

ADVO INC
Form 11-K
June 28, 2005
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FORM 11-K

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

(Mark One)

Annual Report pursuant to Section 15(d) of the Securities Exchange Act of 1934

For the year ended December 31, 2004

or

Transition Report Pursuant to Section 15(d) of the Securities Exchange Act of 1934

For the transition period from _____ to _____

Commission file number 1-11720

ADVO, Inc. 401(k) Savings Plan (Plan Number 004)

(Full title of the plan)

ADVO, Inc.

One Targeting Centre

Windsor, CT 06095

**(Name of issuer of the securities held pursuant to the plan
and the address of its principal executive offices)**

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ADVO, Inc. 401(k) Savings Plan (Plan Number 004)

Annual Report

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All other schedules required by 29 CFR 2520.103-10 of the Department of Labor's Rules and Regulations for Reporting and Disclosure under the Employee Retirement Income Security Act of 1974 have been omitted because they are not applicable.

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Report of Independent Registered Public Accounting Firm

To the Plan Administrator of

ADVO, Inc. 401(k) Savings Plan (Plan Number 004):

We have audited the accompanying statement of net assets available for benefits of the ADVO, Inc. 401(k) Savings Plan (Plan Number 004) (the Plan) as of December 31, 2004 and the related statement of changes in net assets available for benefits for the year then ended. These financial statements are the responsibility of the Plan's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with standards of the Public Company Accounting Oversight Board of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the net assets available for benefits of the Plan as of December 31, 2004 and the changes in net assets available for benefits for the year then ended in conformity with accounting principles generally accepted in the United States of America.

Our audit was performed for the purpose of forming an opinion on the financial statements taken as a whole. The accompanying supplemental Schedule H, line 4i Schedule of Assets (Held at End of Year) as of December 31, 2004, is presented for purposes of additional analysis and is not a required part of the financial statements but is supplementary information required by the Department of Labor's Rules and Regulations for Reporting and Disclosure under the Employee Retirement Income Security Act of 1974. The supplemental schedule is the responsibility of the Plan's management. The supplemental schedule has been subjected to the auditing procedures applied in our audit of the financial statements and, in our opinion, is fairly stated in all material respects in relation to the financial statements taken as a whole.

/s/ Fiondella, Milone & LaSaracina LLP

Manchester, Connecticut

June 17, 2005

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ADVO, Inc.

401(k) Savings Plan (Plan Number 004)

Statement of Net Assets Available for Benefits

	<i>December 31, 2004</i>
Assets	
Participant-Directed Investments:	
Mutual Funds, at Fair Value	\$ 6,683,628
ADVO Stock Fund	434,672
Participant Loans	199,385
Total Participant-Directed Investments	7,317,685
Receivables:	
Employee Contributions	35,115
Employer Contributions	7,379
Total Receivables	42,494
Net Assets Available for Benefits	\$ 7,360,179

The accompanying notes are an integral part of these financial statements.

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ADVO, Inc.

401(k) Savings Plan (Plan Number 004)

Statement of Changes in Net Assets Available for Benefits

	<i>Year Ended</i> <i>December 31, 2004</i>
	<hr/>
Additions to assets attributed to:	
Investment income:	
Net realized and unrealized appreciation in fair value of investments	\$ 713,025
Interest and dividends	142,499
Contributions:	
Employee	915,035
Employer	265,752
Employee rollover	117,453
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Total Additions	2,153,764
Deductions to assets attributed to:	
Benefit payments	760,843
Administrative expenses	60
	<hr/>
Total Deductions	760,903
Net increase in assets before transfers (to)/from other plans	1,392,861
Transfers (to)/from other plans:	
Transfer in of Plan assets from ADVO, Inc. 401(k) Savings Plan (Plan Number 001)	5,967,318
	<hr/>
Net increase in net assets available for benefits	7,360,179
Net assets available for benefits:	
Beginning of the year	
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End of the year	\$ 7,360,179
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The accompanying notes are an integral part of these financial statements.

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ADVO, Inc.

401(k) Savings Plan (Plan Number 004)

Notes to Financial Statements

December 31, 2004

1. Description of the Plan

The following description of the ADVO, Inc. 401(k) Savings Plan (Plan Number 004) (the Plan) provides only general information. Participants should refer to the Plan agreement for a more complete description of the Plan 's provisions.

