

**Panel II:
Actions in Light of Current Market Conditions:
Issuer Tender Offers**

Presenter: Joanne R. Soslow

Types of Issuer Tender Offers

■ Fixed-Price Tender Offer

- Issuer specifies amount of securities and price

■ Modified Dutch Auction Tender Offer

- Issuer specifies amount of securities and shareholder names desired price within a specified range
- Range must be within 15% of the minimum price
- Shares repurchased at “Clearing Price” – highest price at which the issuer may purchase all of the solicited securities.
- Other SEC requirements:
 - Disclosure of minimum/maximum consideration to be paid;
 - Pro rata acceptance; and
 - Prompt announcement of the purchase price (preliminary results PR).

Documents, Process and Timetable

- **Approximately 3 months from planning to closing/payment**
- **Disclosure Requirements/Schedule TO**
 - Offer to Purchase/Summary Term Sheet
 - Additional Exhibits
 - Amendments for material changes and to report results of the offering
- **Dissemination Requirements**
- **Offering Period**
 - At least 20 business days from commencement
 - At least 10 business days from date of certain changes (>2% increase/decrease in class of securities sought; any change in consideration)
 - “All Holders” and “Best Price”
 - Pro Rata Acceptance and Odd Lots
 - Withdrawal Rights
 - Filing of Pre-commencement Communications

Concerns for Issuer Tender Offers

■ **Serial Tender Offers**

- May have inflationary effect on stock price
- May increase going private concerns

■ **Prohibitions on Trading During Offer Period**

- Issuers/affiliates may not purchase any of the subject securities until 10 business days after termination of the offering period
- Must suspend any existing repurchase programs



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**Panel II.
Updating Risk Factors and MD&A in
Today's Economy**

Presenter: Todd J. Russo



Overview

- **Economic and Market Conditions Continue to Create Disclosure Challenges**
- **For the Vast Majority of Issuers, Some Sort of Disclosure Regarding the Impact of the Economic Downturn is Unavoidable**
- **MD&A (Item 303 of Regulation S-K) and Risk Factor (Item 503(c) of Regulation S-K) Disclosure Requirements are the Most Likely Implicated**



MD&A Rules and Guidance

- **Item 303 of Regulation S-K**
- **SEC's Position: Disclosure is not Limited to Issuer-Specific Trends**
 - Any known trends that will have a material impact on an issuer's financial position must be disclosed
- **2003 Interpretive Guidance**
 - Known material trends, events, demands, commitments, and uncertainties
 - Liquidity and capital resources
 - Cash requirements and sources of cash
 - Avoidance of generic and boilerplate disclosure



MD&A Disclosure Considerations

- **Diminished Sources of Capital or Increases in Cost of Capital**
 - Lender health
 - Rating changes
 - Non-compliance issues
 - Debt refinancing

- **Trends/Uncertainties Causing Reported Financial Results to not be Indicative of Future Financial Results**
 - Impact on dividends/distributions



MD&A Disclosure Considerations, con't

- **“Secondary” Risks**
 - Decreases in customer spending
 - Collectability of receivables
- **Loss of Liquidity of Assets**



Risk Factors

- **Item 503(c) of Regulation S-K**
- **Disclosure Considerations**
 - Economic risks
 - Financing risks
 - Dovetailing with MD&A disclosures



General Considerations

- **Boilerplate Disclosure is not the Answer**
- **Disclosing Lack of Impact of Economic Downturn**
- **10-K Disclosures vs. 10-Q Disclosures**
- **Other Disclosure Considerations**
 - Form 8-K

**Panel II.
Dimming the Lights:
Going Dark and Other Steps in the Down Market**

Presenter: Doug Raymond

Delisting/Deregistering a Company

- Delist from exchange (NYSE, NASDAQ, transfer to Pink Sheets)
- “Go dark”/Delist and deregister
- “Go private” and cash out stockholders
- Turn out the lights/deregistration by SEC

