000, compared to 9.2% in 1995. See Investor Responsibility Research Center, *Potential Dilution—2000, The Potential Dilution from Stock Plans at the S&P Super 1,500 Companies* (2000) (the ''IRRC Dilution Study'').

[16] The amendments were proposed in Release No. 33–7944 (Jan. 26, 2001) [66 FR 8732] (the ''Proposing Release'').

[17] The commenters included 11 individual and institutional investors, eight registrants and registrant associations (one registrant submitted two letters), one self-regulatory organization and 10 members of the executive compensation consulting, accounting and legal communities. These comment letters and a summary of comments prepared by our staff are available for public inspection and copying in our Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549, in File No. S7–04–01. Public comments submitted electronically and the summary of comments are available on our Web site *http://www.sec.gov*.

[18] The discussion of Form 10–K in this release also includes Form 10–KSB.

[19] The discussion of proxy statements in this release also includes Schedule 14C information statements.

[20] To help investors better understand equity compensation, our Office of Investor Education and Assistance will create educational materials about the available disclosure on equity compensation programs (including the information available in financial statements).

II. Discussion of Amendments

A. Content of Disclosure

1. Required Disclosure

Under the original proposals described in the Proposing Release, registrants were to disclose in tabular form several categories of information about their equity compensation plans, including the number of securities authorized for issuance under each plan, the number of securities issued, plus the number of securities to be issued upon the exercise of outstanding options, warrants or rights granted, under each plan during the last fiscal year, the number of securities to be issued upon the exercise of outstanding options, warrants or rights granted other than in the last fiscal year and the number of securities remaining available for future issuance under each plan. The proposals would have required registrants to list each plan separately in the table. We also sought comment as to whether any additional categories of information should be included in the table.

In response to concerns that the proposals would be costly and burdensome to implement and duplicative of some of the information required in registrants' financial statements, we have eliminated the first two proposed categories of disclosure. We have made a number of other changes as well, including a change that permits registrants to present the required information on an aggregated basis. These changes are discussed in detail below.

In addition to comments suggesting that we scale back the proposed disclosure, we also received comments citing the need for additional types of disclosure not originally proposed. For example, several commenters suggested that we add a column to the proposed table showing the weighted-average exercise price of outstanding options, warrants and rights.[21] These commenters asserted that investors need this information to assess the dilutive effect of a registrant's equity compensation program.[22] To enable investors to better understand dilution and to enhance the visibility of exercise price information, we have added a column to the table requiring disclosure of the weighted-average exercise price of all outstanding compensatory options, warrants and rights.[23]

As adopted, the amendments require a registrant to provide investors with the following tabular disclosure:

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total			

Registrants must provide the disclosure with respect to any equity compensation plan[24] in effect[25] as of the end of the registrant's last completed fiscal year that provides for the award of a registrant's securities or the grant of options, warrants or rights to purchase the registrant's securities to employees of the registrant or its parent, subsidiary or affiliated companies, or to any other person.[26] The disclosure also is to be provided without regard to whether the securities to be issued under the equity compensation plan are authorized but unissued securities of the registrant or reacquired shares.

2. Aggregated Disclosure

Several commenters suggested that we permit registrants to provide the required tabular disclosure on an aggregate, rather than a plan-by-plan, basis.[27] These commenters indicated that it would be unduly burdensome for many registrants if plans had to be listed separately in the table.[28] Another commenter expressed similar concerns if registrants were required to itemize plans assumed as the result of mergers, consolidations or other acquisition transactions.[29] We are persuaded that plan-by-plan disclosure may be

[21] See, for example, the Letter dated March 26, 2001 from the Council of Institutional Investors (the ''CII Letter''), the Letter dated April 24, 2001 from the Association for Investment Management and Research and the Letter dated April 16, 2001 from the Association of the Bar of the City of New York (the ''NYC Bar Letter'').

[22] While the impact of outstanding options, warrants and rights is contained in the presentation of diluted earnings-per-share required by Statement of Financial Accounting Standards No. 128, *Earnings-Per-Share* (Feb. 1997) (''SFAS 128''), this disclosure does not necessarily isolate ''compensatory'' instruments. Typically, the diluted earnings-per-share figure combines the dilutive effect of compensatory options, warrants and rights with that of other outstanding convertible securities.

[23] See new Item 201(d)(2)(ii) of Regulation S–B [17 CFR 228.201(d)(2)(ii)] and new Item 201(d)(2)(ii) of Regulation S–K [17 CFR 229.201(d)(2)(ii)]. This weighted-average exercise price information may be different from that contained in a registrant's financial statements as required by Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation* (Oct. 1995) (''SFAS 123'') because the information includes grants and awards to non-employees while the information required by SFAS 123 may not. See n. 55 below.

[24] This includes any equity compensation plan that provides for grants and awards to employees or non-employees in exchange for consideration in the form of goods or services as described in SFAS 123.

[25] For purposes of the amendments, we consider an equity compensation plan to be in effect as long as securities remain available for future issuance under the plan, or as long as options, warrants or rights previously granted under the plan remain outstanding.

[26] Disclosure is required without regard to whether participants are employees (including officers) or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders).

[27] See, for example, the Letter dated May 7, 2001 from the American Bar Association (the ''ABA Letter''), the Letter dated April 2, 2001 from Lucent Technologies Inc. and the Letter dated May 22, 2001 from the New York State Bar Association (the ''NY State Bar Letter'').

[28] One commenter estimated that, based upon the number of equity compensation plans it administers, compliance could cost an additional $300,000 annually for printing and distribution. See the Letter dated April 9, 2001 from Lucent Technologies Inc. (the ''Second Lucent Letter'').

[29] See the Letter dated February 27, 2001 from Intel Corporation (the ''Intel Letter'').

[30] In addition, information on the number and identity of a registrant's equity compensation plans should be available in the footnotes to the registrant's financial statements as part of its required SFAS 123 disclosure. See paragraph 46 of SFAS 123.

burdensome for many registrants.[30] Accordingly, we have revised the table to permit registrants to aggregate disclosure in two general categories:

- equity compensation plans approved by security holders; and
- equity compensation plans not approved by security holders.[31]

In the Proposing Release, we sought comment as to whether, when a registrant is submitting a new or existing equity compensation plan for security holder action, the required proxy statement disclosure should include that plan.[32] Several commenters suggested that we expand the table to include information about an existing plan upon which further action is being taken (for example, where a registrant is seeking the approval of security holders for an increase in the number of securities authorized for issuance under the plan).[33] These commenters indicated that, absent this requirement, a registrant amending an existing equity compensation plan otherwise might avoid disclosing information about the securities previously authorized for issuance under the plan. We are persuaded that registrants should include this information in the table.

Accordingly, where action is being taken to amend an existing equity compensation plan, the table should include information about the securities previously authorized for issuance under the plan; that is, the number of securities to be issued upon the exercise, and the weighted-average exercise price, of outstanding options, warrants and rights previously granted under the plan and the number of securities remaining available for future issuance under the plan.[34] A registrant should not include in the table the number of additional securities that are the subject of the plan amendment for which the registrant is seeking security holder approval.

3. Individual Arrangements and Assumed Plans

In the Proposing Release, we sought comment as to whether aggregated disclosure of individual equity compensation arrangements[35] was appropriate. We also asked whether aggregated disclosure should be permitted where a registrant had assumed an equity compensation plan in connection with a merger, consolidation or other acquisition transaction. Several commenters supported aggregated disclosure of individual arrangements,[36] and one commenter was in favor of aggregating the disclosure of individual arrangements with the disclosure of equity compensation plans.[37] Other commenters favored permitting aggregated disclosure of assumed plans.[38] Consistent with the concept of aggregated plan disclosure, we have revised the table to permit registrants to combine information about individual arrangements[39] and assumed plans (where further grants and awards can be made under these plans)[40] with information about other plans, all in the appropriate disclosure category.

4. Non-Security Holder-Approved Plans

As adopted, the amendments require a registrant to identify and describe briefly, in narrative form, the material features of each equity compensation plan in effect as of the end of the last completed fiscal year that was adopted without security holder approval.[41] While several commenters supported this requirement,[42] one commenter suggested that we permit registrants to cross-reference the portion of their required SFAS 123 disclosure containing descriptions of their non-security holder-approved plans to satisfy this requirement.[43] Because it streamlines compliance and ensures that investors have annual[44] access to this information, we are permitting registrants to satisfy the disclosure requirement in this manner.[45] The cross-reference should identify the specific plan or plans in the required SFAS 123 disclosure that have not been approved by security holders. In view of this change, we have eliminated the provision that would have permitted a registrant to satisfy this disclosure requirement by simply identifying the filing containing a narrative description of the plan in the years following the initial disclosure.

5. Foreign Registrants

Some commenters inquired about the applicability of the proposals to foreign registrants. Historically, we have applied a more flexible standard to foreign registrants than domestic registrants in the area of executive compensation disclosure. For example, foreign registrants need not disclose executive compensation information on an individual basis unless they disclose it in that manner under home country law or otherwise.[46] We do not find it necessary to vary from our historical treatment of executive compensation disclosure for foreign registrants,[47] and,

[31] See new Item 201(d)(1) of Regulation S–B [17 CFR 228.201(d)(1)] and new Item 201(d)(1) of Regulation S–K [17 CFR 229.201(d)(1)].

[32] These plans otherwise are subject to the disclosure requirements of Item 10 of Schedule 14A. Item 10 requires a description of the material features of, and tabular disclosure of the benefits receivable or allocable under, the plan being acted upon, as well as additional information regarding specific types of plans.

[33] See, for example, the CII Letter, the Letter dated March 28, 2001 from the State of Wisconsin Investment Board (the ''SWIB Letter'') and the Letter dated March 29, 2001 from the Teachers Insurance and Annuity Association—College Retirement Equities Fund (the ''TIAA-CREF Letter'').

[34] See Instruction 1 to new Item 10(c) of Schedule 14A.

