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SEC Disclosure, Filing Requirements for Public Companies in Chapter 11

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Public companies[1] are subject to explicit disclosure and reporting requirements under the Securities Exchange Act of 1934.[2] The act requires the filing of specified information with the Securities & Exchange Commission (SEC) in annual reports on Form 10-K and in quarterly reports on Form 10-Q. Current reports on Form 8-K are required when specified events occur and can be used to satisfy other disclosure obligations of public companies. Under SEC regulation,[3] public companies can be required to avoid or correct certain kinds of "selective disclosure" — that is, to make public disclosure of any material, nonpublic information that has been privately disclosed to persons outside the company.

These Exchange Act obligations directly affect corporate communications. At most public companies, financial and accounting executives have a sound working knowledge of such requirements as they apply in the ordinary course of the company's business. Quite understandably, however, when a public company seeks protection under Chapter 11 of the U.S. Bankruptcy Code, its management may not be familiar with precisely how such requirements apply to the business during such extraordinary proceedings.

This article reviews the basic Exchange Act disclosure and reporting requirements as they apply to public company Chapter 11 debtors.[4] It is true that companies in Chapter 11 often comply with such requirements only very loosely and that SEC enforcement of such requirements against these companies is rare. Nevertheless, Exchange Act reporting and disclosure requirements continue to apply in bankruptcy, and turnaround professionals must take them into account in managing a case to a successful conclusion.

Announcing the Bankruptcy

Prior to entering Chapter 11, a troubled public company's financial condition and legal, accounting, and operating problems typically are already publicly known to some extent. Filing the Chapter 11 petition with the Bankruptcy Court commences the bankruptcy case and triggers a requirement that the debtor make disclosure on Form 8-K,[5] which must include certain basic information about the bankruptcy proceedings.[6]

Exchange Act reporting and disclosure requirements continue to apply in bankruptcy, and turnaround professionals must take them into account in managing a case to a successful conclusion.

The form must be filed with the SEC within four business days of the date the petition is filed.[7] In most cases, a public company will find it convenient to prepare a press statement that includes the required information regarding the bankruptcy filing, issue the press release on the petition date, and then immediately file a Form 8-K to which the press release is attached as an exhibit.

Federal law does not exempt a debtor from Exchange Act disclosure and reporting requirements. Furthermore, the automatic stay that becomes effective upon filing of the Chapter 11 petition does not operate against governmental units, including the SEC, in exercising their regulatory powers. Obligations to file current and periodic reports with the SEC and to avoid or correct selective disclosure continue throughout the pendency of a bankruptcy case unless and until those requirements are otherwise extinguished.

In addition, by commencing a bankruptcy case, a debtor becomes subject to the Bankruptcy Code's disclosure and reporting requirements, including schedules of assets and liabilities, statement of financial affairs, and monthly operating reports as prescribed by the code, the Office of the United States Trustee, and local rules of the Bankruptcy Court.

Reporting Triggering Events, Other Milestones

During its bankruptcy case, a debtor's management and turnaround professionals must remain mindful of material developments that must be reported with the SEC. Triggering events that commonly occur during a bankruptcy include taking an accounting charge for impairment of assets, disposition of any significant amount of assets, notice of a delisting or failure to satisfy a continued listing rule or standard, departures of directors or certain officers, and appointment of a new chief executive officer. Form 8-K is used not only to disclose information when required by a triggering event, but also to disclose any other event that a debtor "deems of importance to security holders."[8]

To confirm a Chapter 11 plan of reorganization, the Bankruptcy Code requires a debtor to solicit acceptances by creditors and equity holders. The solicitation must be conducted by means of a disclosure statement approved by the Bankruptcy Court. It must contain information adequate for creditors and equity holders to make informed decisions on acceptance, including the proposed treatment of equity securities under the plan and any other matters affecting the status of the debtor as a public company.

Although the Bankruptcy Code does not require the SEC to approve the disclosure

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statement, the agency is often an interested party in connection with the disclosure statement approval process and sometimes submits comments to the debtor to enhance the quality of the disclosure.

