NIRI Boston Chairman's Award 2004

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National Investor Relations Institute BOSTON CHAPTER

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TO FILE AN 8-K OR NOT TO FILE AN 8-K – THAT IS THE QUESTION?!

By Lisa V. DeScenza

Since the Securities and Exchange Commission amended their Form 8-K procedure in late August under the Sarbanes-Oxley Act of 2002, Section 409, the question of whether or not to file an 8-K has become increasingly foggy. Most of the new items that now require disclosure involve timely judgments to be made by the company, which can be difficult when you are caught up in trying to manage the triggering event itself.

The SEC's goal is to establish rules that force companies to disclose material information as quickly as possible. As part of this ruling, the SEC has shortened the period to disclose material events to four days. In the past, it has been either five business days or 15 calendar days depending on the type of triggering event.

In an effort to help you navigate through the fog, the following is a summary of the new items under this requirement. We have also included some ideas of how to quickly identify whether a Form 8-K is necessary and file it within the new time limit of four days after the triggering event.

New Trigger Events*

- Entry into or termination of a material non-ordinary course agreement;
- Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Triggering events that accelerate or increase the material direct financial obligation or a material obligation under an off-balance sheet arrangement;
- Incurring material costs associated with exit or disposal activities;
- Concluding that an asset is materially impaired;
- Receipt of notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing; and
- Concluding or being notified of non-reliance on previously issued financial statements or a related audit report or completed interim review (restatements).

Expanded Trigger Events*

- Departure of directors or principal officers, election of directors or appointment of principal officers; and
- Amendments to Articles of Incorporation or Bylaws or change in fiscal year.

Trigger Events Transferred, in part, from Periodic Reports*

- Unregistered sales of equity securities; and
- Material modifications to rights of security holders.

Now, where does Safe Harbor come into play with these new rules? Since companies are concerned that they may not be able to react quickly enough to meet these new requirements of the shorter time window thus increasing their potential liability, the SEC adopted a limited Safe Harbor that only pertains to the company's obligation to file the Form 8-K but not any other disclosures about the event being described in the report. Any material omissions or misstatements that are filed in the Form 8-K cannot take advantage of the Safe Harbor provision and are subject to Exchange Act Section 10(b) and Rule 10b-5 liability. Also, it is important to note that Safe Harbor only covers the company up until the date of its 10-Q or 10-K in which the 8-K should have been filed.

The particular items* covered under Safe Harbor are:

- Material definitive agreement or termination of such agreement
- Direct financial obligations and off-balance sheet arrangements
- Triggering event accelerating or increasing obligations
- Exit or disposal activities
- Impairments
- Non-reliance of determinations made by registrants, not auditors

* Lists taken from KMZ Rosenman Client Advisory dated July 2004.

Also, it is important to note that timely filings of Forms 8-K related to those items listed above under Safe Harbor do not affect the eligibility to file Forms S-2 and S-3 provided that the company is current on its 8-K filings. This ruling also does not affect the company's eligibility to sell securities under Rule 144.

Thinking ahead, what can we do to prepare ourselves in advance of filing a Form 8-K?

1. Appoint a group of individuals who would have the best direct knowledge of a potential triggering event and have them become familiar with the summary of events listed above. Lou Thompson, President and CEO of NIRI, suggests including your investor relations officer, general counsel, chief financial officer and corporate communications officer, if applicable. One person in this group should be responsible for gathering the information and actually filing the report with the SEC.
2. Build disclosure requirements into your contract negotiations and transaction approval processes. That way all of the information necessary to put together the 8-K will be compiled prior to the triggering event, and you should be able to make the four day deadline.
3. If the triggering event involves any change in financial statements, consult with your auditors prior to the triggering event.

If you plan ahead of your triggering events, you should be able to successfully navigate through the fog of these new Form 8-K disclosure rulings.