[35] For these purposes, an individual equity compensation arrangement includes a ''plan'' for a single person as defined by Item 402(a)(7)(ii) of Regulation S–K [17 CFR 229.402(a)(7)(ii)] (''A plan may be applicable to one person.''), as well as an individual ''written compensation contract'' (see, for example, the Securities Act Rule 405 [17 CFR 230.405] definition of the term ''employee benefit plan'').

[36] See, for example, the NY State Bar Letter and the TIAA–CREF letter.

[37] See the ABA Letter.

[38] See the Intel Letter, the Letter dated August 17, 2001 from Leonard S. Stein and the Letter dated August 26, 2001 from Hendrick Vater.

[39] See Instruction 4 to new Item 201(d) of Regulation S–B [17 CFR 228.201(d)] and Instruction 4 to new Item 201(d) of Regulation S–K [17 CFR 229.201(d)].

[40] See Instruction 5 to new Item 201(d) of Regulation S–B and Instruction 5 to new Item 201(d) of Regulation S–K. In the case of individual options, warrants and rights assumed in connection with a merger, consolidation or other acquisition transaction, registrants should disclose the number of securities underlying the assumed options, warrants and rights and the related weighted-average exercise price information on an aggregated basis in a footnote to the table. *Id.*

[41] See new Item 201(d)(3) of Regulation S–B [17 CFR 228.201(d)(3)] and new Item 201(d)(3) of Regulation S–K [17 CFR 229.201(d)(3)].

[42] See, for example, the CII Letter, the Letter dated April 2, 2001 from the Investment Company Institute and the TIAA–CREF Letter.

[43] See the NYC Bar Letter. Similar cross-referencing is permitted under Item 101(b) (financial information about segments) and Item 101(d) (financial information about geographic areas) of Regulation S–K [17 CFR 229.101(b) and (d)].

[44] As originally proposed, the plan description would have been provided only once—following the year of adoption. The Proposing Release contemplated that, in subsequent years, registrants simply would identify the prior filing containing the plan description. Since SFAS 123 requires plan descriptions to be provided annually, the information will be available each year.

[45] See Instruction 7 to new Item 201(d) of Regulation S–B and Instruction 7 to new Item 201(d) of Regulation S–K. Paragraph 46 of SFAS 123 requires a description of each stock-based compensation plan, including the general terms of awards under the plan, such as vesting requirements, the maximum term of options granted and the number of shares authorized for grants of options or other equity instruments. See also paragraph 362 of SFAS 123. If the SFAS 123 plan description does not contain all of the material features of the plan, cross-referencing is not permitted.

[46] See Item 6.B of Form 20–F [17 CFR 249.220f]. Item 6.B requires disclosure of compensation information about a foreign private issuer's directors and senior management on an aggregated basis, including the amount of compensation paid and benefits in kind granted.

[47] Item 6.E.2 of Form 20–F requires a foreign private issuer to ''describe any arrangements for involving the employees in the capital of the

thus, we do not extend the amendments to foreign registrants at this time.[48]

B. Relationship to Accounting Disclosure

We have made significant changes to the proposals in response to arguments by several commenters that the current accounting literature provides for adequate disclosure about stock-based compensation.[49] We agree that we should strive to minimize redundant disclosure under generally accepted accounting principles and our rules, where practical. Accordingly, we have revised the proposals and will not require disclosure of

- The number of securities authorized for issuance under each equity compensation plan; [50] and
- The number of securities issued, plus the number of securities to be issued upon the exercise of outstanding options, warrants or rights granted, under each plan during the last fiscal year.[51]

The revised table will provide useful information to investors that is not always readily available in a registrant's financial statements.[52] This includes

- An indication of whether an equity compensation plan has been approved by security holders; [53]
- The total number of securities available for future issuance under a registrant's equity compensation program; [54] and
- The number of options and other securities granted or awarded to non-employees for compensatory purposes.[55]

Because this information may be important to investors in making informed voting and investment decisions, we believe it is appropriate to require all registrants subject to Exchange Act reporting to disclose it regularly.

Even where information, such as the number of securities to be issued upon the exercise, and the weighted-average exercise price, of outstanding options, warrants and rights, otherwise is available, it is not transparent to investors.[56] The amendments enhance the accessibility of this information, thereby making it easier for investors to assess the impact of a registrant's equity compensation policies and practices. Moreover, the amendments present the information in categories—plans that have been approved by security holders and plans that have not been approved by security holders—that investors have requested.[57]

The following table reflects the current relevant SFAS 123 disclosure requirements for stock-based compensation [58] and the new disclosure required by the amendments being adopted today, as adjusted to minimize redundancy between the two.

Equity compensation disclosure Item	Required by SFAS 123	Required by Item 201	Required by Item 601	Location of disclosure (financial statements/form 10-K/proxy by statement)
Description of general terms of each plan	Yes (¶ 46)	No	No	Financial Statements.
Number of securities authorized for grants of options or other equity instruments.	Yes (¶ 46)	No	No	Financial Statements.
Number and weighted-average exercise price of:				
Options outstanding at beginning of year	Yes (¶ 47a)	No	No	Financial Statements.
Options outstanding at end of year	Yes (¶ 47a)	Yes*	No	Financial Statements/Form 10–K/ Proxy Statement.**
Options exercisable at end of year	Yes (¶ 47a)	No	No	Financial Statements.
Options granted during year	Yes (¶ 47a)	No	No	Financial Statements.
Options exercised during year	Yes (¶ 47a)	No	No	Financial Statements.
Options forfeited during year	Yes (¶ 47a)	No	No	Financial Statements.
Options expired during year	Yes (¶ 47a)	No	No	Financial Statements.

company, including any arrangement that involves the issue or grant of options or shares or securities of the company.''

[48] In addition, while the use of equity compensation by foreign companies is increasing, it still trails use by U.S. companies. See Towers Perrin, *Stock Options Around the World* (2001).

[49] See the Letter dated April 2, 2001 from Arthur Andersen LLP, the Letter dated April 17, 2001 from the American Institute of Certified Public Accountants, the Letter dated March 29, 2001 from Emerson Electric Co., the Letter dated March 26, 2001 from the Institute of Management Accountants, the Letter dated April 12, 2001 from Microsoft Corporation, the Letter dated April 2, 2001 from PricewaterhouseCoopers LLP, the NY State Bar Letter and the Letter dated March 30, 2001 from Verizon Communications. These commenters also pointed out that duplicative disclosure is inconsistent with initiatives that we jointly have undertaken with the accounting profession to simplify disclosure and eliminate redundancies in financial reporting. See FASB Business Reporting Research Project, *Report of GAAP–SEC Disclosure Requirements Working Group* (2001), available at *http://www.rarc.rutgers.edu/fasb/brrp/BRRP3pl.PDF.*

[50] This information is required by paragraph 46 of SFAS 123.

[51] This information is required by paragraphs 47(a) and (c) of SFAS 123.

[52] See *Report of the New York Stock Exchange Special Task Force on Stockholder Approval Policy* (Oct. 1999) (the ''NYSE Task Force Report''), at 14, available at *http://www.nyse.com/pdfs/policy.pdf.*

[53] While SFAS 123 requires an entity to provide a description of each stock-based compensation plan, these descriptions need not indicate whether a plan has been approved by security holders. See paragraphs 46 and 362 of SFAS 123.

[54] Paragraph 46 of SFAS 123 provides for disclosure of the number of shares authorized for grants of options or other equity instruments pursuant to stock-based compensation plans. It does not specifically require disclosure of the *current* number of authorized shares available for grant. In addition, it may be difficult for investors to determine this number. Currently, a registrant submitting an equity compensation plan for security holder action need not provide any specific disclosure about its other equity compensation plans. In its annual study on stock plan dilution, the Investor Responsibility Research Center found that approximately 22% of the companies surveyed did not disclose the number of shares available for future issuance under their employee stock plans. See the IRRC Dilution Study.

[55] Paragraph 46 of SFAS 123 provides that ''[a]n entity that uses equity instruments to acquire goods or services other than employee services shall provide disclosures similar to those required [for employee transactions] *to the extent that those disclosures are important* in understanding the effects of those transactions on the financial statements'' (emphasis added). Consequently, a registrant has discretion to exclude non-employee grants and awards of equity instruments from its SFAS 123 disclosure. In addition, registrants need not apply the disclosure provisions of SFAS 123 to immaterial items, as determined based on a registrant's particular circumstances. See paragraph 244 of SFAS 123.

[56] See, for example, the NYSE Task Force Report, n. 52 above, at 14 (''The requisite information [to make dilution calculations] is not consistently available in any one place or format in corporate disclosure documents * * * .), the Letter dated April 2, 2001 from the Association of Publicly Traded Companies (''[t]he sheer volume and complexity of most corporate compensation proposals, coupled with stock option plans, makes it difficult for the average investor to interpret and effectively utilize the information provided.'') and the TIAA–CREF Letter (''[l]ack of transparency * * * limits the ability of shareholders * * * to protect themselves against plans that can be highly dilutive.'').

[57] See the Proposing Release at n. 17.

[58] This table does not describe all of the information that registrants must disclose under SFAS 123.

Equity compensation disclosure Item	Required by SFAS 123	Required by Item 201	Required by Item 601	Location of disclosure (financial statements/form 10-K/proxy by statement)
Terms of significant modifications of outstanding awards.	Yes (¶ 47f)	No	No	Financial Statements.
Range of exercise prices for outstanding options.	Yes (¶ 48)	No	No	Financial Statements.
Weighted-average exercise price of outstanding options and similar instruments.	Yes (¶ 48)	Yes*	No	Financial Statements/Form 10–K/Proxy Statement.**
Weighted-average remaining contractual life of outstanding options.	Yes (¶ 48)	No	No	Financial Statements.
Number of securities remaining available for future issuance.	No	Yes*	No	Form 10-K/Proxy Statement.**
Description of material terms of each plan that has not been approved by security holders.	No	Yes	No	Form 10-K/Proxy Statement.**
Filing of compensatory plans in which named executive officers and directors participate and any other compensatory plan unless immaterial.	No	No	Yes	Form 10-K.