Why Companies Go Dark

- Burdensome/expensive disclosure and compliance regime, esp. for smaller companies
 - Difficulty of living in open disclosure regime
 - Orphaned by investors and analysts
 - Focus on quarterly results
 - Invasive regulatory schemes, e.g., compensation and proxy access
- Belief that stock is undervalued
- Voluntarily delist ahead of action by the NYSE/NASDAQ

Failure to Meet Exchange Listing Rules

- NASDAQ Global Market Marketplace Rule 5450
 - Minimum bid price \$1 per share;
 - At least 400 total holders of record; and
 - One of three tests based on float, stockholders' equity, market value
- NYSE Listed Company Manual Section 802
 - Minimum closing price of \$1/share for 30 consecutive days
 - Failure to meet initial listing standards
 - Float, number of public holders, etc.
- Minimum listing requirements were suspended through summer 2009, but the suspensions have been lifted

Considerations:

- Indentures/Agreements may require company to maintain listing on an exchange and/or filings with SEC; risk of default if not waived
- Action may require stockholder approval/special meeting to approve (depending)
- Deregistration may decrease D&O insurance costs
- Reduces liability of officers and directors, especially of certifying CEO and CFO
- Increases company's ability to keep confidential certain matters such as information regarding the company's business and business strategy
- Simplifies corporate governance requirements (i.e., no requirement for independent directors, certain committees)

Process to Go Dark

- Board Considerations
 - Directors generally owe stockholders fiduciary duties of care and loyalty
 - Heightened duties owed to creditors in the “zone of insolvency”
 - Corporate action may be challenged as taken for inappropriate purpose. Board should:
 - Establish clear business purpose for going dark, such as cost reduction, based on empirical data
 - Consider special committee process
 - Ensure plan benefits all stockholders and addresses rights of stockholders that may not have equal rights
 - No particular benefits for insiders
 - Closely monitor public disclosures and communications with stockholders re: the going dark process to ensure disclosures are complete and factually supported

Process to Go Dark

- Deregister under Section 12(g) if company has (a) 300 or fewer record holders or (b) 500 or fewer record holders and under \$10 million in assets as of the end of each of the last three fiscal years
 - Record holders
 - Once below the stockholder threshold, company must make required filings with SEC and the exchange; Required filings depend on whether reporting obligation arose from Exchange Act Section 12(b), 12(g) and/or 15(d)
- Reduce number of record holders
 - Reverse Stock Split
 - Usually requires stockholder approval and special meeting
 - Stockholders would be cashed out instead of fractional shares
 - Tender Offer or other repurchase program
 - Tender is SEC-regulated
 - Disclosure/ 10b-5 issues
 - Participation is voluntary
- Cash-out price set by board, may be lower than actual value of shares
 - Valuation and fiduciary duty issues

Voluntary Deregistration: Section 12(b) Registrants (Listed on National Exchange)

- 10 days before filing Form 25 with SEC:
 - Notice to SEC of intent to file Form 25
 - Notice to NASDAQ/NYSE, with statement of material facts relating to reasons for delisting
 - Press release regarding intent to file Form 25, file Form 8-K, publish on website until delisting effective
- File Form 25 with SEC
- Delisting effective 10 days after filing Form 25, actual termination of registration under 12(b) effective 90 days after Form 25 effective

Voluntary Deregistration: Section 12(g) Registrants (300/500+ Holders of Record)

- Even if Section 12(b) registration terminated, Section 12(g) obligations are revived.
- Most equity issuers have class of securities listed under Section 12(g)
- Terminate Section 12(g) registration with Form 15, certifying:
 - Fewer than 300 record holders; or
 - Fewer than 500 record holders and under \$10 million in assets as of the end of the last three fiscal years
 - May not file Form 15 until Form 25 effective (i.e., 10 days after filing Form 25)
- On filing, reporting obligations under Section 13(a) immediately suspended, other obligations (i.e., proxy rules, Section 16) remain until 90 days after Form 15 effective

