

SEC EXPANDS AVAILABILITY OF SCHEDULE 13G

SIMPSON THACHER & BARTLETT LLP

JANUARY 21, 1998

The Securities and Exchange Commission (the "SEC" or the "Commission") has adopted amendments to its rules and forms under Section 13(d) of the Securities Exchange Act of 1934 (the "Exchange Act") to permit certain shareholders to use the short-form Schedule 13G, rather than the long-form Schedule 13D, to report stock acquisitions. The amendments apply only to persons not seeking to acquire or influence "control" of the issuer and who own less than 20% of the class of securities acquired ("Passive Investors"). The amendments become effective on February 17, 1998.

EXECUTIVE SUMMARY

The more significant features of the rule and form amendments are the following:

- The categories of filers eligible to use Schedule 13G will be expanded to include "Passive Investors" consisting of holders of less than 20% of the class of securities who certify that they do not have an intent to exercise or influence control of the issuer;
- A Passive Investor must file a Schedule 13G within 10 calendar days of acquiring 5% of a class of securities (instead of year end as with other Schedule 13G filings);
- Prompt amendments are required when the Passive Investor's holdings exceed 10% and thereafter every time a Passive Investor acquires or disposes of more than an additional 5% of the class of securities;
- If the filer no longer holds shares with the requisite passive intent or acquires 20% or more of the class, a Schedule 13D must be filed within ten days and the person is not permitted to vote the shares or acquire more shares during the period of time beginning from the change in investment purpose or the acquisition of 20% or more until ten days after the Schedule 13D is filed;
- The categories of institutional investors allowed to use Schedule 13G have been expanded;
- The Commission's release provides interpretive guidance as to the attribution of beneficial ownership to control persons of the direct shareholder;

- The release also provides interpretive guidance as to the interrelationship of Passive Investor status with proxy solicitation activities which are exempt under the proxy rules.

AVAILABILITY OF SCHEDULE 13G FOR INVESTORS WITH NO CONTROL INTENT

Under the amendments, an acquirer of between 5% and 20% of a registered class of equity security who fits the definition of “Passive Investor” is permitted to use the short-form Schedule 13G. A Passive Investor is a beneficial owner of between 5% and 20% of a class of equity security who certifies that the securities were not acquired or held for the purpose of and do not have the effect of changing or influencing the control of the issuer and that the securities were not acquired in connection with or as a participant in any transaction having such purpose or effect. Shareholders that are unable to certify to this effect are considered to have a “disqualifying purpose or effect”. Passive Investors choosing to report on Schedule 13G will file their Schedule 13G within 10 calendar days after acquiring beneficial ownership of more than 5% of a class of subject securities. Persons who do not certify that they do not have a disqualifying purpose or effect would be ineligible to file a Schedule 13G and would be required to file a Schedule 13D. Passive Investors may elect to file on Schedule 13D if they wish.

Passive Investors must amend the Schedule 13G within 45 calendar days after the end of the calendar year to report any change in the information previously reported. Passive Investors also will amend the Schedule 13G during the year if their holdings exceed 10% of the class of securities. This amendment will be required to be filed “promptly” upon acquiring greater than 10%. Between 10% and less than 20%, Passive Investors will be required to file additional amendments “promptly” during the year if they increase or decrease their beneficial ownership by more than 5% of the class.

Schedule 13G has been available to certain institutions specified in Rule 13d-1(b)(1) (“Qualified Institutional Investors”) who hold shares without a control intent. Under the amended rules, when Qualified Institutional Investors or Passive Investors determine that hold the subject securities with a disqualifying purpose or effect, they must file a Schedule 13D no later than 10 calendar days after the change in investment purpose. Furthermore, the amended rules require a “cooling-off” period that begins with the change in investment purpose and lasts until the expiration of the tenth calendar day from the date of the filing of a Schedule 13D. During the cooling-off period, the reporting person is prohibited from voting or directing the voting of the securities or acquiring additional beneficial ownership of any equity securities of the issuer or of any person controlling the issuer.

Passive Investor status is limited to holders of less than 20% of the class of securities and, unlike the rules governing institutional use of Schedule 13G, extends to foreign investors. Upon acquiring 20% or more, the Investor must report the acquisition on Schedule 13D within 10 calendar days. Additionally, the Investor will be subject to a “cooling-off” period commencing from the time the Investor reaches the 20% threshold until ten calendar days after the filing of the Schedule 13D. During this period, the Passive Investor will be prohibited from

voting or directing the voting of the securities and from acquiring additional beneficial ownership in any equity securities of the issuer and any person controlling the issuer.