*Disclosed by category: plans approved by security holders and plans not approved by security holders.
**May be incorporated by reference into the annual report on Form 10-K by including in proxy statement.

C. Location of Disclosure

As proposed, registrants were to include the table in the proxy statement whenever they submitted a compensation plan for security holder action and in the annual report on Form 10–K in all other years. In the Proposing Release, we sought comment as to whether the proposed location of the disclosure was appropriate. Most commenters suggested that, for consistency and to avoid confusion, we should require disclosure in the same document each year.[59] Citing the relevance of the information when electing directors, several commenters suggested that we require disclosure in the proxy statement in all instances, even if a registrant were not submitting a compensation plan for security holder action.[60] Other commenters, on the other hand, recommended that we require the disclosure only in the annual report on Form 10–K.[61]

Although the idea of requiring the disclosure in a single location is appealing, we have elected not to do so for several reasons. If we adopted a requirement that the table appear only in proxy statements, a significant number of companies whose reporting obligations arise solely under Section 15(d) of the Exchange Act[62] would not be subject to the requirement. These companies are not required to prepare and file proxy statements. Further, we are not persuaded that, as a general rule, the proposed disclosure is material to voting decisions by security holders other than those relating to compensation plans.[63]

We also do not believe that the table should be located exclusively in the annual report on Form 10–K. Although the annual report on Form 10–K is filed with us, a registrant is not required to deliver it to security holders.[64] Thus, security holders must take some affirmative action to obtain the information.[65] In addition, limiting the table to the annual report on Form 10–K would misplace the disclosure in those cases when the information would be useful to investors in assessing the merits of a compensation plan submitted for security holder action.[66]

[59] In the Proposing Release, we also sought comment as to whether the table should be required in registration statements filed under the Securities Act of 1933 [15 U.S.C. §§ 77a *et seq.*]. While no commenter favored a blanket requirement for all registration statements, two commenters suggested that registrants include the table in registration statements filed in connection with initial public offerings. See the NYC Bar Letter and the NY State Bar Letter. Two commenters expressly opposed a registration statement disclosure requirement. See the ABA Letter and the Letter dated June 11, 2001 from the New York Stock Exchange (the ''NYSE Letter''). Generally, registrants already include information about the possible effects of future sales of securities, including outstanding options, in registration statements for initial public offerings to the extent that this information is material. Item 506 of Regulation S–K [17 CFR 229.506] requires specific information in a registration statement filed in connection with an initial public offering about dilution, as well as with respect to common equity securities that have been acquired by officers and directors. In addition, Item 201(a)(2) of Regulation S–K [17 CFR 229.201(a)(2)] requires disclosure of the amount of common equity that is subject to outstanding options or warrants. Further information is available pursuant to the disclosure required by Item 402 of Regulation S–K. Accordingly, except where the table is part of an annual report on Form 10–K or 10–KSB that is incorporated by reference into a prospectus, we are not extending the disclosure requirements to registration statements at this time. See Instruction 10 to new Item 201(d) of Regulation S–B and Instruction 10 to new Item 201(d) of Regulation S–K.

[60] See, for example, the ABA Letter, the CII Letter and the SWIB Letter.

[61] See, for example, the Letter dated March 29, 2001 from Ernst &Young LLP, the Second Lucent Letter and the NYC Bar Letter.

[62] 15 U.S.C. § 78o(d).

[63] Some commenters argued that even where a registrant is not submitting a compensation plan for security holder action, the new disclosure contains relevant information with respect to the backgrounds and compensation of directors and executive officers that should be available for evaluation in connection with the election of directors. In general, we find the relevance of the new disclosure to be somewhat attenuated from decisions regarding the election of directors. Moreover, there would be little connection when a nominee has not served previously as a director of the registrant. Finally, the relevance of the new disclosure to decisions concerning the remuneration of directors and officers also is questionable because the table requires general information that does not specifically identify director and executive officer awards.

[64] Registrants are required, however, to provide security holders with an annual report to security holders pursuant to Exchange Act Rule 14a–3(b) [17 CFR 240.14a–3(b)] when soliciting proxies in connection with an annual meeting of security holders at which directors are to be elected. Typically, this annual report to security holders includes the financial statements of the registrant, including the required SFAS 123 disclosure. In some instances, registrants use their annual report on Form 10–K to satisfy this delivery requirement. See Exchange Act Rule 14a–3(d) [17 CFR 240.14a–3(d)].

[65] Under Exchange Act Rule 14a–3(b)(10) [17 CFR 240.14a–3(b)(10)], a registrant must include in its proxy statement or annual report an undertaking to provide without charge to each security holder solicited, upon written request, a copy of the registrant's annual report on Form 10–K. Once filed, the annual report on Form 10–K also is available via our Electronic Data Gathering, Analysis and Retrieval, or EDGAR, system.

[66] Another possible location for the table is the annual report to security holders required by Exchange Act Rule 14a–3(b). This alternative has several drawbacks, however. First, because it is not considered a ''filed'' document, the annual report is not subject to the express civil liability provisions of Section 18 of the Exchange Act [15 U.S.C. § 78r]. See Exchange Act Rule 14a–3(c) [17 CFR 240.14a–3(c)]. Second, as with proxy statements, the disclosure would not apply to registrants subject to reporting solely under Section 15(d) of the Exchange Act. Finally, because principally financial information is required to be included in the annual report, non-financial disclosure such as the table would appear out of place.

We have concluded that the best way to promote consistency, clarity and relevant placement of the new information is to require that the table be included each year in a registrant's annual report on Form 10–K [67] and, additionally, in the proxy statement when the registrant is submitting a compensation plan for security holder action.[68] In situations where a registrant is required to include the information in both filings, it may satisfy its Form 10–K disclosure obligation by incorporating the required information by reference from its definitive proxy statement, if that statement involves the election of directors and is filed not later than 120 days after the end of the fiscal year covered by the Form 10–K.[69]

D. Filing Copies of Non-Security Holder-Approved Plans

In the Proposing Release, we sought comment as to whether, in lieu of, or in addition to, the narrative disclosure required for an equity compensation plan that has been adopted without the approval of security holders, a registrant should be required to file a copy of the plan as an exhibit to the registrant's annual report on Form 10–K for the fiscal year in which the plan was adopted.[70] Several commenters favored a filing requirement in addition to requiring registrants to provide narrative disclosure of the ''material features'' of non-security holder-approved equity compensation plans.[71]

Item 601(b)(10) of Regulation S–K [72] requires registrants to file material contracts as exhibits to many of their documents filed under the Securities Act of 1933 (the ''Securities Act'') and the Exchange Act. Of particular relevance is the provision in Item 601(b)(10)(iii) stating that ''any management contract or other compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing * * * in which any director or any of the named executive officers of the registrant * * * participates shall be deemed material and shall be filed.'' [73] Item 601(b)(10)(iii) also states that ''any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.'' [74] Some commenters expressed concern that non-security holder-approved plans, many of which exclude executive officers and directors, often do not fall within these provisions.[75]

We believe this concern has merit. Accordingly, we have amended Item 601(b)(10) to require registrants to file any equity compensation plan adopted without the approval of security holders in which any employee (whether or not an executive officer or director of the registrant) participates, unless immaterial in amount or significance.[76] Compliance with this requirement should ensure that significant non-security holder-approved plans are available to investors.[77] Coupled with the required narrative description of non-security holder-approved plans, investors should have access to complete information about a registrant's principal equity compensation plans.

III. Paperwork Reduction Act Analysis

The amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995, [78] or PRA. We published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted these requirements to the Office of Management and Budget, or OMB, for review.[79] Subsequently, OMB approved the proposed information collection requirements.

As discussed in Section I above, we received several comment letters on the proposals. We have made a number of changes to the proposals in response to these comments. Accordingly, we are revising our previous burden estimates. We are submitting the revised estimates to the OMB for approval.[80] An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

A. Summary of Amendments

The amendments require tabular disclosure of the number of securities to be issued upon the exercise, and the weighted-average exercise price, of all outstanding options, warrants and rights under a registrant's equity compensation plans, as well as the number of securities remaining available for future issuance under these plans and certain related information. Disclosure is to be made in two categories: plans that have been approved by security holders and plans that have not been approved by security holders. Registrants must include the table in their annual reports on Form 10–K or 10–KSB, and, additionally, in their proxy or information statements in years when they are submitting a compensation plan for security holder action. Registrants also must file copies of their non-security holder-approved plans with us, unless immaterial in amount or significance. Preparing and filing an annual report on Form 10–K or 10–KSB is a collection of information. Similarly, preparing, filing and disseminating a proxy or information statement is a collection of information.[81] The collection of

[67] See revised Item 12 of Part III of Form 10–K and revised Item 11 of Part III of Form 10–KSB.

[68] See new Item 10(c) of Schedule 14A. Proxy or information statement disclosure is triggered by the submission of any compensation plan for security holder action, including cash-only plans.

[69] Similar incorporation by reference is permitted with respect to the other disclosure items required by Part III of Form 10–K and 10–KSB. See General Instruction E(3) to Form 10–KSB and General Instruction G(3) to Form 10–K.

[70] See Section II.A.4 above.

[71] See, for example, the CII Letter, the SWIB Letter and the TIAA–CREF Letter. Other commenters suggested that we require registrants to file copies of all equity compensation plans (whether or not approved by security holders). See the ABA Letter and the NYSE Letter.

[72] 17 CFR 229.601(b)(10).

[73] 17 CFR 229.601(b)(10)(iii)(A). Nondiscriminatory, broad-based compensatory plans, contracts or arrangements are exempt from this requirement. See Item 601(b)(10)(iii)(B)(*4*) [17 CFR 229.601(b)(10)(iii)(B)(*4*)].

[74] *Id.*

[75] See, for example, the CII Letter and the Letter dated March 29, 2001 from the Office of the State Comptroller of the State of New York.

