

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 210 and 228

[Release Nos. 33-8568; 34-51558; 35-27959; IC-26833; FR-74]

RIN 3235-AJ39

AMENDMENT TO RULE 4-01(a) OF REGULATION S-X REGARDING THE COMPLIANCE DATE FOR STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 123 (REVISED 2004), SHARE-BASED PAYMENT.

AGENCY: Securities and Exchange Commission

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is amending Regulation S-X to amend the date for compliance with Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (“Statement No. 123R”) so that each registrant that is not a small business issuer will be required to prepare financial statements in accordance with Statement 123R beginning with the first interim or annual reporting period of the registrant’s first fiscal year beginning on or after June 15, 2005. We also are amending the effective date for compliance with Statement No. 123R so that each small business issuer will be required to prepare financial statements in accordance with Statement 123R beginning with the first interim or annual reporting period of the registrant’s first fiscal year beginning on or after December 15, 2005.

EFFECTIVE DATE: April 21, 2005.

FOR FURTHER INFORMATION CONTACT: Robert E. Burns, Chief Counsel, Office of the Chief Accountant, at (202) 942-4400, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-1103.

SUPPLEMENTARY INFORMATION:

The Commission historically has recognized pronouncements of the Financial Accounting Standards Board (“FASB”) as authoritative in the absence of any contrary determination by the Commission.¹ More recently, in Financial Reporting Release No. 70² the Commission announced its determination that the FASB and its parent organization, the Financial Accounting Foundation, satisfied the criteria in section 108 of the Sarbanes-Oxley Act of 2002³ and section 19(b) of the Securities Act of 1933⁴ and, accordingly, FASB’s financial accounting and reporting standards are recognized as “generally accepted” for purposes of the federal securities laws. As a result, registrants are required to comply with those standards in preparing financial statements filed with the Commission, unless the Commission provides otherwise.⁵

In December 2004, the FASB published a revision to its standard on the accounting for stock-based compensation. The new publication is Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (“Statement No. 123R”). The FASB determined that Statement No. 123R should be effective:

- For public entities that do not file as small business issuers,⁶ as of the beginning of the first interim or annual reporting period that begins after June 15, 2005.

¹ Rule 4-01(a)(1) of Regulation S-X, 17 CFR 210.4-01(a)(1). See Accounting Series Release (“ASR”) No. 150 (December 20, 1973) and ASR No. 4 (April 25, 1938).

² Release Nos. 33-8221; 34-47743; IC-26028; FR-70 (April 25, 2003) (“FR-70”); 68 FR 23333 (May 1, 2003).

³ 15 U.S.C. 7218.

⁴ 15 U.S.C. 77s(b).

⁵ See FR-70; Rule 4-01(a)(1) of Regulation S-X, 17 CFR 210.4-01(a)(1).

⁶ Regulation S-B, item 10, 17 CFR 228.10, defines small business issuer as a company that meets all of the following criteria: (1) has revenues of less than \$25,000,000; (2) is a United States or

- For public entities that file as small business issuers, as of the beginning of the first interim or annual reporting period that begins after December 15, 2005.⁷

Under the FASB's effective dates, calendar year-end registrants that are not small business issuers, for example, would be permitted to file interim financial statements for the first and second quarters of 2005 that comply with the pre-existing accounting standard and would be required to file interim financial statements for the third quarter that comply with the provisions in Statement No. 123R.

Based on feedback from public companies, industry groups, and registered public accounting firms, we are concerned that initial implementation of Statement No. 123R in a period other than the first quarter of a fiscal year may make compliance more complicated for registrants and potentially could make comparisons more difficult for investors. In addition, phasing in Statement No. 123R at the beginning of a registrant's fiscal year would relieve registrants from having to change their accounting systems in the middle of the fiscal year and allow them to implement in a more orderly fashion the software programs that may facilitate compliance with the standard. Implementing the standard at the beginning of the fiscal year also would allow auditors to conduct more consistent audit, review and attest procedures in this area.

Canadian issuer; (3) is not an investment company; and (4) if a majority owned subsidiary, the parent corporation is also a small business issuer; provided however, that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates) of \$25,000,000 or more.

⁷ Statement 123R, ¶ 69. The FASB also provided that Statement No. 123R is effective for nonpublic entities as of the beginning of the first annual reporting period that begins after December 15, 2005. The rule adopted by the Commission in this release does not alter the FASB's effective date for nonpublic entities, as provided in Statement 123R. See the definition of "nonpublic entity" in the Glossary to Statement No. 123R.

For example, under the Commission’s amendment, a domestic registrant⁸ is required to file financial statements that comply with Statement 123R in its Form 10-Q for the first quarter of the first fiscal year that begins after June 15, 2005 (or after December 15, 2005 for small business issuers).⁹ Under the Commission’s amendment, registrants would be permitted, but not required, to comply with Statement 123R for periods before the effective date of the Commission’s new rule.