Effective January 1, 2004, the ADVO, Inc. 401(k) Savings Plan (Plan Number 001) was split into two separate plans identical in all respects except for employer match limitations and associate groups. An eligible associate of the newly established Plan, ADVO, Inc. 401(k) Plan (Plan Number 004), is any non-highly compensated sales associate of the Company and the maximum amount of pay that will be taken into account for employer matching contributions for the plan year is \$50,000. Effective May 18, 2004, the account balances of non-highly compensated sales associates were transferred into the Plan from the ADVO, Inc. 401(k) Savings Plan (Plan Number 001).

General

The Plan is a defined contribution plan covering non-highly compensated sales associates (participants) of ADVO, Inc. (the Company). Participants are eligible to join the Plan on the first day of the month following the date of hire. Participants are eligible for the Company match on the first day of the month following six months of continuous employment.

The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Contributions

Participants may contribute up to 16 percent of their annual compensation on a pretax basis, as defined in the Plan up to the annual IRS limits. Participants may also contribute amounts representing rollover distributions from other defined contribution plans.

The Company contributes 100 percent of the first 6 percent of a participant 's pay deferral contributions to the Plan limited to \$50,000 maximum annual compensation.

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All investment programs are fully participant directed. Participants direct the investment of their and the Company's contributions into various investment options offered by the Plan. The Plan currently offers fifteen investment options: primarily mutual funds and a fund with Company common stock.

Participant Accounts

Each participant's account is credited with the participant's contribution, the Company's matching contribution, and the Plan's earnings. The benefit to which a participant is entitled is the benefit that can be provided from the participant's account.

Vesting

Participants are immediately vested in their voluntary contributions and related employer matching contributions plus actual earnings thereon.

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ADVO, Inc.

401(k) Savings Plan (Plan Number 004)

Notes to Financial Statements

December 31, 2004

Payment of Benefits

Upon termination of service, participants may elect to receive a lump-sum amount equal to the value of their account.

Loans

Participants may borrow from their fund accounts a minimum of \$1,000 up to a maximum equal to the lesser of \$50,000 or 50 percent of their account balance. The loans are secured by the balance in the participant's account and bear interest at a rate commensurate with local prevailing rates as determined quarterly by the plan administrator. Principal and interest are paid ratably through monthly payroll deductions.

Expenses of the Plan

Fees and expenses relating to the operation and administration of the Plan are paid by the Company. Loan setup, loan maintenance and loan withdrawal fees are deducted from the accounts of the participants who make the loan or withdrawal.

ADVO Stock Fund

The ADVO Stock Fund is an unregistered custom separate account maintained by the Trustee and established by the Company for the benefit of the Plan and any other qualified plan of the Company. Ownership is represented by each plan's proportionate units of participation.

Although the performance of the ADVO Stock Fund is based on the performance of the underlying Company common stock, the value of a fund unit is different from the price of one share of common stock. Changes in the unit value of the fund will be affected by price changes in the common stock, earnings, dividends, interest and applicable fees and expenses of the fund. Additionally, the fund maintains highly liquid money market instruments which may contribute to differences in performance between the fund units and net asset value of the underlying common stock.

2. Summary of Accounting Policies

Basis of Accounting

The financial statements have been prepared on the accrual basis of accounting.

Valuation of Investments

The fair value of investments in mutual funds is based on the quoted market prices which represent the net asset values of shares held in these funds at year-end.

The fair value of investments in the ADVO Stock Fund is based on the net asset value (NAV) of participation units held by the Plan at year-end. These NAVs are calculated based on the current market value of the underlying securities and the current number of units by participants in these funds.

Participant loans are stated at their outstanding principal balances which approximate fair value.

Table of Contents**ADVO, Inc****401(k) Savings Plan (Plan Number 004)****Notes to Financial Statements****December 31, 2004****Use of Estimates**

The preparation of financial statements in conformity with generally accepted accounting principles requires plan management to make estimates and assumptions that affect the amounts reported in the financial statements and accompanying notes. While management believes that the estimates and related assumptions in the preparation of these financial statements are appropriate, actual results could differ from those estimates.

3. Investments

The Plan's investments are primarily held by bank-administered trust funds. The following table presents the fair value of investments. Investments that represent 5% or more of the Plan's assets available for benefits are separately identified by the following *.