[76] See new Item 601(b)(10)(iii)(B) of Regulation S–B [17 CFR 228.601(b)(10)(iii)(B)] and new Item 601(b)(10)(iii)(B) of Regulation S–K [17 CFR 229.601(b)(10)(iii)(B)]. This is consistent with our action in 1981 amending then-Item 7 of Regulation S–K to reformulate the definition of ''material contracts'' as applied to remunerative plans, contracts or arrangements. See Release No. 33–6287 (Feb. 6, 1981) [46 FR 11952]. Previously, we had indicated that remuneration plans in which directors or executive officers of the registrant did not participate generally did not need to be filed as exhibits. See Release No. 33–6230, Section II.A.2.b.i. (Aug. 27, 1980) [45 FR 58822].

[77] With respect to an existing non-security holder-approved equity compensation plan subject to new Item 601(b)(10)(iii)(B) of Regulation S–B or new Item 601(b)(10)(iii)(B) of Regulation S–K that is in effect as of the effective date of these amendments and that has not been filed previously, a copy of the plan must be filed as an exhibit to the annual report on Form 10–K or 10–KSB filed by the registrant for its first fiscal year ending on or after March 15, 2002.

[78] 44 U.S.C. § 3501 *et seq.*

[79] Publication and submission were in accordance with 44 U.S.C. § 3507(d) and 5 CFR 1320.11.

[80] The titles for the collections of information affected by the amendments are (1) ''Regulation 14A (Commission Rules 14a–1 through 14b–2 and Schedule 14A),'' (2) ''Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C),'' (3) ''Form 10–K,'' (4) ''Form 10–KSB,'' (5) ''Regulation S–B'' and (6) ''Regulation S–K.''

[81] The likely respondents subject to the collections of information include entities whose reporting obligations arise under the Exchange Act. The reporting requirements of Section 13 of the Exchange Act [15 U.S.C. § 78m], as well as the proxy disclosure requirements of Section 14 of the

Continued

information is mandatory for all registrants and there is no mandatory retention period for the information collected. The collection of information will not be kept confidential.

B. Summary of Comment Letters and Revisions to Proposals

We requested comment on the PRA analysis contained in the Proposing Release. We received six comment letters specifically addressing the estimated paperwork burden associated with the collections of information.[82] These commenters indicated that the amount of time required to comply with the proposals would be significant for many registrants and substantially greater than our estimates. One commenter estimated that, if adopted, the proposals would add at least four pages to its disclosure documents and, where the disclosure appeared in the proxy statement, would result in additional printing costs of $100,000 and additional mailing costs of $200,000 for the extra pages.[83] Another commenter suggested that we offset any increased costs to registrants by eliminating current requirements that do not result in the disclosure of useful information.[84] A third commenter suggested that we consider providing a model form of disclosure for small businesses to reduce their compliance burden.[85]

In response to these comments, we have made a number of changes to the proposals, including eliminating two of the proposed tabular columns and permitting aggregated disclosure. We also are permitting registrants with non-security holder-approved plans to describe the material terms of these plans by cross-referencing to their SFAS 123 disclosure. These changes will streamline compliance and, correspondingly, reduce the burden on registrants. While the amendments require the filing of non-security holder-approved equity compensation plans unless immaterial in amount or significance, this should not increase the burden for registrants significantly as these documents are readily available and will be filed electronically.

C. Revisions to Reporting and Cost Burden Estimates

As a result of the changes described above and a change in one of our underlying assumptions,[86] the reporting and cost burden estimates for the collections of information have changed. Accordingly, we have revised the estimated information collection requirements that were originally submitted to the OMB. With respect to Forms 10–K and 10–KSB, we have increased our estimate by 1,174 hours in the case of Form 10–K and increased our estimate by 707 hours in the case of Form 10–KSB. With respect to Schedules 14A and 14C, we have decreased our estimate by 13,139 hours in the case of Schedule 14A and decreased our estimate by 139 hours in the case of Schedule 14C.

Our estimates are based on several assumptions. First, we estimate that approximately 60%[87] of the registrants that file an annual report on either Form 10–K or 10–KSB maintain equity compensation plans and will be required to provide the new disclosure table.[88] We also estimate that approximately 20%[89] of these registrants maintain non-security holder-approved equity compensation plans and, thus will be required to describe the material features of these plans and file copies with us unless immaterial in amount or significance.[90] We further estimate that, in any year, 30%[91] of the registrants with equity compensation plans will either adopt a new plan or amend an existing plan to increase the number of securities authorized for issuance under the plan, thereby triggering proxy or information statement disclosure.[92] In this situation,

Exchange Act, apply to entities that have securities registered under Section 12 of the Exchange Act [15 U.S.C. § 78l]. The reporting requirements of Section 15(d) of the Exchange Act apply to entities with effective registration statements under the Securities Act that are not otherwise subject to the registration requirements of Section 12 of the Exchange Act.

[82] See the Letter dated April 17, 2001 from the American Institute of Certified Public Accountants (the ''AICPA Letter''), the Letter dated April 2, 2001 from the Association of Publicly-Traded Companies (the ''APTC Letter''), the Letter dated April 2, 2001 from Lucent Technologies Inc. (the ''First Lucent Letter''), the Letter dated May 22, 2001 from the New York State Bar Association, the Letter dated August 17, 2001 from Leonard S. Stein (the ''Stein Letter'') and the Letter dated August 26, 2001 from Hendrick Vater.

[83] See the Letter dated April 9, 2001 from Lucent Technologies Inc.

[84] See the APTC Letter.

[85] See the Stein Letter.

[86] We have changed our assumption about the number of registrants with equity compensation plans that, in any year, either adopt a new plan or amend an existing plan to increase the number of securities authorized for issuance under the plan. In the Proposing Release, we estimated that 50% of the registrants with equity compensation plans would either adopt a new plan or amend an existing plan each year. Based on the available survey data, we have revised this assumption to 30%. See n. 91 below.

[87] This estimate is made after a review of available survey data, which varies widely. For example, in its most recent study of the ''S&P Super 1,500'' (the combination of the S&P 500, the S&P MidCap 400 and the S&P SmallCap 600), the Investor Responsibility Research Center determined that, of the 1,157 companies examined, 1,142 (98.7%) awarded equity to some portion of their employees. See Investor Responsibility Research Center, *Potential Dilution—2000, The Potential Dilution from Stock Plans at the S&P Super 1,500 Companies* (2000). In contrast, a Pilot Survey conducted by the Bureau of Labor Statistics in 1999 determined that 22% of publicly-held companies offered stock options to their employees. This survey sampled 2,100 ''establishments,'' of which approximately 1 in 10 were publicly-held companies. See Bureau of Labor Statistics, *Pilot Survey on the Incidence of Stock Options in Private Industry in 1999*, (Oct. 11, 2000), available at *http://www.bls.gov/ncs/ocs/sp/ncnr0001.txt*. Further, in the Proposing Release we sought comment as to whether our estimates of the burden of the proposed collections of information were accurate. We received no comment letters responding to that request. Because of variations in the available data, we also have estimated the reporting and cost burdens for the proposed collections of information assuming that 98% of the registrants that file annual reports on Form 10–K or 10–KSB maintain an equity compensation plan and are subject to the required disclosure. See nn. 108 and 110 below.

[88] Based on the actual number of registrants filing annual reports on Form 10–K and 10–KSB, we estimate that 6,229 registrants that file on Form 10–K (10,381 × 60%) maintain equity compensation plans (''Form 10–K Filers'') and 2,185 registrants that file on Form 10–KSB (3,641 × 60%) maintain equity compensation plans (''Form 10–KSB Filers'').

[89] In the Proposing Release, we estimated that this figure was 25%. The available survey data does not appear to be representative of the general registrant population. See William M. Mercer, Inc., *Equity Compensation Survey* (2001) (48% of survey respondents (83 participants) maintained non-security holder-approved stock option plans for employees below management level; 60% of such plans most prevalent in large companies (more than 5,000 employees)); iQuantic, Inc., *Trends in Equity Compensation 1996–2000* (2000) (27.3% of survey respondents in 1999 (161 participants) maintained non-security holder-approved stock option plans, compared to 3.2% before 1996). After discussions with several compensation professionals, we reduced our estimate to 20%.

[90] We estimate that of the Form 10–K Filers, 1,246 (6,229 × 20%) maintain a non-security holder-approved equity compensation plan (''Form 10–K Filers with Non-Approved Plans'') and 4,983 (6,229 × 80%) do not (''Form 10–K Filers with Only Approved Plans''). We estimate that of the Form 10–KSB Filers, 437 (2,185 × 20%) maintain a non-security holder-approved equity compensation plan (''Form 10–KSB Filers with Non-Approved Plans'') and 1,748 (2,185 × 80%) do not (''Form 10–KSB Filers with Only Approved Plans'').

[91] This estimate is based on a review of available survey data. In its most recent study, the Investor Responsibility Research Center determined that, of 1,157 companies studied in calendar year 2000, 337 (29%) presented proposals for new or amended equity compensation plans to security holders. See Investor Responsibility Research Center, *Potential Dilution—2000, The Potential Dilution from Stock Plans at the S&P Super 1,500 Companies* (2000). In its most recent study, Pearl Meyers & Partners found that new plan authorizations among the top 200 companies were submitted by 58 companies in 2000 (29%). See Pearl Meyers & Partners, Inc., *2000 Equity Stake, Study of Management Equity Participation in the Top 200 Corporations (2000).*

[92] We estimate that of the Form 10–K Filers with Only Approved Plans, 1,495 (4,983 × 30%) submit a new or amended equity compensation plan for security holder approval annually (''Form 10–K Filers with Only Approved Plans Subject to Section 14'') and of the Form 10–K Filers with Non-Approved Plans, 374 (1,246 × 30%) submit a new or amended equity compensation plan for security holder approval annually (''Form 10–K Filers with Non-Approved Plans Subject to Section 14''). Similarly, we estimate that of the Form 10–KSB

we have assumed that a registrant will include the required disclosure in its proxy or information statement and incorporate that disclosure by reference into its annual report on Form 10–K or 10–KSB. We estimate that approximately 28%[93] of the registrants filing annual reports on Form 10–K or 10–KSB are subject to Section 13 of the Exchange Act by virtue of Section 15(d) of the Exchange Act and, thus, do not file proxy or information statements,[94] and that approximately 98%[95] of the registrants file proxy, rather than information, statements in connection with their annual meeting of security holders at which directors are to be elected.[96] Finally, we estimate that preparation of the required tabular disclosure will take two burden hours and, where required, preparation of the description of the material features of a non-security holder-approved equity compensation plan will take two burden hours.[97]

Our revised estimate of the total burden hours of the required collections of information is set forth in the following table.

