

## SUPPORTING STATEMENT FOR RULE 12h-1

This submission pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Section 3501 et seq., consists of this supporting statement and the following exhibit:

- A. Statutory Authority
- B Rule 12h-1

### A. Justification

#### 1. Necessity of Information Collection

Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") was enacted to extend to investors in certain over-the-counter securities the same protections afforded investors in listed securities by providing that the issuers of certain securities traded over-the-counter be subject to the same requirements that applied to issuers of securities listed on an exchange. Further, Section 12(g) extended the disclosure and other Exchange Act safeguards to unlisted securities as a means to prevent fraud.

Under Section 12(g) of the Exchange Act, an issuer with 500 or more holders of record of a class of equity security and assets in excess of \$10 million at the end of its most recently ended fiscal year must register that class of equity security with the Securities and Exchange Commission (the "Commission"), unless there is an available exemption from registration. Stock options, including stock options issued to employees under stock option plans, are a separate class of equity security for purposes of the Exchange Act. Accordingly, an issuer with 500 or more optionholders and more than \$10 million in assets is required to register that class of options under the Exchange Act, absent an available exemption. While there is an exemption from Exchange Act Section 12(g) registration for interests and participations in certain other types of employee compensation plans involving securities, currently there is no exemption for compensatory employee stock options.

The Commission has exercised its authority under Section 12(h), (which allows the Commission to exempt a class of securities by rules and regulations or by exemptive order from the Exchange Act Section 12 registration requirements if it finds, by reason of the number of public investors, amount of trading interest in the securities, the number and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors), Section 23, and Section 36 (which provides that the Commission may exempt from any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of the Exchange Act to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors), to propose an exemption for private, non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under employee stock option plans where certain conditions, including certain information provision conditions, are present.

The proposed exemption would require the issuer to provide information to optionholders and holders of shares received on exercise of compensatory employee stock options. This condition would require the issuer, for purposes of the proposed exemption, to provide to optionholders (and holders of shares received on exercise of compensatory employee stock options): i) the same risk and financial information that would be required to be provided under Securities Act Rule 701 if securities sold in reliance on Securities Act Rule 701 in a 12-month period exceeded \$5 million, with the optionholders and holders of shares received on exercise of the compensatory employee stock options always having been provided required financial statements that are not more than 180 days old; and (ii) the issuer's books and records, including corporate governance documents, to the same extent that they are available to other shareholders of the issuer.

## 2. Purposes of, and Consequences of Not Requiring, the Information Collection

The purpose of the information collection is to provide holders of compensatory employee stock options in private, non-reporting issuers that are relying on the proposed exemption from Exchange Act registration of the compensatory employee stock options appropriate disclosure and investor protections under the federal securities laws. The proposed exemption would require these private, non-reporting issuer to provide information to optionholders and holders of shares received on exercise of compensatory employee stock options. The information proposed to be required would ensure that a basic level of information is available to optionholders and holders of shares received on exercise of options of these private, non-reporting issuers. If private, non-reporting issuers relying on the proposed exemption from Section 12(g) registration of the compensatory employee stock options are not required to provide this information, optionholders and holders of shares received on exercise of options would not necessarily receive important ongoing information about the company in which they hold securities.

## 3. Role of Improved Information Technology and Obstacles to Reducing Burden

The information required by the proposed amendments to Rule 12h-1 is not filed with the Commission. The proposed amendments would permit issuers to provide the required information (other than the issuer's books and records) to the optionholders and holders of shares received on exercise of compensatory employee stock options either by: (i) physical or electronic delivery of the information; or (ii) notice to the optionholders and holders of shares received on exercise of compensatory employee stock options of (x) the availability of the information on a password-protected Internet site; and (y) any password needed to access the information.

## 4. Efforts to Identify Duplication

The information proposed to be required by Rule 12h-1(f) is the information that would be required to be provided pursuant to the exemption from Securities Act registration provided in Rule 701 under the Securities Act of 1933 if securities sold in reliance on Securities Act Rule 701 in a 12-month period exceeded \$5 million. It is likely that an issuer that has 500 or more optionholders either already is obligated to provide the same information to optionholders due to

sales of securities in reliance on Securities Act Rule 701 or already prepares and, as such, provides such information to its shareholders.

5. Effect on Small Entities

The registration requirements of Section 12(g) arise only if an issuer has more than \$10 million in assets and has 500 or more holders of a class of equity security at the end of its most recently ended fiscal year. Small entities do not satisfy the asset threshold of Section 12(g) and therefore the proposed exemption would not be needed by such entities until their asset size increased to more than \$10 million at the end of a fiscal year.

6. Consequences of Less Frequent Collection

The legislative intent of Section 12(g) was to require issuers that had 500 or more holders of record of an equity security and more than \$10 million in assets as the end of its fiscal year to register under the Exchange Act and become subject to the periodic reporting requirements of that Act. The proposed exemption would eliminate the required registration provided that the conditions, including the information requirements, of the proposed exemption are satisfied. Without the information collection, the information about the private, non-reporting issuer would not be required to be provided to optionholders and holders of shares received on exercise of options.

7. Inconsistencies with Guidelines in 5 CFR 1320.5

Not applicable.

8. Consultation Outside the Agency

Rule 12h-1 is being proposed for public comment for a period ending 60 days after publication in the federal register.

9. Payments or Gift to Respondents

Not applicable.

10. Assurances of Confidentiality

Information provided to optionholders and holders of shares received on exercise of options pursuant to proposed Rule 12h-1(f) is not filed with the Commission but could be subject to confidentiality or other arrangements between and among relevant parties.

11. Sensitive Questions

Not applicable.

12. Estimate of Respondent Reporting Burden

We estimate that approximately 40 private, non-reporting issuers each year may be relying on the exemption. The proposed information requirement of the proposed exemption is estimated to take 2 hours to prepare, review, and provide. It is estimated that 25% of the 80 total annual burden hours (20 hours) will be prepared by in-house issuer personnel time. The burden estimate was based on the time and the cost of preparing and reviewing the information and making the information available to optionholders and holders of shares received on exercise of the options. The estimated burden hours are made solely for purposes of the Paperwork Reduction Act. They are not derived from a comprehensive or even a representative survey or study of the cost of Commission rules and forms.

13. Estimate of Total Annualized Cost Burden

We estimate that 75% of the 80 total annual hours (60 hours) would be prepared by an outside law firm hired by the company. It is estimated that it will cost \$400 per hour (\$400 x 60) for a total of \$24,000 hours. The estimated burden is made solely for purposes of the Paperwork Reduction Act. It is not derived from a comprehensive or even a representative survey or study of the cost of Commission rules and forms.

14. Estimate of Cost to Federal Government

No special filing is required to be made with the government under the proposed rule, so no cost is attributed to the review and processing of the information.

15. Explanation of Changes in Burden

Not applicable.

16. Information Collections Planned for Statistical Purposes

Not applicable.

17. Explanation as To Why Expiration Date Will Not Be Displayed

Not applicable.

18. Exceptions to Certification

Not applicable.

B. Collection of Information Employing Statistical Methods

Not applicable.