The approval of a disclosure statement represents a significant milestone in a Chapter 11 case. The statement may contain additional or different information than that found in the debtor's SEC filings. It therefore is usually advisable for a debtor, immediately upon approval of the disclosure statement and before the commencement of solicitation, to file the final approved disclosure statement with the SEC in a Form 8-K.

The SEC also requires that a Form 8-K be filed upon entry of a Bankruptcy Court order confirming the Chapter 11 plan of reorganization.[9] The form must include certain basic information about the confirmed plan, including (a) the identity of the Bankruptcy Court, (b) the date that the order was entered, (c) a summary of the material features of the plan and a copy of the plan as confirmed, (d) the number of shares or other units of the debtor or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers, and (e) information as to the assets and liabilities of the debtor or its parent as of the date that the order was entered or a date as close to that as practicable. The Form 8-K must be filed with the SEC within four business days of the entry of the confirmation order.[10]

Avoiding Selective Disclosure

During a Chapter 11 case, public company debtors are required to continue to comply with Regulation FD. The regulation generally requires that when a company or a person acting on its behalf discloses material, nonpublic information to certain persons outside the company who may well trade on the basis of the information, the company must publicly disclose that information in the manner required by the regulation.

Regulation FD governs communications only to securities professionals and holders of the public company's securities. The covered securities professionals include brokers, dealers, investment advisers, institutional investment managers, investment companies, and certain individuals associated or affiliated with such professionals. Security holders of the company are covered "under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information."[11]

The timing of the required public disclosure depends on whether the selective disclosure was intentional or unintentional. If it is intentional, the company must publicly disclose the same information simultaneously. If the selective disclosure was unintentional, the public disclosure need only be made "promptly." However, promptly has been defined to mean as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the company learns that there has been a non-intentional disclosure that he or she knows is both material and nonpublic or is reckless in not knowing this is true.[12]

The required public disclosure may be made by filing or furnishing a Form 8-K disclosing that information or by disseminating the information through another method (or combination of methods) that is "reasonably designed to effect broad, non-exclusionary distribution of the information to the public."[13]

Because Regulation FD applies only to disclosures to securities professionals and security holders outside the company, corporate communications by a Chapter 11 debtor to government agencies (including filings with the Bankruptcy Court or the U.S. Trustee's Office), the news media, or its employees usually do not require compliance with Regulation FD. In addition, ordinary-course business-related communications with customers, suppliers, and strategic partners — even when such a person conceivably may also be a shareholder — ordinarily do not trigger the need for Regulation FD compliance because it is not usually reasonably foreseeable that such persons will buy or sell securities on the basis of the communication.[14]

A debtor's communications with committees in Chapter 11 cases, however, do pose special problems. Composed of representatives of holders of the largest unsecured claims or interests, these statutory committees require access to the debtor's information to discharge their fiduciary duties to their constituents. Moreover, under recent amendments to the Bankruptcy Code, committees have a specific obligation to provide access to information to all creditors who hold claims of the kind represented by the committee.[15] Members of some committees, such as bond holders' or equity holders' committees, clearly arerepresentatives of holders of the company's securities. It may very well be reasonably foreseeable that such persons may trade securities on the basis of any information provided by the debtor.

Due to concerns regarding Regulation FD and insider trading, as well as to protect the debtor's sensitive, proprietary, or strategic information and the committee's own attorney-client privilege, committee members typically enter into confidentiality agreements expressly prohibiting disclosure of information about the debtor or privileged communications between the committee and its counsel. Furthermore, given the recent Bankruptcy Code amendments, debtors and creditor committees now often seek a "clarification" order at the outset of the case from the Bankruptcy Court specifying how the access requirement will be satisfied and establishing disclosure parameters for confidential and privileged information. Such an order might require further order of the Bankruptcy Court for the committee to release any confidential, proprietary, or other nonpublic information concerning the debtors.

Such measures help a debtor comply with Regulation FD, which does not apply to any communications made to a person who "owes a duty of trust or confidence to the issuer" or who "expressly agrees to maintain the information in confidence."[16] In this manner, a debtor should be able to discuss confidential plans and strategies with key Chapter 11 constituencies without having to make public disclosure of the information.