TABLE—BURDEN HOUR ESTIMATES

Form	Filings/year			Estimated burden hours/filing			Estimated burden hours/year	
	Estimated filings/year	Estimated filings subject to tabular disclosre	Estimated filings subject to tabular and narrative disclosrue	Before amendments	Adjusted for tabular disclosure	Adjusted for tabular and narrative disclosure	Before amendments	After amendments
	(A)	(B)	(C)	(D)	(E)[98]	(F)[99]	(G) = (A) x (D)	(H) = (B) x (E) + (C) x (F)
0-K	10,381	[100] 3,907	[101] 977	430	430.4	430.6	4,463,830	4,469,691
10-KSB	3,641	[102] 1,371	[103] 343	294	294.4	294.6	1,070,454	1,072,511
14A	9,892	[104] 1,423	[105] 356	18.2	18.3	18.4	179,966	182,101
14C	253	[106] 30	[107] 7	18.1	18.2	18.3	4,582	4,626
Total							5,718,832	5,728,929

Filers with Only Approved Plans, 524 (1,748 × 30%) submit a new or amended equity compensation plan for security holder approval annually (''Form 10–KSB Filers with Only Approved Plans Subject to Section 14'') and of the Form 10–KSB Filers with Non-Approved Plans, 131 (437 × 30%) submit a new or amended equity compensation plan for security holder approval annually (''Form 10–KSB Filers with Non-Approved Plans Subject to Section 14'').

[93] This estimate is based on a comparison of the actual number of registrants filing annual reports on Form 10–K or 10–KSB during the 2000 fiscal year (10,381 + 3,641 = 14,022) with the actual number of registrants filing proxy or information statements during the 2000 fiscal year (9,892 + 253 = 10,145), or 10,145/14,022.

[94] Thus, we have subtracted 419 registrants (1,495 × 28%) from the group of Form 10–K Filers with Only Approved Plans Subject to Section 14, 105 registrants (374 × 28%) from the group of Form 10–K Filers with Non-Approved Plans Subject to Section 14, 147 registrants (524 × 28%) from the group of Form 10–KSB Filers with Only Approved Plans Subject to Section 14 and 37 registrants (131 × 28%) from the group of Form 10–KSB Filers with Non-Approved Plans Subject to Section 14.

[95] This estimate is based on a comparison of the actual number of registrants filing proxy statements during the 2000 fiscal year (9,982) with the actual number of registrants filing information statements during the same period (253), or 9,982/10,145.

[96] Thus, we estimate that of the 1,076 Form 10–K Filers with Only Approved Plans Subject to Section 14, 1,054 (1,076 × 98%) will file proxy statements and 22 will file information statements, of the 269 Form 10 × K Filers with Non-Approved Plans Subject to Section 14, 264 (269 × 98%) will file proxy statements and five will file information statements, of the 377 Form 10–KSB Filers with Only Approved Plans Subject to Section 14, 369 (377 × 98%) will file proxy statements and eight will file information statements and of the 94 Form 10–KSB Filers with Non-Approved Plans Subject to Section 14, 92 (94 × 98%) will file proxy statements and two will file information statements.

[97] Even though we have streamlined compliance in order to reduce the burden on registrants, we have not reduced the number of estimated burden hours to prepare the required disclosure. This decision is in response to comments that our initial burden hour estimate was too low. See the AICPA Letter and the First Lucent Letter.

In addition to the internal hours they will expend,[108] we expect that registrants will retain outside counsel to assist in the preparation of the required disclosures.[109] The total dollar cost of complying with Form 10–K and Form 10–KSB, revised to include outside counsel costs expected from the amendments, is estimated to be $2,345,268,300 for Form 10–K, an increase of $1,758,300 from the current annual burden of $2,343,510,000, and $562,605,100 for Form 10–KSB, an increase of $617,100 from the current annual burden of $561,988,000. The total dollar cost of complying with Regulations 14A and 14C, revised to include outside counsel costs expected from the amendments, are estimated to be $93,254,500 for Regulation 14A, an increase of $640,500 from the current annual burden of $92,614,000, and $2,382,200 for Regulation 14C, an increase of $13,200 from the current annual burden of $2,369,000.[110]

D. Request for Comment

We request comment in order to (a) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility, (b) evaluate the accuracy of our estimate of the burden of the collections of information, (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected and (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.[111]

Any member of the public may direct to us any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549, with reference to File No. S7–04–01. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–04–01 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

IV. Costs and Benefits of Final Rules

A. Background

The use of equity compensation, particularly stock options, has grown significantly during the last decade.[112] Consequently, existing security holders may face higher levels of dilution of their ownership interests as some companies issue more shares of their stock to employees.[113] Since the distribution of equity may result in a significant reallocation of ownership in an enterprise between existing security holders and management and employees, investors have a strong interest in understanding a registrant's equity compensation program.[114]

Until recently, security holder approval was required for most equity compensation plans. However, as approval requirements have been relaxed[115] and as opposition to these plans has grown,[116] an increasing number of registrants have adopted stock option plans without the approval of security holders,[117] thus potentially obscuring investors' ability to assess the dilutive effect of a registrant's equity compensation program. Our current rules do not require that a registrant disclose specific information about its non-security holder-approved equity compensation plans.[118] Nor do current

[98] We estimate that registrants will prepare 50% of the required disclosure and outside counsel will prepare the remaining 50%. Accordingly, this estimate reflects the addition of one burden hour to prepare the required tabular disclosure. See n. 97 above and the accompanying text.

[99] We estimate that registrants will prepare 50% of the required disclosure and outside counsel will prepare the remaining 50%. Accordingly, this estimate reflects the addition of two burden hours to prepare the required tabular and narrative disclosure. See n. 97 above and the accompanying text.

[100] We arrived at this estimate by taking the number of Form 10–K Filers (see n. 88 above) and subtracting (a) the number of Form 10–K Filers with Non-Approved Plans (see n. 90 above) and (b) the number of Form 10–K Filers with Only Approved Plans Subject to Section 14 (see nn. 92 and 94 above), or (6,229 − 1,246 − 1,076).

[101] We arrived at this estimate by taking the number of Form 10–K Filers with Non-Approved Plans (see n. 90 above) and subtracting the number of Form 10–K Filers with Non-Approved Plans Subject to Section 14 (see nn. 92 and 94 above), or (1,246 − 269).

[102] We arrived at this estimate by taking the number of Form 10–KSB Filers (see n. 88 above) and subtracting (a) the number of Form 10–KSB Filers with Non-Approved Plans (see n. 90 above) and (b) the number of Form 10–KSB Filers with Only Approved Plans Subject to Section 14 (see nn. 92 and 94 above), or (2,185 − 437 − 377).

[103] We arrived at this estimate by taking the number of Form 10–KSB Filers with Non-Approved Plans (see n. 90 above) and subtracting the number of Form 10–KSB Filers with Non-Approved Plans Subject to Section 14 (see nn. 92 and 94 above), or (437 − 94).

[104] We arrived at this estimate by taking the number of Form 10–K Filers with Only Approved Plans Subject to Section 14 that will file proxy statements and adding the number of Form 10–KSB Filers with Only Approved Plans Subject to Section 14 that will file proxy statements (see n. 96 above), or (1,054 + 369).

[105] We arrived at this estimate by taking the number of Form 10–K Filers with Non-Approved Plans Subject to Section 14 that will file proxy statements and adding the number of Form 10–KSB Filers with Non-Approved Plans Subject to Section 14 that will file proxy statements (see n. 96 above), or (264 + 92).

[106] We arrived at this estimate by taking the number of Form 10–K Filers with Only Approved Plans Subject to Section 14 that will file information statements and adding the number of Form 10–KSB Filers with Only Approved Plans Subject to Section 14 that will file information statements (see n. 96 above), or (22 + 8).

[107] We arrived at this estimate by taking the number of Form 10–K Filers with Non-Approved Plans Subject to Section 14 that will file information statements and adding the number of Form 10–KSB Filers with Non-Approved Plans Subject to Section 14 that will file information statements (see n. 96 above), or (5 + 2).

[108] Assuming that 98% of the registrants that file annual reports on Form 10–K or 10–KSB maintain an equity compensation plan and are subject to the required disclosure, the estimated burden hours per year resulting from the amendments would be 16,511 hours, increasing this estimate to 5,735,343 hours.

financial reporting disclosure rules require that non-security holder-approved plans be identified.[119]

Consequently, it is often difficult for investors to determine whether they have adequate information about a registrant's equity compensation program. In response to ongoing investor concerns,[120] in January 2001 we proposed amendments to our rules to enhance the quality of information available to investors about equity compensation plans.[121]

B. Response to Comment Letters

In the Proposing Release, we noted that registrants would incur costs in complying with the proposals. We also noted that these costs, to the extent that they could be estimated, would not be significant, as the required disclosure can be derived from information that is readily available to registrants through the routine administration of their equity compensation programs. We requested comment on the costs and benefits of the proposals. Of the comment letters we received, 22 respondents discussed the costs and benefits associated with the proposals.[122] Most of the comment letters addressed these matters in general terms.

Several respondents asserted that, because the proposals duplicated disclosure already required in registrants' audited financial statements, the cost of providing information to investors would increase without any useful benefit.[123] In response to these comments, we have revised the proposals to eliminate redundant disclosure and to minimize the overlap with financial reporting requirements, thereby reducing the cost of compliance. As discussed in Subsection C below, the amendments will enhance the quality of the disclosure available to investors about the dilutive effect of registrants' equity compensation programs.

