

## One Minute Memo™



### SEC Comments On Form 8-K Financial Statement Requirements For Certain Reverse Mergers

In August 2005, new rules adopted by the Securities and Exchange Commission (SEC) relating to the use of Form 8-K by shell companies became effective. The new rules amended Item 2.01 of Form 8-K to require a former shell company, within four business days after completing a reverse merger with an operating company (an OpCo), to disclose the same detailed information about the OpCo, including financial information, as would be required to register a class of securities on Form 10 or Form 10-SB under the Securities Exchange Act of 1934, as amended (the Exchange Act), which is similar to the information about an OpCo that would be required to register securities in an initial public offering by the OpCo. The new rules also amended Item 9.01 of Form 8-K to require former shell companies to file the Form 10 or Form 10-SB financial statements with the initial Form 8-K within four business days.

Under U.S. generally accepted accounting principles and SEC accounting interpretative guidance, the OpCo is usually the accounting acquirer in a reverse merger with a public shell company, and the OpCo's financial statements become the historical financial statements of the former public shell company. Under the revised rules, a Form 8-K of a former shell company filed shortly after the OpCo's year end or quarter end would generally

not include the financial statements of the OpCo for such period. Although the exclusion of such financial statements from the Form 8-K is permissible under the rules, in a speech delivered to the 2006 AICPA National Conference, Louise M. Dorsey, the Associate Chief Accountant at the SEC's Division of Corporation Finance, recently clarified that the SEC has interpreted its rules to require that such financial statements of the OpCo be filed by an amendment on Form 8-K/A within ninety calendar days of the date that the original Form 8-K is filed.

The SEC staff has generally interpreted Exchange Act Rules 13a-1 and 13a-13 to require issuers to timely file annual reports once every 12 months and quarterly reports once every three months. In light of Rules 13a-1 and 13a-13, the SEC staff has taken the position that an OpCo should likewise not have a gap in reporting after a reverse merger with a public shell company. Consequently, if the Form 8-K of a former public shell company excludes the financial statements of the OpCo relating to a recently completed fiscal period, a amendment on Form 8-K/A must be filed as follows:

- If the recently completed fiscal period was the fiscal year end of the OpCo, then the Form 8-K/A would have to include two years of audited financial

statements for an OpCo that qualifies for S-B reporting (three years if it does not) together with all other information required by Form 10-K or Form 10-KSB, as applicable; or

- If the recently completed fiscal period was the fiscal quarter end of the OpCo, then the Form 8-K/A would have to include the latest three month and year-to-date financial statements and comparative financial statements from the prior year, together with all other information required by Form 10-Q or Form 10-QSB, as applicable. Such financial statements would not have to be reviewed by an independent auditor in accordance with Rule 10-01(d) of Regulation S-X because such financial statements were being filed in a Form 8-K/A and not a Form 10-Q or 10-QSB.

Similarly, foreign private issuers that are shell companies that file an acquisition Form 20-F within three months after the OpCo's latest fiscal year end and exclude the OpCo's financial statements from the Form 20-F will be required to provide such financial statements, together with all other information required by Form 20-F, in an amendment on Form 20-F/A within six months of the date that the acquisition Form 20-F is filed.

No certifications are required in the Form 8-K/A or Form 20-F/A because such amendments are made to file the most recent financial statements of the OpCo, which was a non-issuer at the time of the original Form 8-K or Form 20-F filing, as applicable, to avoid a lapse in reporting under Exchange Act Rules 13a-1 and 13a-13, as applicable.

A transcript of Ms. Dorsey's remarks at the AICPA conference is available online at <http://www.sec.gov/news/speech/2006/spch121206lmd.htm>. If you want to learn more about the Form 8-K requirements in connection with a reverse merger with a public shell company or have specific questions about such a matter, please contact one of the corporate securities attorneys listed on our website at [www.seyfarth.com](http://www.seyfarth.com).

Attorney Advertising. This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Copyright© 2007 Seyfarth Shaw LLP. All rights reserved.