Although not technically required by Regulation FD, a debtor is well-advised to insist on execution and delivery of a written confidentiality agreement before providing any material, nonpublic information to an individual. The confidentiality agreement must do more than acknowledge that the recipient will not use the information in violation of the federal securities laws; the recipient must expressly agree to keep the information confidential.

Managing Periodic Reporting Obligations

Preparing periodic reports — particularly audited financial statements — can involve substantial accounting and legal expense. Although some Chapter 11 debtors can maintain compliance with their Exchange Act reporting obligations throughout their bankruptcy cases, such compliance can very difficult for others to maintain.

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At the outset of a case, turnaround managers should assess the status of compliance with periodic reporting obligations and determine, in light of the client's particular circumstances, objectives, and prospects, whether the debtor should attempt to return to or continue to maintain such compliance. This determination depends on a variety of factors, including whether the benefits of periodic reporting outweigh the costs. The determination may need to be made with due consideration of the debtor's fiduciary duties to all relevant constituencies, including both creditors and holders of equity securities.

Continued periodic reporting offers obvious benefits, including the following:

- It allows a debtor to provide both creditors and shareholders with useful and reliable information in a customary format
- Properly audited financial statements, as required under SEC rules, may assist a debtor in negotiating the reorganization plan and preparing the disclosure statement
- It may boost the confidence of customers and suppliers and retain and incentivize employees
- It supports a liquid market for the company's securities
- It may preserve a debtor's eligibility to take advantage of certain benefits or exemptions available to issuers who are "current" in their periodic reports
- It facilitates a company's emergence from bankruptcy as a public company

On the other hand, continued periodic reporting involves significant negatives and other considerations. For example:

- It is not required by the Bankruptcy Code, which has its own disclosure and reporting regime
- There may be little or no value in or trading of the debtor's publicly traded securities and therefore no compelling reason to preserve liquidity for the security holders
- Conservation of cash is usually a top priority for debtors, and the cost of periodic reporting can be significant
- Completing audited financial statements can be time-consuming and distracting for the debtor's management, which has many other priorities in a Chapter 11
- The debtor may not expect to emerge from Chapter 11 protection as a reporting company
- From the perspective of its creditors, audited financial information for prior periods may not even result in meaningful current information about the company
- If the debtor is out of compliance with its periodic reporting obligations, it may be extremely difficult to restore the company to full compliance. In cases of fraud, mismanagement, or severe failure of internal controls and reporting systems, management may not even have reliable information that can be audited

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Considering 'Modified Reporting'

If continuing full periodic reporting is not a viable option, debtors may consider the use of "modified reporting." Simply stated, modified reporting allows a debtor, during the bankruptcy case, to file the monthly operating reports otherwise required under the Bankruptcy Code in place of Exchange Act periodic reports (*i.e.*, Form 10-Ks and 10Qs).

The concept of modified reporting derives from the SEC's Release No. 34-9660.[17] The release applies to "[i]ssuers which have ceased or severely curtailed their operations" and for whom it would be "extremely difficult" to comply fully with the Exchange Act. In the release, the SEC expressed the general position that, with respect to issuers subject to the jurisdiction of the Bankruptcy Court, it generally would accept reports that "differ in form or content from reports required to be filed under the Exchange Act." Additional guidance regarding the availability of modified reporting is available in Staff Legal Bulletin (CF) No. 2[18] and the various no-action letters granted in this area.

A debtor using modified reporting may timely file its monthly operating reports required in the bankruptcy case on Form 8-K in lieu of quarterly reports on Form 10-Q and annual reports on Form 10-K. The debtor must continue to file a Form 8-K to disclose any material events, including those relating to reorganization or liquidation, and must satisfy the proxy, debtor tender offer, and going-private provisions of the Exchange Act.