Other respondents, while generally supporting the proposals, suggested that we scale back the required disclosure to reduce compliance costs. For example, some respondents indicated that requiring plan-by-plan disclosure would create an undue burden for registrants without providing an incremental benefit to investors.[124] In response to these comments, we have revised the proposals to permit aggregated disclosure of information about plans and individual equity compensation arrangements and to allow the required narrative summary of a non-security holder-approved stock option plan to be provided by a cross-reference to a description of the plan in a registrant's financial statements.[125] Some respondents suggested that we expand the required disclosure to include additional information, such as weighted-average exercise price data and information about existing equity compensation plans being submitted for security holder action. They also requested that we require the filing of non-security holder-approved equity compensation plans. We have made these changes.[126]

Most respondents suggested that the proposed disclosure be required in the same document each year, to both streamline compliance and to minimize investor confusion. While we carefully considered this suggestion, ultimately we concluded that these concerns were outweighed by the need for consistent application of the disclosure to all registrants.[127] Accordingly, the required disclosure is to be provided each year in a registrant's annual report on Form 10–K or 10–KSB and, additionally, in the proxy or information statement in years when the registrant is submitting a compensation plan for security holder action.

C. Benefits

1. Disclosure of Non-Security Holder-Approved Plans

New Item 201(d)(1) of Regulation S–K and Regulation S–B requires registrants to disclose whether they have one or more non-security holder-approved stock option plans by separately providing information about the dilutive effects of these plans. New Item 201(d)(3) of Regulation S–K and Regulation S–B requires that this disclosure be accompanied by a narrative summary of the material features of each non-security holder-approved plan. Also, as amended Item 601(b)(10) of Regulation S–K and Regulation S–B requires registrants to file a copy of any non-security holder-approved equity compensation plan with us unless the plan is immaterial in amount or significance.

Presently, it is difficult for investors to ascertain whether a registrant has adopted a non-security holder approved stock option plan.[128] If a plan is broad-based, restricts or prohibits the participation of officers and directors and does not permit the grant of tax-qualified stock options, for instance, it is unlikely to require security holder approval. Frequently, investors must examine the required public filings of a registrant made over several years in order to identify the registrant's stock option plans and determine if they have been approved by security holders. Even when a non-security holder-approved plan is identified, information about the plan may be limited since it may not be subject to our disclosure rules and may not be filed with us. The amendments will enable investors to ascertain if a registrant has adopted a non-security holder approved plan and highlight a

[109] One-half of the total burden resulting from the amendments is reflected as burden hours and the remainder is reflected in the total cost of complying with the information collection requirements. We have used an estimated hourly rate of $300.00 to determine the estimated cost to respondents of the disclosure prepared by outside counsel. We arrived at this hourly rate estimate after consulting with several private law firms.

[110] These cost burden increases reflect a change in our assumption of the number of registrants with equity compensation plans that either adopt a new plan or amend an existing plan to increase the number of securities authorized for issuance under the plan (see n. 85 above) and a change in the estimated hourly rate of outside counsel. With respect to Forms 10–K and 10–KSB, we increased our estimate by $937,300 in the case of Form 10–K and increased our estimate by $483,100 in the case of Form 10–KSB. With respect to Schedules 14A and 14C, we decreased our estimate by $8,089,500 in the case of Schedule 14A and decreased our estimate by $209,800 in the case of Schedule 14C. Assuming that 98% of the registrants that file annual reports on Form 10–K or 10–KSB maintain an equity compensation plan and are subject to the required disclosure, the estimated cost burden per year resulting from the amendments would be $4,946,400.

[111] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

[112] A study of stock-based pay practices at the nation's 200 largest corporations indicates that these companies allocated 15.2% of outstanding shares (calculated on a fully-diluted basis) for management and employee equity incentives in 2000, compared to only 6.9% in 1989. See Pearl Meyers & Partners, Inc., *2000 Equity Stake, Study of Management Equity Participation in the Top 200 Corporations* (2000). Both the size of individual awards and the number of companies that use equity broadly throughout the organization have increased significantly. See Core, Guay and Larcker, *Executive Equity Compensation and Incentives: A Survey,* Working Paper, University of Pennsylvania (2001), at 5–7.

[113] This question should be considered in the dilutive effect may already have occurred and is likely to be reflected in the basic earnings-per-share computation and security holders' equity data.

[122] These commenters included seven individual and institutional investors, four registrants and registrant associations, one self-regulatory organization and 10 members of the executive compensation consulting, accounting and legal communities.

[123] See, for example, the Letter dated April 2, 2001 from Arthur Andersen LLP (the ''AA Letter''), the Letter dated April 17, 2001 from the American Institute of Certified Public Accountants (the ''AICPA Letter''), the Letter dated March 29, 2001 from Emerson Electric Co., the Letter dated April 12, 2001 from Microsoft Corporation and the Letter dated April 2, 2001 from PricewaterhouseCoopers LLP (the ''PWC Letter'').

[127] See Section II.C above.

[128] Available information on non-security holder-approved stock option plans is sparse. See William M. Mercer, Inc. *Equity Compensation Survey* (2001) (48% of survey respondents (83 participants) maintained non-security holder-approved stock option plan for employees below management level; such plans (60%) most prevalent in large companies (more than 5,000 employees); iQuantic, Inc., *Trends in Equity Compensation 1996–2000* (2000) (27.3% of survey respondents in 1999 (161 participants) maintained non-security holder-approved stock option plans, compared to 3.2% before 1996).

description of the plan's material features.

2. Tabular Disclosure

New Item 201(d)(1) of Regulation S–K and Regulation S–B requires registrants to disclose, for their entire equity compensation program as in effect as of the end of the last completed fiscal year, the number of securities underlying, and the weighted-average exercise price of, outstanding options, warrants and rights and the number of securities remaining available for future issuance. This disclosure is to be made separately for plans approved by security holders and plans that have not been approved by security holders.

The required disclosure will assist investors in assessing the potential dilution from a registrant's equity compensation program in two ways. First, the required disclosure of the number of securities to be issued upon the exercise, and weighted-average exercise price, of all outstanding options, warrants and rights will enable investors to view this information in two categories: plans approved by security holders and plans not approved by security holders. While numerical and weighted-average exercise price information is presently available in the footnotes to a registrant's audited financial statements, this disclosure does not separately identify the potential dilutive effect of any non-security-holder approved stock option plans.

Second, disclosure of the number of securities available for future issuance under a registrant's equity compensation plans will enable investors to better calculate the ''overhang[129] resulting from the registrant's entire equity compensation program. Under existing disclosure requirements, it is not always possible to make this calculation.[130] This information may be useful to investors where the cost of a registrant's equity compensation plan exceeds its incentive effects. The new disclosure also will enhance the ability of investors and others, such as proxy review firms, to monitor the impact of a board of directors' actions concerning equity compensation matters. Access to this information will make it easier for investors to determine both the portion of the current value of a business that will be transferred to option holders upon exercise and the potential allocation of future cash flow rights.[131]

While the economic impact of outstanding options, warrants and rights is incorporated into the presentation of diluted earnings-per-share under SFAS 128, this calculation differs from the new disclosure in several ways. First, it does not isolate ''compensatory'' instruments. Typically, the diluted earnings-per-share figure combines the dilutive effect of compensatory options, warrants and rights with that of other outstanding convertible securities. Second, SFAS 128 employs the so-called ''treasury stock method'' to compute diluted earnings-per-share. Among other things, this methodology excludes ''out-of-the-money'' options and warrants from the computation and requires certain assumptions about the timing of option exercises and the use of the assumed proceeds of exercise to arrive at the total number of potentially dilutive securities. Finally, while weighted-average exercise price information is available for various option groupings under SFAS 123, it does not differentiate between equity compensation plans that have been approved by security holders and plans that have not been approved by security holders.

D. Costs

The amendments will increase the cost of preparing annual reports on Form 10–K and 10–KSB and proxy and information statements. Registrants must compile the required information, place it in the appropriate category and prepare the required table. In addition, registrants with non-security holder-approved stock option plans must prepare a narrative summary of the material features of each plan and file a copy of any material plan with us. Registrants also will incur an increase in printing and distribution costs as a result of the amendments.

While several respondents indicated that the cost estimates in the Proposing Release were too low,[132] only one provided an alternative cost estimate. This respondent stated that compliance could result in additional costs approximating $300,000 in years when disclosure was required in its proxy statement.[133] The respondent's estimate is no longer relevant because of the substantial revisions that we have made to the proposals, as discussed in Subsection B above.

The required disclosure will provide investors both with new information and with an alternative means for analyzing currently available information. With respect to the dilution disclosure, we believe that the compliance costs are warranted because this information is not otherwise available to investors. Moreover, these costs should be minimal because this information can be derived from information that is readily available to registrants through the routine administration of their equity compensation programs.

With respect to the information concerning non-security holder-approved stock option plans, much of the required tabular disclosure, such as the number of outstanding options, warrants and rights and the related weighted-average exercise price data, is already maintained for purposes of satisfying financial reporting requirements. The amendments merely require registrants to disclose this information on the basis of whether or not the related plan has been approved by security holders. In addition, many registrants summarize the material features of their equity compensation plans to satisfy their SFAS 123 disclosure obligations. Indeed, one respondent indicated that the amendments would result in only minimal additional costs to registrants because, in their experience, most registrants already maintain the required information in order to comply with SRO rules and for effective plan administration.[134]

Although the amendments will increase the length of registrants' annual reports on Form 10–K and 10–KSB, as well as their proxy and information statements, generally this should not have a major impact on a registrant's

[129] This measure may be formulated in different ways. For purposes of this discussion, ''overhang'' means the sum of the number of securities underlying outstanding options, warrants and rights plus the number of securities remaining available for future issuance under the registrant's existing equity compensation plans, and is often expressed as a percentage of the total number of outstanding securities.

[130] It may be difficult for investors to calculate the ''overhang'' of a registrant's equity compensation program because the number of securities available for future issuance under the registrant's plans may not be disclosed or apparent. Currently, a registrant submitting an equity compensation plan for security holder action need not provide any specific disclosure about its other equity compensation plans. Moreover, in its annual study on stock plan dilution, the Investor Responsibility Research Center found that approximately 22% of the companies surveyed did not disclose the number of shares available for future issuance under their employee stock plans. See the IRRC Dilution Study.

