

Reg-SK-Subpart 229.200 — Securities of the Registrant: Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters Reg. §229.201. Item 201.

(e) Performance graph.

(1) Provide a line graph comparing the yearly percentage change in the registrant's cumulative total shareholder return on a class of common stock registered under section 12 of the Exchange Act (as measured by dividing the sum of the cumulative amount of dividends for the measurement period, assuming dividend reinvestment, and the difference between the registrant's share price at the end and the beginning of the measurement period; by the share price at the beginning of the measurement period) with:

(i) The cumulative total return of a broad equity market index assuming reinvestment of dividends, that includes companies whose equity securities are traded on the same exchange or are of comparable market capitalization; provided, however, that if the registrant is a company within the Standard & Poor's 500 Stock Index, the registrant must use that index; and

(ii) The cumulative total return, assuming reinvestment of dividends, of:

(A) A published industry or line-of-business index;

(B) Peer issuer(s) selected in good faith. If the registrant does not select its peer issuer(s) on an industry or line-of-business basis, the registrant shall disclose the basis for its selection; or

(C) Issuer(s) with similar market capitalization(s), but only if the registrant does not use a published industry or line-of-business index and does not believe it can reasonably identify a peer group. If the registrant uses this alternative, the graph shall be accompanied by a statement of the reasons for this selection.

(2) For purposes of paragraph (e)(1) of this Item, the term "measurement period" shall be the period beginning at the "measurement point" established by the market close on the last trading day before the beginning of the registrant's fifth preceding fiscal year, through and including the end of the registrant's last completed fiscal year. If the class of securities has been registered under section 12 of the Exchange Act (15 U.S.C. 78l) for a shorter period of time, the period covered by the comparison may correspond to that time period.

(3) For purposes of paragraph (e)(1)(ii)(A) of this Item, the term "published industry or line-of-business index" means any index that is prepared by a party other than the registrant or an affiliate and is accessible to the registrant's security holders; provided, however, that registrants may use an index prepared by the registrant or affiliate if such index is widely recognized and used.

(4) If the registrant selects a different index from an index used for the immediately preceding fiscal year, explain the reason(s) for this change and also compare the registrant's total return with that of both the newly selected index and the index used in the immediately preceding fiscal year.

Instructions to Item 201(e):

1. In preparing the required graphic comparisons, the registrant should:

a. Use, to the extent feasible, comparable methods of presentation and assumptions for the total return calculations required by paragraph (e)(1) of this Item; provided, however, that if the registrant constructs its own peer group index under paragraph (e)(1)(ii)(B), the same methodology must be used in calculating both the registrant's total return and that on the peer group index; and

b. Assume the reinvestment of dividends into additional shares of the same class of equity securities at the frequency with which dividends are paid on such securities during the applicable fiscal year.

2. In constructing the graph:

a. The closing price at the measurement point must be converted into a fixed investment, stated in dollars, in the registrant's stock (or in the stocks represented by a given index) with cumulative returns for each subsequent fiscal year measured as a change from that investment; and

b. Each fiscal year should be plotted with points showing the cumulative total return as of that point. The value of the investment as of each point plotted on a given return line is the number of shares held at that point multiplied by the then-prevailing share price.

3. The registrant is required to present information for the registrant's last five fiscal years, and may choose to graph a longer period; but the measurement point, however, shall remain the same.

4. Registrants may include comparisons using performance measures in addition to total return, such as return on average common shareholders' equity.

5. If the registrant uses a peer issuer(s) comparison or comparison with issuer(s) with similar market capitalizations, the identity of those issuers must be disclosed and the returns of each component issuer of the group must be weighted according to the respective issuer's stock market capitalization at the beginning of each period for which a return is indicated.

6. A registrant that qualifies as a "small business issuer," as defined by Item 10(a)(1) of Regulation S-B (17 CFR 228.10(a)(1)) is not required to provide the information required by paragraph (e) of this Item.

7. The information required by paragraph (e) of this Item need not be provided in any filings other than an annual report to security holders required by Exchange Act Rule 14a-3 (17 CFR 240.14a-3) or Exchange Act Rule 14c-3 (17 CFR 240.14c-3) that precedes or accompanies a registrant's proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

8. The information required by paragraph (e) of this Item shall not be deemed to be "soliciting material" or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 – 240.14a-104 or 240.14c-1 – 240.14c-101), other than as provided in this item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically requests that such information be treated as soliciting material or specifically incorporates it by reference into a filing under the Securities Act or the Exchange Act.

Additional Information (SEC 3/14/07):

Section 5. Item 201(e) – Performance graph

Question 5.01: May a registrant plot monthly or quarterly returns in the performance graph required by Item 201(e)?

Answer: A registrant may plot monthly or quarterly returns provided that each return is plotted at the same interval, and the annual changes in cumulative total return are reflected clearly. [March 13, 2007]

Question 5.02: How should a registrant that presents in the performance graph a self-constructed peer or market capitalization index weight the returns of the component entities of that index?

Answer: A registrant that presents a self-constructed peer or market capitalization index should weight the returns of the component entities of that index according to their market capitalization as of the beginning of each period for which a return is indicated. [March 13, 2007]

Question 5.03: May a registrant-constructed peer or market capitalization index exclude the registrant?