NIRI BOSTON PROGRAM CALENDAR OF UPCOMING EVENTS

Date	Program
Thursday, Nov. 18, 2004	**"Issues in Shareholder Communications"** Guest Speaker: Henry Blodget, former sell-side internet analyst at Merrill Lynch. Evening program at the Doubletree Guest Suites in Waltham, MA
Wednesday, Dec. 15, 2004	**Holiday Social -** **"Come Get Bowled Over by NIRI!"** An evening of bowling and networking at Kings, 10 Scotia Street, Boston, MA 6:00 pm cocktail hour begins, 7pm to 9pm Bowling, dinner and more networking

Unless otherwise indicated in the formal invitation sent prior to each event, monthly chapter meetings are held at the Doubletree Guest Suites, 550 Winter Street, Waltham, Massachusetts 02154. (781) 890-6767. The hotel is located just off Route 128 (Exit 27B) in Waltham.

SEPTEMBER MEETING FOCUSES ON STRATEGIC IR ISSUES

On September 14th, NIRI Boston kicked off its new programming year in Boston's Financial District at the Downtown Club. The event featured moderators that facilitated discussions about many of the issues and challenges IROs face in their companies every day. The evening gave IROs a forum to discuss how companies in the area have dealt with issues ranging from compliance, to interacting with the buy-side to industry specific topics. The meeting was part of the Boston Chapter's effort to encourage more networking and participation among corporate IROs. Below, we have summarized the key takeaways that came out of each discussion.

INTEGRATING INVESTOR RELATIONS AND PUBLIC RELATIONS

The discussion focused on the "Integration of Investor Relations and Public Relations." The conversation began with all agreeing that the success of any public company's corporate communications plan relies on the effective integration of IR and PR.

No longer can a communications professional focusing solely on IR or PR distribute a targeted message to one – and only one – audience. Today, given the overlap in a company's audiences, i.e., employees are now often shareholders, and the speed and access to information across all mediums, especially the internet, a company must speak with one voice and one set of messages to all constituencies.

The second observation the group had was that management, in general, has become more conservative in all forms of their communications over the past year or two – including both IR and PR. The group believed this to be the result of both the "stop and start" economy, which has impacted many companies' ability to accurately forecast results, and the seemingly disproportionate punishment a company's stock receives when disappointing news is delivered - thus leaving us with the "better safe than sorry" attitude. The ubiquity of the Internet, the power of the business media and the rise of the individual investor have blurred the lines between traditional IR and PR audiences. Institutional investors, individual investors, analysts, employees, partners and customers all receive corporate information directly or indirectly from the same channels. Therefore, while communications still can be targeted to a primary audience, the consistency of the message is essential.

So how do IR and PR practitioners work together to build and maintain a cohesive corporate story? At organizations with multiple people responsible for the IR and PR functions, the challenge of integration and message consistency can be difficult. All at the table agreed that the respective heads of IR and PR need to institute formal or informal internal communication processes to ensure success. For example, some companies exchange drafts of external communications between IR and PR as a component of the overall approval process. Others hold weekly meetings to provide updates, share ideas and discuss messaging strategies.

The participants at the table said that informal internal processes have been successful at their companies. However, they cautioned that for informal processes to be effective, the IR and PR professionals must be able to work well together.

Everyone agreed that it may be easier to integrate IR and PR at a very small organization, because, chances are, one person wears both the IR and PR hats. Therefore, it is easier for messages to be consistent in news releases, conference call scripts, marketing collateral and other external communications.

In each case at the table, IR and PR professionals had been working effectively together to deliver a unified message, and each person agreed that this was critical to their companies' success.

SELL-SIDE ISSUES

Aided by two former sell-side analysts, the group's discussion focused on three main points: the current structure and trends in the sell-side, the fluctuating value of sell-side coverage, and ideas to target the sell-side. Everyone agreed on the following: #1. Recent regulatory changes have significantly negatively affected the reputation of sell-side analysts, but the industry is cyclical, and may bounce back; #2. The best and the brightest professionals were fleeing to the buy-side; #3. The separation from banking was continuing to spawn independent research firms; #4. Under the new compensation structure, the sell-side is now spending the much of its time on the road bringing company management to investors, rather than doing research.