Staff Legal Bulletin No. 2 calls for debtors using modified reporting to file the appropriate Form 8-K upon the effectiveness of the Chapter 11 plan.[19] The SEC's position is that the form should include the reorganized company's audited balance sheet.[20] If the Chapter 11 plan involves a liquidation, after the plan becomes effective the debtor must continue to disclose material events relating to the liquidation on Form 8-K, including a final Form 8-K when the liquidation is complete to report that event. Reorganized debtors or their successors-in-interest who continue to be subject to reporting obligations must resume meeting all of these for all periods that begin after the plan becomes effective.

It is important, however, to understand the limitations of modified reporting. Modified reporting does *not*:

- Relieve a debtor from any other obligation under the Exchange Act. The debtor must continue to file current reports on Form 8-K and satisfy the proxy, tender offer, and going-private provisions of the act.
- Extend beyond the duration of the bankruptcy case. When the plan of reorganization becomes effective, the reorganized company must file all Exchange Act periodic reports for the periods that begin going forward.
- Excuse the debtor from post-bankruptcy compliance with the federal securities laws. The reorganized debtor must provide, in connection with any post-reorganization filings under the Exchange Act or Securities Act, audited financial statements prepared in accordance with generally accepted accounting principles for all periods for which they may be required — even though the issuer may have been subject to bankruptcy proceedings during some portion of those periods in question.
- Preserve all benefits that would have been available to the debtor if it had remained current on its periodic reports.[21]

Debtors may implement modified reporting either by relying on the general guidance provided by the SEC (*i.e.*, in Release 34-9660, Staff Legal Bulletin No. 2, and previously granted no-action letters) or by requesting specific no-action relief from the SEC's Division of Corporation Finance. In either case, availability of modified reporting depends on a very factual, case-by-case analysis of several

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factors. In deciding whether to accept modified Exchange Act reports, the SEC generally considers (a) how difficult it is for the debtor to obtain the information necessary for those reports; (b) the debtor's financial condition; (c) the debtor's efforts to advise its security holders and the public of its financial condition and activities; and (d) the nature and extent of the trading in the debtor's securities.

Request for no-action relief involves submission of a letter setting forth a set of facts and legal analysis with relevant citations. If the request is successful, the debtor receives a response from the staff of the division to the effect that, if the relevant facts are as represented, it will not recommend that the SEC take any enforcement action. Although not technically binding on the SEC, a no-action response provides a significant degree of comfort to a debtor.

To obtain no-action relief regarding modified reporting, a debtor must:

- Have been current in its Exchange Act reports for 12 months before filing for relief under the Bankruptcy Code. The many public companies that are delinquent filers on the Chapter 11 petition filing date will not be able to meet these criteria.
- Have timely filed notice of its bankruptcy filing and made other efforts — such as press releases — to inform its interest holders and the market. No-action requests by public companies that file a Form 8-K more than four days after the filing or whose efforts to keep the market informed are considered by the staff to have been less than adequate are subject to rejection.
- Submit its request "promptly" following its filing for bankruptcy protection. The division may not consider a request to be prompt if it is filed before the date the debtor's first post-filing periodic report is due. Accordingly, a debtor should determine whether to seek no-action relief very early in the bankruptcy planning stage, preferably before commencement of the case.
- Demonstrate that there is essentially no trading in its securities. Under this factor, a debtor is automatically disqualified if it has any securities on a national securities exchange (such as the New York Stock Exchange) or the NASDAQ or if there is an "active market" for its securities. Specifically, debtors must demonstrate, by providing detailed trading information, that trading in its securities is "minimal." General or conclusory statements that trading is "minimal" or "insignificant" are not sufficient.[22]
- Discuss why it is unable to continue Exchange Act reporting. The debtor must specifically address (1) whether it has ceased its operations or the extent to which it has curtailed operations; (2) why filing audited periodic reports would represent an undue hardship; (3) why it cannot comply with the disclosure requirements; and (4) why it believes that granting the request is consistent with the protection of public investors.

Deregistration relieves a debtor not only from filing current and periodic reports, but also from all other Exchange Act regulation, including costly compliance with Sarbanes-Oxley.

The very restrictive criteria for modified reporting no-action relief effectively limit availability for this relief to a relatively small number of debtors. A realistic candidate for no-action relief appears to be a company with little or no assets or operations, and whose securities may still be quoted on the OTC Bulletin Board[23] or in the "pink sheets"[24] but which have all but ceased to trade.