Voluntary Deregistration:

Section 15(d) Registrants (Effective Registration Statement)

- If company ever registered securities under Exchange Act, Section 15(d) reporting obligations must also be suspended
- Under Rule 12h-3(a), company must have met reporting obligations under Section 13(a) for the shorter of (a) the last three fiscal years and the current year to date or (b) the period since the company became subject to Section 13(a)
- Under Rule 12h-3(b), company must fall below 300/500 record holder threshold
 - If less than 300 holders on first day of fiscal year in which suspension effective, suspension is automatic but company must also notify SEC by filing Form 15 within 30 days of first day of fiscal year of suspension
 - If more than 300 holders on first day of fiscal year but subsequently less than 300, file Form 15 pursuant to Rule 12h-3 to suspend obligations, certifying company has filed all required reports for most recent 3 fiscal years and current year
- If in same year suspension is sought company filed a registration statement or a registration statement is updated pursuant to Section 10(a)(3) relating to same class of securities, company cannot suspend registration under Section 15(d)
 - Reporting obligations continue for the fiscal year of withdrawal (including the 10-K due after the close of the fiscal year), unless obtain no action relief from SEC

Voluntary Deregistration: Exchange Rules

- NYSE Listed Company Manual Section 806.02 and NASDAQ Marketplace Rule 5840(j)(1)
 - Copy of board resolutions authorizing delisting
 - Comply with applicable law in effect in state of incorporation and applicable Exchange rules
 - Notice to Exchange at least 10 days before filing Form 25 with SEC, accompanied by other information
 - Issue press release
 - File Form 25 with SEC to withdraw from listing and from registration under Exchange Act

Going Private

- Process to go private:
 - Cash-out stockholders of all or substantially all company's public shares
 - Often accomplished by merger, tender offer or reverse stock split
 - Requires extensive disclosure under Exchange Act Rule 13e-3
- Expanded fiduciary duties generally apply when board decides to go private
 - Going private is viewed by SEC as one-sided transaction, heavy scrutiny (expect at least a month clearing SEC comments on disclosures); essentially no scrutiny by SEC for going dark
 - Courts typically subject going private transactions to stricter "entire fairness" standard of judicial review, rather than more deferential business judgment rule
- Although private company is no longer subject to disclosure requirements, anti-fraud laws still apply, raising potential insider trading issues

Turing Out the Lights and Failure to Meet Exchange Act Reporting Obligations

- In 2008, SEC initiated two administrative enforcement actions resulting in revocation of registration of eight companies that had failed to meet reporting obligations (Release No. 58820 (Oct. 21, 2008); Release No. 58830 (Oct. 22, 2008))
 - Companies had failed to meet filing requirements for anywhere from 9 to 16 years
 - Only one company filed a response to SEC's order initiating proceedings, other eight were summarily deregistered in an administrative proceeding, pursuant to Exchange Act Section 12(j)

**Panel II:
Actions in Light of Current Market Conditions:
Registered Direct Offerings**

Presenter: Joanne R. Soslow

Advantages

- **The Securities Offered and Purchased are Registered Securities**
 - The securities are registered under the Securities Act (and are not restricted securities). Investment banks usually act as issuer's agent, facilitating introductions to select investors.
- **Fast Alternative for Issuers with Shelf Registration Statements**
 - Issuers with effective shelf registration statements may bring the securities down from the shelf within a short timeframe.
- **Relatively Limited Documentation**
 - Registered direct offerings involve filing a free writing prospectus, a prospectus supplement and a Form 8-K which includes the transaction documents (placement agent agreement and subscription agreement).

Disadvantages

- **Public Offering – Section 11 liability**
 - Comfort letter
 - 10b-5 opinion
- **Stock Exchange Requirements are Applicable – Deemed Private Placement**
 - Registered direct offering that result (or could potentially result) in the issuance of 20% or more of outstanding common stock (including upon conversion or due to economic readjustments) at a discount will require shareholder approval.