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ANNUAL REPORT SEASON IS A GOOD TIME TO REVIEW YOUR REGISTRATION STATEMENTS

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When a public company files its Annual Report on Form 10-K, it is deemed to have automatically updated its Securities Act registration statements that incorporate the Form 10-K by reference. These include, for example, Form S-8s and Form S-3s. This automatic update occurs even if the offering initially registered on such registration statement is no longer taking place (for example, a Form S-8 covering a stock option plan that has terminated where there are no outstanding options).

A potentially adverse impact of this automatic update is that it can prevent the company from suspending its periodic filing obligations with the SEC if it desires to do so before filing its next Form 10-K. Under SEC rules, even if a company otherwise meets the requirements to suspend its filing obligations (for example, by having less than 300 holders of record), it generally cannot voluntarily suspend its filing obligations if it had any Securities Act registration statement that has gone effective, or been updated by filing an annual report on Form 10-K, during the course of the year. In effect, this means that if a company has a Form S-8 or Form S-3 on file, every time it files an annual report on Form 10-K, it is committing itself to filing reports for the rest of that fiscal year, including the Form 10-K for that fiscal year.

Recommendation. In connection with filing each Form 10-K, we recommend the company review its outstanding registration statements to determine whether the offering pursuant to those registration statements is continuing. If not, and any shares registered pursuant to the registration remain unsold, the company should file a post-effective amendment to terminate the offering and deregister any shares that have not been sold before filing that year's Form 10-K. The SEC will not permit a public company that has registered an offering under the Securities Act to suspend its reporting obligations unless all prior Securities Act registration statements have been terminated, even those that went effective years in the past.