The amended rules allow Passive Investors or Qualified Institutional Investors who have lost their eligibility to file on Schedule 13G to re-establish their Schedule 13G eligibility and again report on Schedule 13G. A Qualified Institutional Investor that has lost its Schedule 13G eligibility, because it is no longer a qualified entity under Rule 13d-1(B)(1)(ii) or cannot make the required certification, is allowed to resume filing a Schedule 13G pursuant to the Qualified Institutional Investor provision once it re-establishes its status under Rule 13d-1(b)(1)(ii) or can again make the necessary certification. Similarly, a Passive Investor that has lost its Schedule 13G-eligibility under amended Rule 13d-1(c), because it can no longer certify that it does not have a disqualifying purpose or effect or because it reached the 20% threshold, is able to resume filing on Schedule 13G when the investor can once again make the certification or when its beneficial ownership falls below 20%.

ADDITIONAL INSTITUTIONAL INVESTORS PERMITTED TO USE SCHEDULE 13G

The Commission has also expanded the list of Qualified Institutional Investors permitted to use Schedule 13G to allow employee benefit plans maintained primarily for the benefit of state or local government employees, savings associations, church employee benefit plans and controlling persons of institutional investors to report on Schedule 13G. Additionally, recent amendments to the Investment Advisers Act of 1940 excluded certain investment advisers from the filing provisions of the Act. Because eligibility for using Schedule 13G turned on the filing status of investment advisers, the Investment Advisers Act amendments had the effect of barring the excluded investment advisers from using Schedule 13G. The amendments adopted by the SEC restore the ability of these investment advisers to use Schedule 13G. Conforming changes to the beneficial owner definition under Section 16 have been adopted to include all of the above entities in the list of persons that are not deemed to be the beneficial owners of securities held for the benefit of third parties.

CONTROL PERSONS OF INSTITUTION INVESTORS

In the release adopting the amendments, the SEC provides interpretive advice in two areas. Commentators on the rule amendments requested guidance as to when beneficial ownership under Rule 13d-3 must be attributed to entities under common control with the entity with direct ownership of the shares. This issue commonly arises in the context of parent-subsidiary relationships as well as subsidiary corporations having a common parent. The SEC's position is that beneficial ownership of shares directly held by a subsidiary should normally be attributed to a parent entity that controls the subsidiary. Where the organizational structure is such that the voting and investment power over the securities is exercised by the subsidiary independently of the parent, attribution of beneficial ownership to the parent may not be required. Such a situation may exist in which an information barrier has been created by the subsidiary and the parent to ensure that the subsidiary's voting and investment powers are exercised independently.

To the extent that an information barrier is relied upon, the SEC states that the companies involved should maintain written policies and procedures designed to prevent the flow of information to and from the other business units. In addition, the operation of the information barrier should be the subject of annual independent assessments. Furthermore, the parent should have no officers, directors or employees who are involved in the exercise of the voting and investment power of the subsidiary. An independent investment committee at the subsidiary level is evidence of an effective separation by the parent and the subsidiary.

SHAREHOLDER COMMUNICATIONS AND BENEFICIAL OWNERSHIP REPORTS

The SEC also expressed its views as to when communication among shareholders under exemptions from the proxy rules will be sufficient common activity that the soliciting activity:

- (i) may constitute the formation of a “group” under Rule 13-5(b); or
- (ii) may be construed as having the purpose or effect of changing or influencing the control of the issuer, and therefore would disqualify a person from eligibility to use Schedule 13G.

A shareholder who is a passive recipient of a soliciting communication from another shareholder will not be deemed to be a member of a group with the soliciting person even if the recipient shareholder grants the soliciting shareholder a revocable proxy. Whether a shareholder who actively engages in soliciting activity exempt under the proxy rules will lose eligibility to use Schedule 13G will depend on whether the activity was engaged in with the purpose or effect of changing or influencing control of the issuer. It is clear that participation in a solicitation as to a proposal with no control implications will not prevent the use of Schedule 13G by participants. This will be the case of most social or public policy proposals such as environmental policies or apartheid.

Corporate governance issues are in a gray area. Proposals relating to executive compensation, director's pensions and confidential voting would not generally prevent the use of Schedule 13G by the proponents. Depending on the circumstances, proposals relating to the removal of defensive measures such as a poison pill or a staggered board might not constitute a disqualifying purpose or effect. More specific proposals addressing a change of control such as proposing that the issuer be put up for sale or engaging in a contested election of directors would result in ineligibility to use Schedule 13G. The release identifies several factors which are relevant in assessing the control implications of a shareholder proposal.

AMENDMENT TO FILING RULES

The Commission will no longer require Schedules 13G and amendments thereto to be transmitted to exchanges on which the securities are traded. Additional technical changes to the forms have been made.

* * *

Please feel free to contact James S. Lanigan, Jr. at (212) 455-2665 if you have any questions concerning the matters discussed in this memorandum.

SIMPSON THACHER & BARTLETT LLP