Such companies have scant prospect of successfully reorganizing in Chapter 11, and for them the value of modified reporting may be primarily for the limited period of time required to prepare for exiting the Exchange Act reporting system entirely. Companies with substantial ongoing business operations, which may have some prospect of reorganizing, are relatively poor candidates for no-action relief. Companies whose securities are listed on the NYSE or traded on NASDAQ simply need not apply.

Debtors who do not obtain no-action relief should consult with counsel regarding whether it is appropriate, based on the SEC's general guidance, to use modified reporting under their particular circumstances. The SEC encourages such debtors to take all steps possible to inform their security holders and the market of their ongoing financial condition and the status of their bankruptcy cases, including filing "any available information" — such as the petition, schedules, statement of affairs, and monthly operating reports — with the SEC as current reports using Form 8-K and press releases.

Deregistering

Deregistration — causing the debtor to cease to be a public company subject to Exchange Act regulation — is a common element of many public company Chapter 11 reorganizations. In some cases, deregistration may take place at the initiative of the SEC or upon effectiveness of a confirmed Chapter 11 plan of reorganization (*e.g.*, cancelling the securities). This section discusses deregistration by action of the debtor, other than those it takes through a plan of reorganization.

Deregistration relieves a debtor not only from filing current and periodic reports, but also from all other Exchange Act regulation, including costly compliance with Sarbanes-Oxley. If the applicable requirements are satisfied, deregistration may take place at any time during the bankruptcy case.

Often, at the outset of the case or sometime later, debtors are or become subject to delisting proceedings by a stock exchange, NASDAQ, or OTC Bulletin Board. Delisting does not, however, automatically lead to deregistration of the securities with the SEC. Unless and until the debtor elects to deregister its securities, it continues to be subject to Exchange Act reporting requirements.

Additionally, the limits of deregistration must be properly understood. Deregistration does not, for example, cancel a debtor's securities. Upon deregistering, the debtor's securities will cease to be quoted on the NASDAQ or the OTC Bulletin Board, but they continue to be outstanding and may be eligible for quotation on the pink sheets. The debtor may want to continue to furnish information to market makers to maintain quotation of its securities on the pink sheets.

Deregistration does not terminate all obligations to shareholders. After deregistering, a debtor still is required to comply with the laws of its state of incorporation, including holding annual meetings and furnishing financial statements, subject to supervision of the Bankruptcy Court. Similarly, deregistration does not eliminate the need for a debtor to communicate with its creditors and holders of interest or to issue public statements from time to time. A debtor may very well decide that press releases remain a useful tool for communicating milestones in the case.

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And while deregistration suspends a debtor's reporting obligations, it does not excuse it from any responsibility to file Exchange Act reports due on or before the date it filed its Form 15.

There are a number of requirements that a company must satisfy to be able to terminate its registration. Under SEC rules, a public company may deregister any class of securities held of record by (a) fewer than 300 persons or (b) fewer than 500 persons when the total assets of the debtor have not exceeded $10 million on the last day of each of the debtor's three most recent fiscal years.[25]

A "holder of record" is any person identified as the owner of the securities on records maintained by or on behalf of the debtor.[26] "Total assets" is defined as the total assets shown on either the debtor's balance sheet or the consolidated balance sheet of the debtor and its subsidiaries, whichever is larger.[27] Because most beneficial owners hold their stock in street name through a bank, broker, or other depositary institution rather than "of record," many small-cap issuers are eligible to deregister under this standard. Deregistration is effected (or at least commenced) by filing a certification on Form 15 with the SEC.

A debtor's decision to deregister typically commences by obtaining any necessary approvals by its board of directors and the Bankruptcy Court. Additionally, if the debtor's securities are listed on a stock exchange or NASDAQ, the debtor may also need to give notice of its intention to delist or apply for removal of the listing of its securities with these organizations.

