

Question 115.02

Question: ~~In annual reports for fiscal years ending on or after December 15, 2007 but before December 15, 2009, non-accelerated filers are required to provide management's report on internal control over financial reporting pursuant to Item 308T of Regulation S-K. The report is deemed not to be "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. Does a non-accelerated filer's the failure to provide the disclosure required by Item 308(a) of Regulation S-K management's report in its Form 10-K under Item 308T(a) affect its an issuer's form Form S-3 or S-8 eligibility, the ability to incorporate by reference in Form S-1 or S-11, or the ability to use Rule 144?~~

Answer: It is the Division's view that the failure to provide this management report renders the annual report materially deficient. As a result, if management did not complete the evaluation and provide the report as required by Item 308T(a), the company would not be timely or current in its Exchange Act reporting. This would result in the company not being eligible to file new Form S-3 or ~~Form~~ S-8 registration statements, ~~the inability to incorporate by reference in Form S-1 or S-11,~~ and the loss of the availability of Rule 144. Because the filing of the Form 10-K constitutes the Section 10(a)(3) update for any effective Forms S-3 or S-8, ~~or any Form S-1 for which the issuer has elected to forward incorporate by reference pursuant to Item 12(b) of that form,~~ the company also would be required to suspend any sales under already effective registration statements.

However, if the company subsequently amends its Form 10-K to provide management's report on whether or not internal control is effective, the company can file new Forms S-8 ~~and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied).~~ Although amending the Form 10-K to provide management's report may result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. ~~Additionally, the Division will not object if the company and resumes making sales under already effective Forms S-8 or, as well as under Forms S-1 that use forward incorporation by reference, and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied).~~ In each situation, the position would be the same. ~~This would be the case~~ regardless of whether management reached an effective or ineffective conclusion about its internal control. ~~Although amending the Form 10-K to provide management's report may~~

~~result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. [July 3, 2008]~~