[131] While the full dilutive impact of these authorized but unissued securities cannot be assessed until derivative instruments have been granted and the prices for which the underlying securities may be issued can be compared to existing market values, this information, combined with knowledge of the minimum exercise price at which these instruments may be granted, may provide useful insight into the potential future economic consequences of the program.

[132] See, for example, the AA Letter, the AICPA Letter, the Letter dated May 22, 2001 from the New York State Bar Association and the PWC Letter.

[133] See the Letter dated April 9, 2001 from Lucent Technologies Inc.

[134] See the ABA Letter.

printing and distribution costs. We have revised the proposals to reduce and standardize the size of the required tabular disclosure. These revisions should ensure that registrants do not incur significant additional printing and postage charges to prepare and distribute their proxy or information statements to security holders. While in most instances, the required disclosure should not exceed one-third of a page, where a registrant has one or more non-security holder-approved stock option plans, the disclosure may be longer. These registrants may incur additional expense to print and distribute their proxy or information statement materials. While we do not expect these costs to be significant, we have estimated these amounts to be approximately $750 per registrant.[135]

For the reasons discussed above, we do not believe that the amendments will lead to significant compliance costs for registrants.[136] Notwithstanding the foregoing, we have adjusted our initial cost estimates to reflect the revisions made to the proposals. Because the size and scope of equity compensation programs vary among registrants, it is difficult to provide an accurate cost estimate with which all parties will agree; however, we estimate that each of the approximately 8,400 registrants[137] subject to the amendments will spend an average of approximately one to two hours each year and incur an average annual cost of approximately $393[138] to prepare the disclosure. Thus, the aggregate cost of the amendments is estimated to be approximately $3,300,000.

E. Conclusion

Based on the information provided in the comment letters and our own analysis, we believe that the amendments will enhance the quality of disclosure available to investors about registrants' equity compensation plans, thereby leading to better-informed investment and voting decisions. These benefits are difficult to quantify. We also believe that these benefits will justify the minimal costs of compliance.

V. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis, or FRFA, has been prepared in accordance with the Regulatory Flexibility Act.[139] This FRFA relates to rule amendments adopted under the Exchange Act that revise the disclosure requirements with respect to registrants' equity compensation plans. Specifically, the amendments revise Item 201 of Regulation S–B, Item 201 of Regulation S–K and Form 10–K, Form 10–KSB, Exchange Act Rule 14a–3 and Schedule 14A under the Exchange Act to require tabular disclosure of the number and weighted-average exercise price of all outstanding options, warrants and rights under a registrant's equity compensation plans, as well as the number of securities remaining available for future issuance under these plans and certain related information. Disclosure is to be made in two categories: plans that have been approved by security holders and plans that have not been approved by security holders. Registrants must include the table in their annual reports on Form 10–K or 10–KSB, as well as in their proxy or information statements in years when they are submitting a compensation plan for security holder action. Copies of most equity compensation plans will be required to be filed with us for public inspection.

A. Need for the Amendments

The increased use of equity compensation has raised investor concerns about the potential dilutive effect of a registrant's equity compensation plans, the absence of full disclosure to security holders about these plans and the adoption of many plans without the approval of security holders. These concerns may be especially acute for investors in small entities, which use equity compensation in order to attract and retain key employees and to preserve scarce cash resources.[140] The amendments enhance the quality of information available to investors about a registrant's equity compensation plans.

B. Significant Issues Raised by Public Comment

A summary of the Initial Regulatory Flexibility Analysis, or IRFA, appeared in the Proposing Release.[141] We requested comment on any aspect of the IRFA, including the number of small businesses that would be affected by the proposals, the nature of the impact, how to quantify the number of small entities that would be affected and how to quantify the impact of the proposals. We received no comment letters responding to that request.

C. Small Entities Subject to the Amendments

Exchange Act Rule 0–10[142] defines the term ''small business'' to be an issuer that, on the last day of its most recent fiscal year, has total assets of $5 million or less.[143] There are approximately 770 issuers that are subject to the reporting requirements of Section 13 of the Exchange Act that have assets of $5 million or less.[144] Only small businesses that have a reporting obligation under the Exchange Act *and* adopt or maintain an equity compensation plan will be subject to the amendments. We estimate that there are approximately 460 entities that have

[135] This estimate is based on the Letter dated April 9, 2001 from Lucent Technologies, Inc., in which the commenter estimated that providing four additional pages of disclosure to its over five million security holders would result in additional printing costs of $100,000 and additional mailing costs of $200,000. Assuming that the required disclosure consists of one additional page and that a registrant has 50,000 security holders, the registrant may incur additional costs of $750 to prepare and distribute the additional disclosure.

[136] Since all registrants are required to make the same disclosure, the amendments will impose the same dollar costs on each registrant. Accordingly, for small entities the relative burden of compliance will be higher than for large entities.

[137] This figure is based on our estimate that 60% of the actual number of registrants filing annual reports on Form 10–K or 10–KSB (14,022 registrants) maintain equity compensation plans. This estimate is made after a review of available survey data, which varies widely. For example, in its most recent study of the ''S&P Super 1,500'' (the combination of the S&P 500, the S&P MidCap 400 and the S&P SmallCap 600), the Investor Responsibility Research Center determined that, of the 1,157 companies examined, 1,142 (98.7%) awarded equity to some portion of their employees. See Investor Responsibility Research Center, *Potential Dilution—2000, The Potential Dilution from Stock Plans at the S&P Super 1,500 Companies* (2000). In contrast, a Pilot Survey conducted by the Bureau of Labor Statistics in 1999 determined that 22% of publicly-held companies offered stock options to their employees. This survey sampled 2,100 ''establishments,'' of which approximately 1 in 10 were publicly-held companies. See Bureau of Labor Statistics, *Pilot Survey on the Incidence of Stock Options in Private Industry in 1999,* (Oct. 11, 2000), available at *http://www.bls.gov/ncs/ocs/sp/ncnr0001.txt.*

[138] We arrived at this estimate by assuming that approximately 80% of these registrants will be required to provide the tabular disclosure only and 20% of these registrants will be required to describe the material features of their non-security holder-approved plans as well. See n. 90 above and the accompanying text. Thus, 80% of the registrants will incur an average annual outside counsel cost of $300 (80% of 8,400 x $300 = $2,016,000) while 20% will incur an average annual outside cost of $600 (20% of 8,400 x $600 = $1,008,000). In addition, we estimate that approximately 365 registrants with non-security holder-approved plans will incur additional printing and distribution costs of $750 each, or $273,750. See n. 135 above. The sum of these amounts averaged over 8,400 registrants equals $393.

[139] 5 U.S.C. § 603.

[140] A recent study of approximately 250 companies conducted by the National Center for Employee Ownership found that 55% of the respondents had less than 200 employees (with 17% having less than 31 employees) and that 55% of the respondents had less than $40 million in annual revenue (with 14% having annual revenues of $1.1 million or less). See National Center for Employee Ownership, *An Overview of How Companies are Granting Stock Options* (2001).

[141] See the Proposing Release at Section V.

[142] 17 CFR 240.0–10(c).

[143] A similar definition is provided under Securities Act Rule 157 [17 CFR 230.157].

[144] This estimate is based on filings with the Commission.

total assets of $5 million or less that meet this criteria.[145]

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The amendments impose new reporting requirements by requiring specific annual disclosure by all registrants, including ''small businesses,'' concerning their equity compensation plans in effect as of the end of the most recently completed fiscal year. Consequently, the amendments will increase the costs associated with the preparation of the disclosure included in annual reports on Form 10–K or 10–KSB and furnished to security holders in proxy and information statements. Specifically, the amendments require registrants to disclose the number and weighted-average exercise price of all outstanding options, warrants and rights under a registrant's equity compensation plans, as well as the number of securities remaining available for future issuance under these plans and certain related information. Disclosure is to be made in two categories: plans that have been approved by security holders and plans that have not been approved by security holders. Since this information can be derived from information that is readily available to registrants through the routine administration of their equity compensation programs, we do not expect these additional costs to be significant.

We do not anticipate that the amendments will impose any significant recordkeeping requirements in addition to those already required under the Exchange Act. The information to be disclosed can be derived from information that is readily available to registrants through the routine administration of their equity compensation programs. All registrants with equity compensation plans have various legal, financial reporting and other disclosure obligations that require maintenance of information regarding these plans similar to that covered by the amendments.

E. Agency Action To Minimize Effect on Small Entities

As required by Sections 603 and 604 of the Regulatory Flexibility Act, we have considered alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered several alternatives, including the following:

- Establishing different compliance and reporting requirements that take into account the resources of small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Overall, the amendments are intended to assist investors in understanding a registrant's equity compensation policies and practices. The quality of information available about the potential dilutive effect of a registrant's equity compensation plans is relevant to investors in both small and large entities. Different compliance or reporting requirements for small entities are not appropriate because small entities may use equity compensation plans to a greater extent than large entities to preserve scarce cash resources.[146] In addition, it is not feasible to further clarify, consolidate or simplify the amendments for small entities because the amendments require only minimal information about a registrant's equity compensation plans. Because uniformity and comparability are important, especially where small entities have equity compensation plans, we do not propose to use performance standards to specify different requirements for small entities. Finally, we believe that the amendments should apply equally to all entities required to disclose information, in order to safeguard protection of all investors.

VI. Analysis of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[147] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule will have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. We have considered the amendments in light of the standards in Section 23(a)(2). We requested comment on any anti-competitive effects of the proposals. We received no comment letters responding to that request.