Before proceeding with deregistration, a debtor's management should work carefully with counsel to make sure that this option is feasible. A list of stockholders of record should be obtained from the debtor's transfer agent to determine the exact number of holders of record. Because the steps necessary to deregister vary depending on the section under which the debtor's securities are registered, a determination should be made regarding whether it is registered under Section 12(b), 12(g), or 15(d) of the Exchange Act. It is also advisable to determine whether the company has filed a Securities Act registration statement that has been declared effective during the fiscal year (if so, suspension of reporting obligations will not be permitted during such year).

The debtor should confirm that it has filed its annual and quarterly reports. A company will not be permitted to suspend its reporting obligations under Section 15(d) if it has not filed all such reports for the shorter of its most recent three fiscal years and the portion of the current year preceding the date of the filing of the Form 15, or the period since the company became subject to the reporting obligations.[28] Fortunately, a company must merely have filed the reports; they do not need to have been filed within the required deadlines.

Deregistration relieves a debtor not only from filing current and periodic reports, but also from all other Exchange Act regulation, including costly compliance with Sarbanes-Oxley.

Other considerations are involved as well. The debtor's articles of incorporation and bylaws and the applicable law of its state of incorporation should be reviewed. The potentially adverse consequences of deregistration should be considered and analyzed. Deregistration, for example, may trigger a default by the debtor under registration rights agreements, financing agreements, and other contractual commitments, and may affect the liquidity and value of employee stock options.

Debtors should note, too, that Exchange Act reporting obligations may be suspended by SEC action. The SEC is authorized, following violation of the Exchange Act, to revoke a public company's registration pursuant to administrative proceeding.[29] Failure to make periodic filings as required by Exchange Act is a sufficient violation.

Because revocation is the maximum penalty for failure to file periodic reports, a debtor that has definitively decided to cease reporting may consider facilitating its own exit from the Exchange Act reporting system by stipulating to a revocation order. Debtors wishing to explore this option may have their counsel contact the SEC's Division of Enforcement to pursue the matter.

Plan, Prepare

Exchange Act disclosure and reporting obligations continue during a bankruptcy. Public company debtors and their management and turnaround professionals need to be familiar with the types of events for which Form 8-K must be filed. Confidentiality agreements in appropriate form should be negotiated and obtained from the statutory committees, and debtors must avoid selective disclosure in violation of Regulation FD.

Early (ideally, pre-filing) planning for SEC reporting compliance during a bankruptcy should be undertaken. Strategic considerations should include a cost/benefit analysis of continuing reporting obligations through the bankruptcy case and consideration of whether modified reporting is available. Thoughtful planning and preparation and the assistance of experienced securities counsel is required to assist a debtor exit the Exchange Act reporting system during the bankruptcy case. CR

[1] In this article, "public company" refers to any issuer that has securities registered pursuant to Section 12 of the Exchange Act or that has a registration statement that has become effective under the Securities Act of 1933, 15 U.S.C. Section 77a, *et seq.*

[2] 15 U.S.C. Section 78a *et seq.* Public companies having securities registered pursuant to Section 12 of the Exchange Act are subject to periodic reporting and supplementary information requirements under Section 13 of the Exchange Act. Public companies having a registration statement that has become effective under the Securities Act are subject to periodic reporting requirements under Section 15(d) of the Exchange Act.

[3] Regulation FD, 17 C.F.R. Section 243.100 *et seq.* Regulation FD is generally applicable to any U.S. company that has a class of securities registered under Section 12 of the Exchange Act or is required to file reports under Section 15(d) of the Exchange Act. 17 C.F.R. Section 243.101(b)

[4] Public companies are, of course, subject to other federal securities law requirements that affect their communications in one way or another, including filing, reporting, and disclosure requirements under proxy, tender offer, going-private, insider trading, and anti-fraud rules, and the directors, executive officers and beneficial owners of the securities of public companies also can be subject to such requirements. Discussion of these topics is beyond the scope of this article.

[5] Form 8-K, Item 1.03(a). The disclosure is triggered "[i]f a receiver, fiscal agent or similar officer has been appointed for a registrant or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the registrant or its parent, or if such jurisdiction has been assumed by leaving the directors and officers in possession but subject to the supervision and orders of a court or governmental authority…" *Id.*

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[6] The information must include the name or other identification of the proceeding, the identity of the court or governmental authority; the date that jurisdiction was assumed; and the identity of the receiver, fiscal agent, or similar officer and the date of his or her appointment. *Id.*

[7] Form 8-K, Item 1.03(a).