So what does this mean to IROs? Most of us concluded that the diminished reputation of the sell-side had increased our work load. This was not only due to the increased demands of the buy-side, but also because of the time pressures on the analysts and their relative lack of experience. This is requiring more education and hand holding of investors by IROs. Everyone was surprisingly positive about their experiences with independent research, maintaining that it does hold value, but that the value really depends on the quality of the individual analyst, their reputation and their distribution reach.

The remainder of the discussion focused on best practices for targeting. Above all, it was suggested that IROs understand their peer group as seen by the sell-side and be able to identify the appropriate analysts for coverage. We discussed obtaining "informal" coverage through the provision of valuable industry information to analysts that follow your peer group; hosting analyst meetings and ensuring inclusion of industry experts and third parties to boost perception of your company's expertise in the industry; soliciting your top investors' opinions on who they see as valuable on the sell-side and then enlisting their help in spreading information about your company; and finally, participating in sell-side and industry conferences. Lastly, we talked about the value of relationship building, being respectful of the limited resources available to many analysts these days, and fostering good relationships with junior analysts, who may very well be given their own coverage universe over time and/or may end up moving on and being the star analysts of tomorrow.

BUY-SIDE ISSUES

The buy-side table, which included IROs from companies as small as $300 million to as large as $15 billion, discussed current issues affecting communications with the buy-side, how best to interact with investors, and why IROs enjoy working with the portfolio managers and analysts who invest in our companies.

A lot of good talent is joining the investment side of the house – from seasoned sell-side analysts migrating over to the buy-side, to recent MBAs entering the field. Therefore it pays for IROs to have an astute understanding of what works best in attracting interest from Wall Street. This means telling your company's story in a way that makes sense. If your story is EPS growth, then IROs must focus on that metric to market to the buy-side. However, if your company is a slow and steady performer, then you should be highlighting the predictability of your earnings.

When interacting with the buy-side, there is no substitute for face-to-face meetings. One of the buy-side's key skills is targeting a stock before they proactively request a meeting. Therefore, assuming their investment style fits the current profile of your company, there is a high probability that a one-on-one meeting would be productive for your management team. Although the buy-side always prefers to meet primarily with the CFO or

CEO, IROS must determine when it makes sense to conduct meetings on their own without executive management involvement.

The group also discussed the difficulty in saying ‘no’ to the buy-side. “No, we don’t provide earnings guidance,” or “No, I cannot arrange a conversation with our Big Customer.” Although it may be difficult at first, investors understand you cannot always provide every piece of information they request. And it gets easier to say no the second, third and fourth time.

Finally, as IROs we understand we cannot be responsible for operational results, but we must maximize the value of our companies by maximizing interaction and positively influencing the discourse with the buy-side.

TECHNOLOGY PRODUCTS & SERVICES

This discussion had a mix of IROs and vendors, and discussed a wide range of technology services and products available to IR practitioners. Topics included: Nasdaq Online and its sister NYSE product offering 13F, momentum, and targeting data; Research from companies like First Call, Multex, and Reuters; Businesswire and PRNewswire offering 8K filings and EDGAR; Conference Calls where slides and management photos are sometimes used; one-on-one days at corporate offices; IR sections of websites where visitors can send emails to Board of Directors members, as well as internal websites for senior management and board members only; the Whistleblower hotline mandated by Sarbanes Oxley; and the potential deletion of old drafts of news releases, conference call scripts, etc.

CURRENT TRENDS/ ISSUES AFFECTING LIFE SCIENCES

The first issue that we discussed was whether or not to pay for conferences. Conversation included pro/cons involved for these pay for access conferences. For example, the group discussed if you have sufficient analytical coverage, then you probably would not consider paying for conferences because your analysts will invite you to their conferences. The point was raised, however, that it may make sense if it is a good conference and you need exposure. IROs at the table agreed that most of the time in the life sciences industry you are selling a story not an earnings stream. An additional challenge is that within the life sciences there is further stratification such as Biotech, Pharma, Biopharma, Med Device, Diagnostics etc. This requires IROs to define their companies’ sector and discuss how your company is able to differentiate itself in that sector. The vast diversification of the industry can make it difficult for the IRO to tell their companies’ stories.