	December 31, 2004
PIMCO Total Return	\$ 128,727
Calamos Growth Fund - Class A	1,200,315*
Fidelity Equity Income Fund	138,892
Fidelity Balanced Fund	782,098*
Fidelity Diversified International Fund	523,919*
Fidelity Dividend Growth Fund	783,593*
Fidelity Small Cap Stock Fund	766,762*
Fidelity Income Fund	10,861
Fidelity Freedom 2010 Fund	26,507
Fidelity Freedom 2020 Fund	153,777
Fidelity Freedom 2030 Fund	73,908
Fidelity Freedom 2040 Fund	57,545
Fidelity Retirement Money Market Portfolio	626,583*
Spartan U.S. Equity Index Fund	1,410,141*
ADVO Stock Fund	434,672*
Participant Loans	199,385
TOTAL	\$ 7,317,685

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ADVO, Inc
401(k) Savings Plan (Plan Number 004)
Notes to Financial Statements
December 31, 2004

During 2004, the Plan's investments (including investments purchased, sold as well as held during the year) appreciated in fair value as determined by quoted market prices as follows:

	Net Realized and Unrealized
	Appreciation In Fair
	Value of Investments
	2004
Mutual Funds	\$ 661,452
ADVO Stock Fund	51,573
	\$ 713,025

4. Risks and Uncertainties

The Plan invests in various investment securities. Investment securities are exposed to various risks such as interest rate, market and credit risks. Due to the level of risk associated with certain investment securities, it is at least reasonably possible that changes in the value of investment securities will occur in the near term and that such changes could materially affect participants' account balances and the amounts reported in the Statement of Net Assets Available for Benefits.

5. Income Tax Status

The Plan has applied for but has not received a determination letter from the Internal Revenue Service stating that the Plan is qualified under Section 401(a) of the Internal Revenue Code. However, the plan administrator believes that the Plan is qualified and, therefore, the related trust is exempt from taxation.

6. Plan Termination

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Although it has not expressed any intent to do so, the Company has the right under the Plan to discontinue its contributions at any time and to terminate the Plan subject to the provisions of ERISA. In the event of plan termination, participants will remain 100 percent vested in their accounts. After payment of expenses, distributions would be made pro rata based on the value of such accounts.

7. Party-in-Interest

Fidelity Management Trust Company is the trustee and custodian as defined by the Plan. Therefore, transactions in various Fidelity investment funds qualify as party-in-interest transactions.

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ADVO, Inc. 401(k) Savings Plan

Employer Identification Number 06-0885252, Plan Number 004

Schedule H, Line 4i Schedule of Assets (Held at End of Year)

December 31, 2004

(a)	(b) Identity of Issue, Borrower, Lessor or Similar Party	(c) Description of Investment	(d) Cost	(e) Current Value
*	PIMCO	Total Return Administrative Class, 12,065 shares	**	\$ 128,727
*	Calamos	Growth Fund Class A, 22,656 shares	**	1,200,315
*	Fidelity	Equity Income Fund, 2,632 shares	**	138,892
*	Fidelity	Balanced Fund, 43,889 shares	**	782,098
*	Fidelity	Diversified International Fund, 18,293 shares	**	523,919
*	Fidelity	Dividend Growth Fund, 27,504 shares	**	783,593
*	Fidelity	Small Cap Stock Fund, 42,223 shares	**	766,762
*	Fidelity	Freedom Income Fund, 964 shares	**	10,861
*	Fidelity	Freedom 2010 Fund, 1,946 shares	**	26,507
*	Fidelity	Freedom 2020 Fund, 11,016 shares	**	153,777
*	Fidelity	Freedom 2030 Fund, 5,249 shares	**	73,908
*	Fidelity	Freedom 2040 Fund, 6,958 shares	**	57,545
*	Fidelity	Fidelity Retirement Money Market Portfolio, 626,583 shares	**	626,583
*	Spartan	U.S. Equity Income Fund, 32,901 shares	**	1,410,141
*	ADVO, Inc.	ADVO Stock Fund, 10,168 units	**	434,672
*	Participant Loans	Loans to participants bear interest rates ranging from 5.25% to 10.50%.	**	199,385
				\$ 7,317,685

* Denotes a party-in-interest.

