

and (3) a statement of the independent accountant's opinion that the content of the abbreviated financial statements complies with Item 305.<sup>78</sup> It is contemplated that an independent accountant's report satisfying the requirements of proposed Item 305 would fall within the auditing guidance contained in SAS No. 62,<sup>79</sup> which governs reporting on financial statements prepared on a basis of accounting prescribed in a regulatory provision that results in an incomplete presentation but one that is otherwise in conformity with GAAP. Comment is solicited as to whether a report in the form prescribed by proposed Item 305 is appropriate and sufficient, or whether additional or different statements or explanations would be desirable. Also, comment is requested as to whether auditing guidance other than SAS No. 62 would be applicable to a report on abbreviated financial statements, or whether the reporting objectives under the proposed rule would require the accounting profession to develop new guidance governing the form of such report and procedures necessary to its issuance.

#### G. Abbreviated Interim Financial Statements

Proposed Item 305 also would state that, like full financial statements, abbreviated financial statements required with respect to an interim period should be prepared in conformity with GAAP and Regulation S-X,<sup>80</sup> except that note disclosures to the abbreviated interim financial statements would be limited only to any of the thirteen items set forth above not previously disclosed in the abbreviated annual financial statements. As currently required in interim financial statements, loss contingencies would have to be disclosed even though a significant change since year end may not have occurred.<sup>81</sup>

#### H. Delivery of Full Financial Statements to Requesting Investors

Registrants choosing to include abbreviated financial statements in disclosure documents delivered to investors would have to furnish the full audited financial statements and the independent accountant's report thereon to any person making a written or oral request, at no cost to the person making the request.<sup>82</sup> Comment is solicited on whether registrants should

be permitted to send only the remaining financial information rather than the complete full financial statements. Which format would be more useful to investors? Comment also is solicited on whether a means should be provided that would enable security holders who receive abbreviated financial statements in an annual report and request delivery of the full financial information also to indicate that they would like to receive automatically full financial information or the entire Form 10-K or 10-KSB in future years.

As proposed, if Form 10-K (and/or Form 10-Q) financial statements were delivered to investors in compliance with the delivery requirement, registrants could deliver only the portion of those reports that contain the financial statements.<sup>83</sup> The delivered information would have to be for the same periods covered by the abbreviated financial statements.<sup>84</sup>

A statement setting forth the registrant's obligation to furnish the full financial statements and the name, address and telephone number of the person designated by the registrant to receive requests would have to be included in the disclosure document.<sup>85</sup>

The registrant would be required to deliver the requested information by a means reasonably calculated to result in the information reaching the requesting investor within five business days from the date the request is received. Comment is solicited as to whether a delivery period should be specified in the rule, and if so, whether the proposed time period is appropriate, both from an investor's and registrant's perspective, or should it be shorter or longer. Should the rule simply require prompt delivery, with promptness being determined according to the context? Comment also is solicited as to whether the delivery period should be shorter than five business days when the abbreviated financial statements are delivered to investors in connection with certain types of transactions, e.g., mergers and exchange offers, where the investor does not initiate the transaction, has no control over the timing of the transaction, and will be affected financially by the transaction even if the investor does not act. Commenters also should address whether the delivery

period should be longer when the requested delivery is not in connection with any specific transaction.

Further comment is solicited on whether the rule should specify the appropriate means of delivery, and, if so, the means that should be specified. Finally, comment is requested as to whether availability of the full financial statements by public filing at the Commission, and from the registrant upon investor request, is sufficiently practical, timely and effective for meeting investor requirements.

#### I. Safe Harbor Provisions

The Commission recognizes that the utility of the abbreviated financial statement proposal will depend on companies' perception of their vulnerability to liability for the omission of certain financial statement notes pursuant to the provisions of proposed Item 305.<sup>86</sup> The proposed rules, therefore, include a safe harbor provision stating that disclosure contained in disclosure documents will not be materially misleading or omit to state a material fact on the basis of the exclusion from the abbreviated financial statements of the information permitted to be excluded from the financial statement notes pursuant to proposed Item 305. The safe harbor would cover cases where, for example, an investor claimed that the information included in the abbreviated financial statements in the delivered document failed to include information that was in the full financial statements included in the filed document. Comment is requested as to both the efficacy of the proposed safe harbor provisions and their appropriateness.

As discussed above in Part II.A, proposed Item 305 would not provide for inclusion of note disclosures regarding matters other than those specified by the Item,<sup>87</sup> although comment is solicited on whether registrants should be permitted to add discretionary note disclosures. As proposed, the safe harbor would not be available to issuers that included additional notes. Commenters are asked to address whether the protection of the safe harbor provisions should be available to registrants who add

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> With respect to delivery of annual reports or proxy or information statements that include abbreviated financial statements, in addition to setting forth this statement, registrants would continue to be required to provide the Rule 14a-3(b)(10) [17 CFR 240.14a-3(b)(10)] undertaking to provide persons from whom proxy authority is solicited with a Form 10-K or 10-KSB upon written request.

<sup>86</sup> Safe harbors with respect to the omission of notes from abbreviated financial statements would be provided in proposed Securities Act Rule 435 and Exchange Act Rules 13e-3, 13e-4, 14a-16, 14c-8 and 14d-1. These rules also would provide that the omitted information is deemed part of the disclosure document.

<sup>87</sup> This would not preclude the registrant from discussing such information in the delivered disclosure document, but only cause that discussion to be set forth outside of the abbreviated financial statements.

<sup>78</sup> Proposed Item 305(b)(4) of Regulation S-K.

<sup>79</sup> *Special Reports*.

<sup>80</sup> Article 10 of Regulation S-X specifies the content of interim financial statements.

<sup>81</sup> Proposed Item 305(b)(5)(ii) of Regulation S-K.

<sup>82</sup> Proposed Item 305(e) of Regulation S-K.