Another discussion arose around the challenges for life science companies answering to not only the SEC but also to the FDA. Balancing the two can be tough. Related to this is the fact that you have to be extremely careful of the wording that you use regarding medical trials/information. For example you are not allowed to promote off-label use of a product regardless of how successful it may be in that off-label area.

In addition, even the mention of using embryonic cells could affect your company in the eyes of investors. And we all are aware of the actions of the animal rights activists who reject animal testing. Clearly, there are serious ramifications of word choice.

The group agreed that there is a rising interest in socially responsible investing. In addition to the traditional rules for companies when they are considering an investment, questions regarding social responsibility have found their way into conversations. To be prepared to answer these and many other “hot” issues types of questions it is always good practice to have a crisis communication plan ready to go, if the need arises.

Metrics for life sciences were discussed to be a little different than for other industries as well. Investors want to see a healthy pipeline, clinical trial success, many visible milestones/benchmarks, a good balance sheet, strong cash balances and strength of the management team in the life sciences. It was noted that just because a product achieved FDA approval, that there are still significant hurdles to cross within the life sciences, such as product recall, and newer, better drugs/products, so your pipeline is extremely important to continue to fuel a company’s success.

Career development was also discussed for life science members. It was discovered that most IROs did not have a science education or experience, but were able to be quick studies and apply their IR experience to the job, and learn the details. It was noted that there are other IROs that have never strayed from the life science industry believing that the learning curve would be difficult without any relevant “science” experience.

CAREER DEVELOPMENT

The group in this discussion was wide ranging, including experienced IR professionals, those looking to transition into an IR position, people that are between job assignments, and an experience communications recruiter. In addition to sharing some “war stories” and job hunting strategies, the discussion focused on what constitutes an IR career path and translating other professional experiences into distinguishing attributes to an IRO. The group concluded that the IR profession is continuing to grow and evolve with no uniformly predetermined career path. This puts a significant emphasis on the individual’s ability to be flexible and adaptable in meeting new challenges as well as gaining experience valued by employers.

SMALL-CAP AND MICRO-CAP ISSUES

At the microcap and smallcap issues table, a number of relevant trends and opportunities for smaller public companies to increase their visibility were discussed by both corporate and agency practitioners. The lack of sell-side research was bemoaned by a number of participants as a potential impediment to increasing interest within the investment community. While generating sell-side research from larger investment firms and boutiques can take a long time, contracting research from an independent research firm might be something to consider. In the right context, at the right price, paying for research can provide important third-party analysis of your firm – although several warned strongly against enlisting a firm to perform research in exchange for stock or warrants in the company. Different investor forums and conferences in which public companies tell their stories to a targeted audience of either institutional investors or brokers – or a combination of both – also represented another avenue to building visibility. The quality of these conferences – most of which require the participating company to pay the conference organizer for the opportunity to present – can vary widely depending on location, time of year, theme and overall participation level of other public companies. Related to this are industry associations in which one of the benefits to membership includes participation in the organization’s investor conference. For example, the American Electronics Association holds a very well-attended investor conference that attracts both the buy and sell-side. Alternatively, the table also reviewed strategies for public companies to take their stories directly to individual investors and investment clubs through involvement in organizations such as the National Association of Investors Corporation. Another valuable approach to building broader support is to enlist your firm’s current shareholders, and use them to generate leads about firms that may have an interest in your company.

EDITORIAL CALENDAR

It is the objective of the Communications Committee to make this publication a user-friendly source of timely information aimed at briefing members and other interested parties on any current events relating to the practice of Investor Relations.

Please contact any of the Communications Committee members with comments, suggestions or story ideas. Story ideas in the form of a brief outline may be submitted in writing to any member of the Communications Committee.

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