** Cost information may be omitted with respect to participant directed transactions under an individual account plan.

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SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the ADVO, Inc. Associate Savings Committee has duly caused this annual report to be signed on its behalf by the undersigned hereunto duly authorized.

ADVO, Inc.
401(k) Savings Plan (Plan Number 004)

Date: June 28, 2005

By: /s/ JOHN D. SPERIDAKOS

John D. Speridakos
Vice President and Controller

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ze="2">900,000 4,020,705 22.3% 18.2% 54-58 Park Street,
Sydney
NSW 2000, Australia

Nelson Peltz(3)
4,082,163 1,200,000 2,882,163 18.5% 13.1% c/o Triarc Companies, Inc.
280 Park Avenue
New York, NY 10017
Peter W. May(4)

2,977,453 1,000,000 1,977,453 13.5% 9.0% c/o Triarc Companies, Inc.
280 Park Avenue
New York, NY 10017
Triarc Companies, Inc.(5)

2,002,865 600,000 1,402,865 9.1% 6.4% 280 Park Avenue
New York, NY 10017

DWG Acquisition Group, L.P.(6)
2,002,865 600,000 1,402,865 9.1% 6.4% c/o Triarc Companies, Inc.
280 Park Avenue
New York, NY 10017

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Name of Beneficial Owner	Number of Shares of Common Stock Beneficially Owned Before This Offering(1)	Number of Shares of Common Stock Included in This Offering	Number of Shares of Common Stock Beneficially Owned After This Offering(1)	Percent Beneficially Owned Before This Offering	Percent Beneficially Owned After This Offering
Madison West Associates Corp.(7) c/o Triarc Companies, Inc. 280 Park Avenue New York, NY 10017	1,901,590	600,000	1,301,590	8.6%	5.9%
Neale M. Albert(8) c/o Paul, Weiss, Rifkind, Wharton & Garrison 1285 Avenue of the Americas New York, NY 10019	1,540,898	400,000	1,140,898	7.0%	5.2%
Robert M. Whyte(9) c/o Audant Investments Pty Limited Level 4 Quay West 111 Harrington Street Sydney NSW 2000, Australia	1,100,897	200,000	900,897	5.0%	4.1%
Eric D. Kogan(10) c/o Clarion Capital Partners, LLC 110 East 59th Street New York, NY 10022	226,744	150,000	76,744	1.0%	*
Edward P. Garden(11) c/o Triarc Companies, Inc. 280 Park Avenue New York, NY 10017	57,385	57,385		*	
Brian L. Schorr Amy B. Schorr(12) c/o Triarc Companies, Inc. 280 Park Avenue New York, NY 10017	27,189	27,189		*	
Carl C. Gregory, III(13) c/o Encore Capital Group, Inc. 5775 Roscoe Court San Diego, CA 92123	258,811	76,716	182,095	1.2%	*
Barry R. Barkley(14) c/o Encore Capital Group, Inc. 5775 Roscoe Court San Diego, CA 92123	153,829	23,000	130,829	*	*
J. Brandon Black(15) c/o Encore Capital Group, Inc. 5775 Roscoe Court San Diego, CA 92123	139,248	50,284	88,964	*	*

* indicates ownership of less than 1%.

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- (1) The numbers and percentages shown include the shares of common stock actually beneficially owned as of July 31, 2004, and the shares of common stock that the person or group had the right to acquire within 60 days of such date. In calculating the percentage of ownership, all shares of common stock that

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the identified person or group had the right to acquire within 60 days of July 31, 2004, upon the exercise of options are deemed to be outstanding for the purpose of computing the percentage of the shares of common stock owned by such person or group, but are not deemed to be outstanding for the purpose of computing the percentage of the shares of common stock owned by any other person.

- (2) According to Amendment No. 8 to Schedule 13D filed on October 22, 2003 by Consolidated Press International Holdings Limited (CPIHL) and C. P. International Investments Limited (CPII) to further supplement and amend the Schedule 13D originally filed by CPIHL and CPII on February 22, 2000, as supplemented and amended by Amendment No. 1 dated March 22, 2001, by Amendment No. 2 dated August 28, 2001, by Amendment No. 3 dated February 27, 2002, by Amendment No. 4 dated April 18, 2002, by Amendment No. 5 dated August 26, 2003, by Amendment No. 6 dated August 29, 2003, and by Amendment No. 7 to Schedule 13D filed on September 29, 2003, each of CPII and CPIHL may be deemed the beneficial owners of these shares. The shares reported include 4,920,705 shares directly owned by CPII. CPII has sole voting and dispositive power with respect to these shares. Of the shares included in this offering, 900,000 are being offered by CPII.