[8] Form 8-K, Item 8.01.

[9] Form 8-K, Item 1.03(b). The disclosure is triggered "[i]f an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the registrant or its parent…" *Id.*

[10] Form 8-K, General Instructions B.1.

[11] Regulation FD, 17 C.F.R. Section 243. 100(b) (1)(iv).

[12] Regulation FD, 17 C.F.R. Section 243.101(d).

[13] Regulation FD, 17 C.F.R. Section 243.101(e). Other methods may include press releases distributed through a widely circulated news or wire service, announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephonic transmission, or by other electronic transmission, including use of the Internet. See generally J. Hamilton & T. Trautman, *Guide to Regulation FD and Insider Trading Reforms* (CCH 2001) ¶ 109.

[14] In fact, if such a person were to trade on the basis of material, nonpublic information obtained in his or her representative capacity, the person likely would face liability for insider trading.

[15] 11 U.S.C. Section 1102(b)(3).

[16] 17 C.F.R. Section 243.100(b)(2).

[17] Release No. 9660 dated June 30, 1972, 1972 SEC LEXIS 449.

[18] Staff Legal Bulletin No. 2 (CF) (April 15, 1997), available at www.sec.gov/interps/legal/slbcf2.txt.

[19] Item 1.03 to Form 8-K calls for the form to be filed on the entry by the Bankruptcy Court of the confirmation order, which normally precedes effective date of the plan.

[20] But see Item 1.03 to Form 8-K, which simply calls for "information as to assets and liabilities," and the instructions to Item 1.03 permit the presentation of such information in the form in which it is furnished to the Bankruptcy Court.

[21] Having filed modified reports as a debtor, a reorganized company is not considered "current" in its Exchange Act reporting with respect to those reports due while its bankruptcy proceedings were pending, for purposes of (1) determining eligibility to use Securities Act Form S-2 or S-3, (2) satisfying the current public information requirement of Securities Act Rule 144(c)(1), or (3) satisfying the "reporting issuer" definition of Rule 902(1) of Regulation S. See Staff Legal Bulletin No. 2.

[22] The staff of the Division of Corporation Finance has indicated that the nature and extent of trading as described in the Evolve Software, Inc., no-action letter is representative of "minimal" trading for this purpose. See the SEC's Compliance and Disclosure Interpretations, updated on September 30, 2008, at www.sec.gov/divisions/corpfin/guideance/exchangeactsections-interps.htm. The Evolve no-action letter is available at www.sec.gov/divisions/corpfin/cf-noaction/evolvesoft071603.htm.

[23] The OTC Bulletin Board (OTCBB) is a regulated quotation service that displays real-time quotes, last-sale prices, and volume identification in over-the-counter (OTC) equity securities. An OTC equity security is generally any equity security that is not listed or traded on NASDAQ or a national securities exchange. Issuers failing to remain current on their Exchange Act reporting obligations are subject to having their securities removed from the OTCBB. See generally www.otcbb.com/aboutotcbb/rulesindex.stm.

[24] The term "pink sheets" refers to an inter-dealer electronic quotation and trading system in the OTC market, operated by Pink OTC Markets Inc. See www.pinksheets.com.

[25] See Exchange Act Rule 12g-4 at 17 C.F.R. Section 240.12g-4 and Exchange Act Rule 12h-3 at 17 C.F.R. Section 240.12h-3.

[26] Exchange Act Rule 12g5-4, 17 C.F.R. Section 240.12g5-1.

[27] Exchange Act Rule 12g5-2, 17 C.F.R. Section 240.12g5-2.

[28] Exchange Act Section 15(d) at 15 U.S. C. 81(d) and Exchange Act Rule 15d-6, 17 C.F.R. Section 240.15d-6.

[29] Exchange Act Section 12(j), 15 U.S.C. Section 78(j).

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