

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 228, 229 and 249

[Release Nos. 33-7280; 34-37086; File No. S7-10-96]

RIN 3235-AG77

#### Safe Harbor for Disclosure of Qualitative and Quantitative Information About Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments, and Derivative Commodity Instruments

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Rule Proposals.

**SUMMARY:** The Securities and Exchange Commission ("Commission") today is proposing amendments that would apply the safe harbor provisions recently added to the Securities Act of 1933 and Securities Exchange Act of 1934 by the Private Securities Litigation Reform Act of 1995 to specified disclosures made pursuant to proposed Item 305 of Regulation S-K or proposed Item 9A of Form 20-F.

**DATES:** Comments should be received on or before May 20, 1996.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-10-96; this file number should be included in the subject line if E-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web Site (<http://www.sec.gov>).

**FOR FURTHER INFORMATION CONTACT:** Elizabeth M. Murphy, Special Counsel, (202) 942-2910, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 3-7, Washington, D.C. 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing amendments to proposed Item 305 of Regulation S-K<sup>1</sup> and proposed Item 9A of Form 20-F,<sup>2</sup> as well as to Item 10 of Regulation S-B.<sup>3</sup>

<sup>1</sup> 17 CFR Part 229.

<sup>2</sup> 17 CFR 249.220F.

<sup>3</sup> 17 CFR 228.10.

## I. EXECUTIVE SUMMARY AND BACKGROUND

On December 28, 1995, the Commission issued a release<sup>4</sup> proposing amendments that would, among other things, require registrants to provide disclosure of qualitative and quantitative information about market risk inherent in derivative financial instruments, other financial instruments, and derivative commodity instruments ("Derivatives Proposing Release"). This disclosure would be required pursuant to proposed new Item 305 of Regulation S-K and proposed new Item 9A of Form 20-F.

The Derivatives Proposing Release indicated that it is the Commission's intention that disclosures made pursuant to the proposed new items be made subject to a safe harbor, and stated that a release would be forthcoming to propose an appropriate safe harbor in light of the recently enacted Securities Litigation Reform Act of 1995 ("Litigation Reform Act").<sup>5</sup> The Litigation Reform Act, among other changes, added new Section 27A<sup>6</sup> to the Securities Act of 1933 ("Securities Act")<sup>7</sup> and new Section 21E<sup>8</sup> to the Securities Exchange Act of 1934 ("Exchange Act"),<sup>9</sup> establishing statutory safe harbors for forward-looking information. The purpose of this release is to propose amendments that would explicitly extend the statutory safe harbor protections to specified disclosures that would be provided pursuant to proposed Item 305 of Regulation S-K and proposed Item 9A of Form 20-F.

## II. DISCUSSION OF PROPOSALS

The amendments being proposed today would add a safe harbor provision to proposed Item 305 of Regulation S-K<sup>10</sup> and proposed Item 9A of Form 20-F.<sup>11</sup> The provision would state that the safe harbor provided in Section 27A of the Securities Act and Section 21E of the Exchange Act will apply to quantitative information about market risk provided pursuant to Item 305(a) of Regulation S-K or Item 9A(a) of Form

<sup>4</sup> Release No. 33-7250 (December 28, 1995) [61 FR 578]. The period for comment on the proposals issued in that release was extended from May 7, 1996 to May 20, 1996 in Release No. 33-7281 issued on April 9, 1996.

<sup>5</sup> Pub. L. No. 104-67, 109 Stat. 737 (1995). See Section I and III.B.3.e of the Derivatives Proposing Release.

<sup>6</sup> 15 U.S.C. 77z-2.

<sup>7</sup> 15 U.S.C. 77a *et seq.*

<sup>8</sup> 15 U.S.C. 78u-5.

<sup>9</sup> 15 U.S.C. 78a *et seq.*

<sup>10</sup> Proposed paragraph (c) to proposed Item 305 of Regulation S-K.

<sup>11</sup> Proposed paragraph (c) to proposed Item 9A of Form 20-F.

20-F, and information about market risk with respect to future reporting periods provided pursuant to Item 305(b)(3) of Regulation S-K or Item 9A(b)(3) of Form 20-F.

The Commission notes that, by its terms, the statutory safe harbor may be available with respect to disclosure required by proposed Items 305 and 9A, to the extent that all of the conditions of the statutory safe harbor are met. By invoking its rulemaking authority under Sections 27A and 21E, the Commission seeks to ensure the application of the statutory safe harbor to specified disclosures under Items 305 and 9A, and to broaden the application of the statutory safe harbor with respect to those disclosures. The Commission believes that the proposed safe harbor protection is consistent with the public interest and the protection of investors.