Answer: Yes. [March 13, 2007]

Question 5.04: May issuers choose between using the price shown in the registration statement for an initial public offering, the opening price on the first trading day, or the closing market price on the first trading day when preparing the performance graph?

Answer: No. The issuer should use the closing market price at the end of the first trading day. [March 13, 2007]

Question 5.05: Is the performance graph required to be included in Form 10-K, given that Item 5 of Form 10-K indicates that the registrant is required to furnish the information required under Item 201?

Answer: No. Instruction 7 to Item 201(e) specifies that the performance graph need not be provided in any filings other than an annual report to security holders required by Exchange Act Rule 14a-3 or Exchange Act Rule 14c-3 that precedes or accompanies a registrant's proxy statement or information statement relating to an annual meeting of security holders at which directors are to be elected (or a special meeting or written consents in lieu of such meeting). [March 13, 2007]

Question 5.06: If a company includes the performance graph in its Form 10-K, can the company omit the performance graph from its annual report to shareholders required under Exchange Act Rule 14a-3 or Rule 14c-3?

Answer: The performance graph is required to be in the annual report to shareholders pursuant to Exchange Act Rule 14a-3 or Rule 14c-3, so unless the company is using a "Form 10-K wrap" approach to satisfy the requirements of Rule 14a-3 or Rule 14c-3, the inclusion of the performance graph in the Form 10-K would not satisfy these requirements. [March 13, 2007]

Question 5.07: May a registrant include the performance graph in the proxy statement?

Answer: Yes, provided that the performance graph is also included in the annual report that accompanies or precedes the proxy statement and therefore complies with Exchange Act Rules 14a-3 or 14c-3. [March 13, 2007]

5.01 As a general rule, when a registrant changes the entities comprising a self-constructed index from the index used in the prior year, the reasons for the change must be explained and the total return must be compared with that of both the newly constructed index and the prior index. See Item 201(e)(4) and Release No. 34-32723 (Aug. 6, 1993) at IV.B.1. Two limited exceptions are set forth in Release No. 34-32723. Presentation on the old basis is not required: (i) if an entity is omitted solely because it is no longer in the line of business or industry; or (ii) the changes in the composition of the index are the result of application of pre-established objective criteria. In these two cases, a specific description of, and the bases for, the change must be disclosed, including the names of the companies deleted from the new index. [March 13, 2007]

5.02 If a company becomes listed on an exchange that is different from the exchange it was listed on in the prior year, the change needs to be reflected in the performance graph if the company also changes its broad

market indices as a result. For example, if a company that had been listed on the American Stock Exchange becomes listed on a different exchange and now plans to use the S&P 500 as its broad market index rather than the American Stock Exchange Composite Index, the company must provide a narrative explanation of the change in indices and compare returns based upon the old and new index on the graph. [March 13, 2007]

5.03 In lieu of data for the last trading day prior to the end of a given fiscal year, a registrant may use data for the last day in that year made available by a third-party index provider. [March 13, 2007]

5.04 A registrant created by a spin-off may begin its Performance Graph presentation on the effective date of the registration of its common stock under Section 12 of the Exchange Act. [March 13, 2007]

5.05 A registrant that spins off a portion of its business should treat that transaction as a special dividend, make the appropriate adjustments to its shareholder return data, and disclose the occurrence of the transaction and resultant adjustments in its performance graph. [March 13, 2007]

5.06 A merger or other acquisition involving the registrant, where the registrant remains in existence and its common stock remains outstanding, does not change the presentation of the registrant's performance graph. [March 13, 2007]

5.07 A registrant with several distinct lines of business may construct a composite peer group index composed of entities from different industry groups, representing each of the registrant's lines of business (with the lines of business weighted by revenues or assets). The basis and amount of the weighting should be disclosed. Alternatively, the registrant may plot a separate peer index line for each of its lines of business. [March 13, 2007]

5.08 If a company selects its own peer group and subsequently changes the group, an additional line showing the newly selected index should be added to the performance graph. [March 13, 2007]

5.09 Companies that have a short fiscal year (for example, following an initial public offering, as the result of a spin-off, or after emerging from bankruptcy) must do a stock performance graph for the short year unless the short year is 30 days or less. [March 13, 2007]

5.10 A company is preparing its first proxy statement following its emergence from bankruptcy. The new class of stock that was issued under the bankruptcy plan started trading in March 2006. The measurement period for the graph is from March 2006 through December 2006. However, the company may plot the graph on a monthly basis and can continue the graph beyond December 2006 as long as the December 2006 plotting point is clearly shown. The same principle applies to initial public offerings and spin-off situations with a short fiscal year. [March 13, 2007]

5.11 A "published industry or line-of-business index" is one that is "accessible to the registrant's security holders" and, if prepared by the registrant or an affiliate, is also "widely recognized and used." Certain guidance concerning the use of trade group indices and of composite indices composed of more than one published index is given in Release No. 34-32723 (Aug. 6, 1993) at Section IV.B.2. Self-constructed indices (which term includes those prepared by a third party for the registrant and which are not "published") are not prohibited or discouraged by Item 201(e), they just must be weighted by market capitalization (as are most published indices) and include identification of the component issuers. See Instruction 5 to Item 201(e). [March 13, 2007]