We believe that the rule being adopted will lower compliance costs for companies. Any burden that may be imposed on investors by the amendment will be reduced because, among other things: (1) the information required by Statement No. 123R will be provided within months of the effective date established by the FASB; (2) implementing these requirements at the beginning of a fiscal year should allow for easier comparison of quarterly data prepared under consistent standards; and (3) related information currently is disclosed in the footnotes to the financial statements.¹⁰

Sections 3(f) and 23(a)(2) of the Securities Exchange Act of 1934,¹¹ section 2(b) of the Securities Act of 1933,¹² and section 2(c) of the Investment Company Act of

⁸ Similarly, a foreign private issuer is required to comply with Statement No. 123R in its annual report on Form 20-F for the first fiscal year that begins after June 15, 2005, or in a prospectus or registration statement that is required to include an interim period of the first fiscal year that begins after June 15, 2005.

⁹ Annual or interim financial statements for any reporting period beginning on or after the beginning of the registrant’s first fiscal year after June 15, 2005 (or after December 15, 2005 for small business issuers) that are contained in a registration statement under the Securities Act of 1933 must be prepared in accordance with Statement No. 123R. A non-public entity that meets the definition of a “public entity” in Statement 123R after June 15, 2005 should apply the provisions of Statement No. 123R applicable to its new status together with the Commission’s amendment. See also Statement No. 123R, at ¶ B257.

¹⁰ See Statement of Financial Accounting Standards No. 123, Accounting for Stock-Based Compensation (October 1995).

¹¹ 15 U.S.C. 78c(f) and 78w(a)(2).

1940¹³ require the Commission, when engaging in rulemaking, to consider whether the action will promote efficiency, competition, and capital formation. The Commission has considered the effect of the amendment on efficiency, competition and capital formation. We believe that this amendment will not burden competition because registrants of similar size and fiscal year will be treated alike. The increased comparability of quarterly financial information and more orderly transition to the new accounting standard provided by this amendment will not adversely impact the efficiency of the securities markets nor adversely impact capital formation.¹⁴

Public companies and their auditors may already be in the process of attempting to comply with Statement 123R. Changing companies' financial and tax systems in the middle of the year while the Commission publishes notice and seeks comment may add unnecessary costs to the implementation of the standard. In addition, some companies will, if the Commission does not act immediately, file a quarterly filing using the new standard, potentially making comparisons of quarterly information more difficult for analysts and investors. Accordingly, in light of these concerns, the impending deadline and the other reasons discussed above, the Commission for good cause finds that providing notice and an opportunity for comment would be impracticable and contrary to the public interest.¹⁵ In addition, for good cause and because implementing Statement

¹² 15 U.S.C. 77b(b).

¹³ 15 U.S.C. 80a-2(c).

¹⁴ The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is not applicable to the promulgation of the amendment because it does not impose any collection of information requirements that would require approval of the Office and Management and Budget.

¹⁵ See Section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), which states that an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are "impracticable, unnecessary, or contrary to the public interest." The

No. 123R at the beginning of a fiscal year will relieve a restriction or obligation on registrants, the Commission's rule will be effective on April 21, 2005.¹⁶

The statutory basis for this amendment to Regulation S-X includes sections 3(a) and 108 of the Sarbanes-Oxley Act of 2002 and Schedule A and sections 7, 8, 10 and 19 of the Securities Act of 1933, sections 3, 10A, 12, 13, 14, 17 and 23 of the Securities Exchange Act of 1934, sections 5, 10, 14 and 20 of the Public Utility Holding Company Act of 1935 and sections 8, 30, 31, 32 and 38 of the Investment Company Act of 1940.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Part 228

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 210 – FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority for part 210 continues to read as follows:

Regulatory Flexibility Act (“RFA”) is not applicable to the promulgation of the amendment because the RFA applies only when an agency must publish a general notice of proposed rulemaking for notice and comment and the Commission has determined that notice and comment are not required for this amendment. See 5 U.S.C. 603.

¹⁶ 5 U.S.C. 553(d). —

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w(a), 78ll, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, unless otherwise noted.

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2. Section 210.4-01 is amended by removing the authority citation following the section and adding paragraph (a)(3) to read as follows:

§ 210.4-01 Form, order, and terminology.

(a) ***

(3)(i) Notwithstanding the effective dates set forth in Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment (“Statement No. 123R”), financial statements shall be prepared in accordance with Statement No. 123R beginning with:

(A) The first interim or annual reporting period of the registrant’s first fiscal year beginning on or after June 15, 2005, provided the registrant does not file as a small business issuer; and

(B) The first interim or annual reporting period of the registrant’s first fiscal year beginning on or after December 15, 2005, provided the registrant files as a small business issuer.

(ii) For periods prior to the effective dates set forth in this paragraph, both Statement No. 123R and Statement of Financial Accounting Standards No. 123,

Accounting for Stock-Based Compensation (October 1995), shall be considered to be generally accepted accounting principles.

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PART 228 – INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

3. The authority citation for Part 228 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350.

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4. Section 228.310 is amended by adding Note 6 to read as follows:

§ 228.310 Financial Statements.

Notes:

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6. Rule 4-01(a)(3) of Regulation S-X, 17 CFR 210.4-01(a)(3), shall apply to the preparation of financial statements of small business issuers.

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By the Commission

Margaret H. McFarland
Deputy Secretary

April 15, 2005