Comment is solicited as to whether it is appropriate to include a safe harbor provision in proposed Item 305 of Regulation S-K and proposed Item 9A of Form 20-F, and if so, whether it is appropriate to apply the new statutory safe harbor protection to the disclosure required by these items, or whether a different safe harbor should be established. The proposed safe harbor is limited to paragraphs (a) and (b)(3) of Items 305 and 9A because these appear to be the provisions pursuant to which forward-looking information may be required. Comment is requested on whether the proposed safe harbor should be expanded to apply to any or all of the information required by paragraphs (b)(1) and (b)(2) of proposed Items 305 and 9A, especially in light of the difficult nature of the required disclosure.

As proposed, the safe harbor would be available with respect to the specified information regardless of whether the issuer providing it or the type of transaction otherwise is excluded from the statutory safe harbor.<sup>12</sup> Thus, for

<sup>12</sup> Paragraph (b) of Section 27A of the Securities Act and Section 21E of the Exchange Act exclude from the statutory safe harbor a forward-looking statement:

(1) that is made with respect to the business or operations of an issuer that: (A) during the three-year period preceding the date on which the statement was first made: (i) was convicted of a felony or misdemeanor described in clauses (i) through (iv) of Exchange Act Section 15(b)(4)(B) [15 U.S.C. 78o(b)(4)(B)]; or (ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that prohibits future violations of the antifraud provisions of the securities laws, requires that the issuer cease and desist from violating the antifraud provisions of the securities laws, or determines that the issuer violated the antifraud provisions of the federal securities laws; (B) makes the forward-looking statement in connection with an offering of securities by a blank check company; (C) issues penny stock; (D) makes the forward-looking

example, first-time Commission registrants and those making initial public offerings would be covered by the safe harbor with respect to this specific information if all other conditions are satisfied. As is the case with the statutory safe harbor, the proposed safe harbor would apply only to a forward-looking statement made by: (1) an issuer; (2) a person acting on behalf of the issuer; (3) an outside reviewer retained by the issuer making a statement on behalf of the issuer; or (4) an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer. Comment is solicited on whether all or some of the types of issuers and transactions excluded from the statutory safe harbor also should be excluded from the proposed safe harbor provisions.

As proposed, the Item 305 and 9A disclosures may be provided in footnotes to the financial statements,<sup>13</sup> and the safe harbor proposed today would also be available regardless of whether the information is set forth in text or financial statement footnotes. Comment is requested as to whether disclosure contained in a footnote to the financial statements, which, in the absence of Commission rulemaking, would be excluded from the statutory safe harbor, should be covered by the proposed safe harbor provisions, as proposed.

As proposed, Item 305 information would not be required of small business issuers complying with Regulation S-B. The safe harbor proposed today would be available to those small business issuers that choose to provide this information.<sup>14</sup> To the extent that this disclosure is voluntarily provided, however, the proposed safe harbor protection would be available for information within the scope of proposed Item 305(a) only if all of the information that would be required by 305(a) were provided, rather than just a

statement in connection with a rollup transaction; or (E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is: (A) included in a financial statement prepared in accordance with generally accepted accounting principles; (B) contained in a registration statement of, or otherwise issued by, an investment company; (C) made in connection with a tender offer; (D) made in connection with an initial public offering; (E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or (F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to Exchange Act Section 13(d) [15 U.S.C. 78m(d)].

<sup>13</sup> See General Instruction 5 to paragraphs (a) and (b) of proposed Item 305 of Regulation S-K and proposed Item 9A of Form 20-F.

<sup>14</sup> Proposed Item 10(g) to Regulation S-B.

portion of it. Similarly, the safe harbor protection would be available for information within the scope of Item 305(b)(3) only if all of the information required by Item 305(b) were provided. Comment is requested as to whether the proposed safe harbor should apply to voluntarily provided disclosures. Additionally, comment is solicited as to whether the proposed safe harbor's application to voluntarily reported information should depend on providing all of the disclosure that would be required by proposed Item 305, rather than permitting compliance with either 305(a) or 305(b) separately. Conversely, should the proposed safe harbor apply to voluntary disclosures even when only a portion of the information required by paragraph (a) or paragraph (b) is provided by a small business issuer?

### III. Request for Comment

Any interested person wishing to submit written comments on the proposed amendments as well as other matters that might have an impact on the proposed rules, is requested to do so. The Commission also requests comment on whether the proposed amendments, if adopted, would have an adverse impact on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments responsive to this inquiry will be considered by the Commission in complying with its responsibilities under Section 23(a) of the Exchange Act.<sup>15</sup>

### IV. Cost-Benefit Analysis

To evaluate fully the costs and benefits associated with the proposed rules, the Commission requests commenters to provide their views and data as to the costs and benefits associated therewith. It is expected that the proposed amendments would reduce the costs to companies that provide disclosure pursuant to proposed Items 305 and 9A by providing protection as set forth in the safe harbor.

### V. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis has been prepared in accordance with 6 U.S.C. 603 concerning the proposed amendments. The analysis notes that the purpose of the amendments proposed is to extend the applicability of the safe harbor provisions in Section 27A of the Securities Act and Section 21E of the Exchange Act to quantitative information about market risk included

<sup>15</sup> 15 U.S.C. 78w(a).

in Securities Act and Exchange Act documents pursuant to paragraph (a) of proposed Item 305 of Regulation S-K or proposed Item 9A of Form 20-F, and information about market risk with respect to future reporting periods provided pursuant to paragraph (b)(3) of those proposed items.