The amendments may have a disparate impact on registrants that use equity compensation extensively, such as smaller firms or registrants in certain industry sectors (such as high-technology companies), as compared to registrants with limited or no equity compensation programs.[148] Thus, we are sensitive to the concern that registrants with a greater compliance obligation will be placed at a competitive disadvantage. In addition, several commenters, while not specifically addressing this issue, did argue that the new disclosure would be duplicative of information currently required to be included in registrants' audited financial statements. In response to these concerns, we have revised the proposals to eliminate redundant requirements and to streamline the compliance process. Because these changes should enable registrants to keep compliance costs low, we do not believe that the amendments will impose a significantly disproportionate cost on smaller firms or high-technology companies.

Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act[149] require us, when engaging in rulemaking requiring us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We have considered the amendments in light of the standards in these provisions. We requested comment on how the proposals would affect efficiency, competition and capital formation. We received no comment letters responding to that request.

It is widely believed that equity compensation, particularly instruments such as stock options, can be used to align the interests of employees and security holders, thereby promoting effective corporate governance.[150] Because an equity compensation plan may necessarily have an unintended dilutive effect on the existing ownership interests, however, it is important that the plan be closely monitored to ensure that its cost is commensurate with its benefit to investors. The amendments are intended to enhance the quality of disclosure about registrants' equity compensation programs that is available

[145] This figure is based on our estimate that 60% of the registrants that file an annual report on either Form 10–K or 10–KSB maintain equity compensation plans and will be required to provide the new tabular disclosure. See n. 87 above.

[146] See n. 140 above.

[147] 15 U.S.C. 78w(a).

[148] See n. 140 above.

[149] 15 U.S.C. § 77b(b) and 78c(f).

[150] See, for example, the American Benefits Council, *Taking Stock in Employee Benefits: The Democratization of Broad-Based Stock Plans* (Feb. 2001), at 2–3.

to investors. Increasing the transparency of these programs should result in better monitoring by investors. This should result in better corporate governance, thereby increasing the efficiency of the organization. This should promote capital formation.

VII. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 3(b) and 19(a) of the Securities Act and Sections 12, 13, 14(a), 15(d) and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 228, 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of Rule Amendments

■ In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

■ 1. The general authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 80a–8, 80a–29, 80a–30, 80a–37 and 80b–11, unless otherwise noted.

■ 2. Section 228.201 is amended by adding paragraph (d) before the *Instruction* to read as follows:

§ 228.201 (Item 201) Market for Common Equity and Related Stockholder Matters.

* * * * *

(d) *Securities authorized for issuance under equity compensation plans.* (1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to compensation plans (including individual compensation arrangements) under which equity securities of the small business issuer are authorized for issuance, aggregated as follows:

(i) All compensation plans previously approved by security holders; and

(ii) All compensation plans not previously approved by security holders.

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total			

(2) The table shall include the following information as of the end of the most recently completed fiscal year for each category of equity compensation plan described in paragraph (d)(1) of this Item:

(i) The number of securities to be issued upon the exercise of outstanding options, warrants and rights (column (a));

(ii) The weighted-average exercise price of the outstanding options, warrants and rights disclosed pursuant to paragraph (d)(2)(i) of this Item (column (b)); and

(iii) Other than securities to be issued upon the exercise of the outstanding options, warrants and rights disclosed in paragraph (d)(2)(i) of this Item, the number of securities remaining available for future issuance under the plan (column (c)).

(3) For each compensation plan under which equity securities of the small business issuer are authorized for issuance that was adopted without the approval of security holders, describe briefly, in narrative form, the material features of the plan.

Instructions to Paragraph (d).

1. Disclosure shall be provided with respect to any compensation plan and individual compensation arrangement of the small business issuer (or parent, subsidiary or affiliate of the small business issuer) under which equity securities of the small business issuer are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders) in exchange for consideration in the form of goods or services as described in Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation,* or any successor standard. No disclosure is required with respect to:

a. Any plan, contract or arrangement for the issuance of warrants or rights to all security holders of the small business issuer as such on a pro rata basis (such as a stock rights offering) or

b. Any employee benefit plan that is intended to meet the qualification requirements of Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)).

2. For purposes of this paragraph, an ''individual compensation arrangement'' includes, but is not limited to, the following: a written compensation contract within the meaning of ''employee benefit plan'' under § 230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(7)(ii) of Regulation S–B (§ 228.402(a)(7)(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.

* * * * *

■ 3. Section 228.601 is amended by redesignating paragraph (b)(10)(ii)(B) as paragraph (b)(10)(ii)(C) and by adding new paragraph (b)(10)(ii)(B) to read as follows:

§ 228.601 (Item 601) Exhibits.

* * * * *

(b) *Description of Exhibits* * * *

(10) *Material Contracts* * * *

(ii) * * *

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the small business issuer) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a small business issuer in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make further grants or awards of its equity securities shall be considered a compensation plan of the small business issuer for purposes of the preceding sentence.

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 4. The general authority citation for Part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), and 80b–11, unless otherwise noted.

* * * * *

■ 5. The authority citation following § 229.201 is removed.

■ 6. Section 229.201 is amended by adding paragraph (d) before the *Instructions to Item 201* to read as follows:

§ 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.

* * * * *

(d) *Securities authorized for issuance under equity compensation plans.* (1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to compensation plans (including individual compensation arrangements) under which equity securities of the registrant are authorized for issuance, aggregated as follows:

(i) All compensation plans previously approved by security holders; and

(ii) All compensation plans not previously approved by security holders.

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total.			

(2) The table shall include the following information as of the end of the most recently completed fiscal year for each category of equity compensation plan described in paragraph (d)(1) of this Item:

(i) The number of securities to be issued upon the exercise of outstanding options, warrants and rights (column (a));

(ii) The weighted-average exercise price of the outstanding options, warrants and rights disclosed pursuant to paragraph (d)(2)(i) of this Item (column (b)); and

(iii) Other than securities to be issued upon the exercise of the outstanding options, warrants and rights disclosed in paragraph (d)(2)(i) of this Item, the number of securities remaining available for future issuance under the plan (column (c)).

(3) For each compensation plan under which equity securities of the registrant are authorized for issuance that was adopted without the approval of security holders, describe briefly, in narrative form, the material features of the plan.

Instructions to Paragraph (d).

1. Disclosure shall be provided with respect to any compensation plan and individual compensation arrangement of the registrant (or parent, subsidiary or affiliate of the registrant) under which equity securities of the registrant are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lenders) in exchange for consideration in the form of goods or services as described in Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation,* or any successor standard. No disclosure is required with respect to:

a. Any plan, contract or arrangement for the issuance of warrants or rights to all security holders of the registrant as such on

a pro rata basis (such as a stock rights offering) or

b. Any employee benefit plan that is intended to meet the qualification requirements of Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)).

2. For purposes of this paragraph, an ''individual compensation arrangement'' includes, but is not limited to, the following: a written compensation contract within the meaning of ''employee benefit plan'' under § 230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(7)(ii) of Regulation S–K (§ 229.402(a)(7)(ii)).

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

4. A registrant 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 registrant may aggregate information regarding a compensation plan assumed in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant 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 registrant 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 registrant'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 registrant, 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.

* * * * *

■ 7. Section 229.601 is amended by redesignating paragraph (b)(10)(iii)(B) as paragraph (b)(10)(iii)(C) and by adding new paragraph (b)(10)(iii)(B) to read as follows:

§ 229. 601 (Item 601) Exhibits.

* * * * *

(b) *Description of Exhibits* * * *

(10) *Material Contracts* * * *

(iii) * * *

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the registrant) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a registrant in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make further grants or awards of its equity securities shall be considered a compensation plan of the registrant for purposes of the preceding sentence.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 8. The general authority citation for Part 240 is revised to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

■ 9. The authority citation following § 240.14a–3 is removed.

■ 10. Section 240.14a–3 is amended by revising paragraph (b)(9) to read as follows:

§ 240.14a–3 Information to be furnished to security holders.

* * * * *

(b) * * *

(9) The report shall contain the market price of and dividends on the registrant's common equity and related security holder matters required by Item 201(a), (b) and (c) of Regulation S–K (§ 229.201(a), (b) and (c) of this chapter).

* * * * *

■ 11. In § 240.14a–101, amend Item 10 of Schedule 14A by adding paragraph (c) before the undesignated heading *Instructions* and revise Item 14(d)(4) of Schedule 14A to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 10. Compensation Plans. * * *

* * * * *

(c) *Information regarding plans and other arrangements not subject to security holder action.* Furnish the information required by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter).

Instructions to paragraph (c).

1. If action is to be taken as described in paragraph (a) of this Item with respect to the approval of a new compensation plan under which equity securities of the registrant are authorized for issuance, information about the plan shall be disclosed as required under paragraphs (a) and (b) of this Item and shall not be included in the disclosure required by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter). If action is to be taken as described in paragraph (a) of this Item with respect to the amendment or modification of an existing plan under which equity securities of the registrant are authorized for issuance, the registrant shall include information about securities previously authorized for issuance under the plan (including any outstanding options, warrants and rights previously granted pursuant to the plan and any securities remaining available for future issuance under the plan) in the disclosure required by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter). Any additional securities that are the subject of the amendments or modification of the existing plan shall be disclosed as required under paragraphs (a) and (b) of this Item and shall not be included in the Item 201(d) disclosure.

* * * * *

Item 14. Mergers, consolidations, acquisitions and similar matters. * * *

* * * * *

(d) *Information about parties to the transaction: registered investment companies and business development companies.* * * *

* * * * *

(4) Information required by Item 201(a), (b) and (c) of Regulation S–K (§ 229.201(a), (b) and (c) of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 12. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.*, unless otherwise noted.

* * * * *

■ 13. By amending Form 10–K (referenced in § 249.310) by revising Item 12 of Part III to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

* * * * *

Part III

* * * * *

Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.

Furnish the information required by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter) and by Item 403 of Regulation S–K (§ 229.403 of this chapter).

* * * * *

■ 12. By amending Form 10–KSB (referenced in § 249.310b) by revising Item 11 of Part III to read as follows:

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Part III

* * * * *

Item 11. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.

Furnish the information required by Item 201(d) of Regulation S–B and by Item 403 of Regulation S–B.

* * * * *

By the Commission.

Dated: December 21, 2001.

Margaret H. McFarland,

Deputy Secretary.

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