Question 117.05

Question: A registrant with a calendar fiscal year end has filed a Securities Act registration statement (or post-effective amendment) for which it seeks effectiveness after December 31, 2009 but before its 2009 Form 10-K is due. Must it include Item 402 disclosure for 2009 in the registration statement before it can be declared effective?

Answer: If the registration statement is on Form S-1, then it must include Item 402 disclosure for 2009 before it can be declared effective. This is because 2009 is the last completed fiscal year. Part I, Item 11(l) of Form S-1 specifically requires Item 402 information in the registration statement, which includes Summary Compensation Table disclosure for each of the registrant's last three completed fiscal years and other disclosures for the last completed fiscal year. General Instruction VII of Form S-1, which permits a registrant meeting certain requirements to incorporate by reference the Item 11 information, does not change this result because the registrant has not yet filed its Form 10-K for the most recently completed fiscal year.

On the other hand, Form S-3's information requirements are satisfied by incorporating by reference filed and subsequently filed Exchange Act documents; for example, there is no specific line item requirement in Form S-3 for Item 402 information. Accordingly, a non-automatic shelf registration statement on Form S-3 can be declared effective before the Form 10-K is due. ~~Securities Act Forms C&DI 123.01~~Securities Act Forms C&DI 114.05 addresses the situation in which a company requests effectiveness for a non-automatic shelf registration statement on Form S-3 during the period between the filing of the Form 10-K and the definitive proxy statement. [~~Feb. 16~~March 14, ~~2010~~2025]