As discussed more fully in the analysis, the changes would affect persons that are small entities, as defined by the Commission's rules, by making the safe harbor available to those small entities that voluntarily provide such disclosure.

The analysis discusses possible alternatives to the proposed amendments including, among others, establishing different compliance or reporting requirements or exempting small issuers from all or part of the proposed amendments. Given the fact that the proposed amendments would extend protection to all issuers, including small business issuers, disclosing information to which the safe harbor protection applies, the Commission does not believe that any of the alternatives are preferable at this time.

Comments are encouraged on any aspect of this analysis. A copy of the analysis may be obtained by contacting Elizabeth M. Murphy, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

### VI. Statutory Basis

The amendments to Item 10 of Regulation S-B, and proposed Item 305 of Regulation S-K and Item 9A of Form 20-F are being proposed pursuant to Section 27A of the Securities Act and Section 21E of the Exchange Act.

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

Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

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

### **PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS**

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

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

2. By amending § 228.10 by adding paragraph (g) to read as follows:

§ 228.10 (Item 10) General.

(g) Quantitative and qualitative disclosures about market risk. The safe harbor provision included in paragraph (c) of Item 305 of Regulation S-K (§ 229.305(c) of this chapter) shall apply to information required by paragraph (a) of Item 305 of Regulation S-K (§ 229.305(a) of this chapter) that is voluntarily provided by or on behalf of a small business issuer complying with Regulation S-B, but only if all of the information required by Item 305(a), and not just a portion of it, is provided. The safe harbor provision also shall apply to statements with respect to future reporting periods provided pursuant to paragraph (b)(3) of Item 305 of Regulation S-K (§ 229.305(b)(3) of this chapter) that are voluntarily provided by or on behalf of a small business issuer complying with Regulation S-B, but only if all of the information required by Item 305(b) (§ 229.305(b) of this chapter), and not just a portion of it, is provided.

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

3. The authority citation for Part 229 continues to read in part as follows:

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

4. By amending § 229.305, as provided in the Federal Register (61 FR 593, January 8, 1996), by adding paragraph (c) after the General Instructions to paragraphs 305(a) and 305(b) to read as follows:

§ 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.

(c) Safe Harbor. The safe harbor provided in Section 27A of the Securities Act of 1933 (15 U.S.C. 77z-2) and Section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbors") shall apply, with respect to all types of issuers and transactions, to information provided pursuant to paragraph (a) of this Item (§ 229.305(a)), and any statements with respect to future reporting periods provided pursuant to paragraph (b)(3) of

this Item (§ 229.305(b)(3)), whether located in text or notes to financial statements, provided that the disclosure is made by an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for Part 249 continues to read in part as follows:

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

6. By amending Form 20-F (referenced in § 249.220f) by adding paragraph (c) to Item 9A in Part I after the General Instructions to paragraphs 9A(a) and 9A(b) to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20-F—Registration Statement Pursuant to Section 12 (b) or (g) of the Securities Exchange Act of 1934 or Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 or Transaction Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Part I

Item 9A. Quantitative and qualitative disclosures about market risk.

(c) Safe Harbor. The safe harbor provided in Section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbor") shall apply, with respect to all types of issuers and transactions, to information provided pursuant to paragraph (a) of this Item, and any statements with respect to future reporting periods provided pursuant to paragraph (b)(3) of this Item, whether located in text or notes to financial statements, provided that the disclosure is made by an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

By the Commission.

Dated: April 9, 1996. Margaret H. McFarland, Deputy Secretary. [FR Doc. 96-9183 Filed 4-15-96; 8:45 am] BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 229, 239, 240, and 249

[Release Nos. 33-7281; 34-37087; IC-21876; File No. S7-35-95]

RIN 3235-AG42

Proposed Amendments To Require Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Qualitative and Quantitative Information About Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments, and Derivative Commodity Instruments

AGENCY: Securities and Exchange Commission.

ACTION: Extension of Comment Period.

SUMMARY: The expiration date of the comment period for proposals concerning derivative financial instruments, issued on December 28, 1995 in Release No. 33-7250 (61 FR 578) is extended from May 7, 1996 until May 20, 1996. This expiration date is extended to coincide with the last day for comments on proposals to establish a safe harbor for disclosure about derivative instrument market risk issued on April 9, 1996 in Release No. 33-7280.

DATES: Comments should be received on or before May 20, 1996.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters should refer to File No. S7-35-95. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Cathy J. Cole, Thomas J. Linsmeier, Russell B. Mallett, III, or Stephen M. Swad, at (202) 942-4400, Office of the Chief Accountant, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 11-3, Washington, D.C. 20549, or Kurt R. Hohl, at (202) 942-2960, Division of Corporation Finance, Securities and Exchange Commission,