- (3) According to Amendment No. 5 to Schedule 13D filed on October 23, 2003 by Madison West Associates Corp. (Madison West), Triarc Companies, Inc. (Triarc), Nelson Peltz, Peter W. May, Neale M. Albert and DWG Acquisition Group, L.P. (DWG) to further supplement and amend the Schedule 13D originally filed by such reporting persons on March 4, 2002, as supplemented and amended by Amendment No. 1 dated November 1, 2002, by Amendment No. 2 dated September 8, 2003, by Amendment No. 3 dated September 30, 2003 and by Amendment No. 4 to Schedule 13D filed on October 9, 2003 (as so supplemented and amended, the Madison West 13D), Mr. Peltz is a co-trustee of the Nelson Peltz Children's Trust (the NP Trust) and a general partner of the Peltz Family Limited Partnership (the Peltz LP) and in such capacity shares voting and dispositive power over the 581,310 shares of common stock directly owned by the NP Trust and the 1,497,988 shares directly owned by the Peltz LP. As the indirect beneficial owner of approximately 38.5% of the outstanding voting common stock of Triarc, Mr. Peltz shares voting and dispositive power with Triarc, Mr. May and DWG over the 2,002,865 shares of common stock beneficially owned by Triarc (see note (5) below). As a result, pursuant to Rule 13d-3 of the Securities Exchange Act of 1934 (Rule 13d-3), Mr. Peltz may be deemed the indirect beneficial owner of (i) the 581,310 shares of common stock directly owned by the NP Trust, (ii) the 1,497,988 shares of common stock directly owned by the Peltz LP; and (iii) the 2,002,865 shares of common stock beneficially owned by Triarc, which would, in the aggregate, constitute approximately 18.5% of the outstanding shares of our common stock. Mr. Peltz disclaims beneficial ownership of such shares. Of the shares included in this offering, 600,000 shares are being offered by the Peltz LP, and 600,000 shares are being offered by Madison West. Mr. Peltz is Chairman, Chief Executive Officer, and a director of Triarc. Mr. Peltz has served as a director of Encore since January 2003 and previously served as a director of Encore from February 1998 until October 2001.

- (4) According to the Madison West 13D, Mr. May is a co-trustee of each of the Jonathan P. May 1998 Trust (the JM Trust) and the Leslie A. May 1998 Trust (the LM Trust), and in such capacity Mr. May shares voting and dispositive power with Neale M. Albert over the 479,794 shares of common stock directly owned by the JM Trust and the 479,794 shares of common stock directly owned by the LM Trust (see note (8) below). Mr. May also beneficially owns 15,000 shares of common stock that he acquired through a brokerage transaction and has sole voting and dispositive power over such shares. As the beneficial owner of approximately 34.9% of the outstanding voting common stock of Triarc, Mr. May shares with Triarc, Mr. Peltz and DWG voting and dispositive power over the 2,002,865 shares of common stock beneficially owned by Triarc (see note (5) below). As a result, pursuant to Rule 13d-3, Mr. May may be deemed the beneficial owner of (i) the 479,794 shares of common stock directly owned by the JM Trust, (ii) the 479,794 shares of common stock directly owned by the LM Trust, (iii) the 2,002,865 shares of common stock beneficially owned by Triarc, and (iv) the 15,000 shares of common stock owned directly by Mr. May, which, in the aggregate, constitute approximately 13.5% of the outstanding shares of our common stock. Mr. May disclaims beneficial ownership of all such shares other than the 15,000 shares of common stock that he owns directly. Of the shares included in this offering, 200,000 shares are being offered by the JM Trust, 200,000 shares are

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being offered by the LM Trust and 600,000 shares are being offered by Madison West. Mr. May is President, Chief Operating Officer, and a director of Triarc. Mr. May has served as a director of Encore since February 1998.

- (5) According to the Madison West 13D, Triarc may be deemed the beneficial owner of 2,002,865 shares of common stock, including (i) 1,901,590 shares of common stock directly owned by Madison West; and (ii) 101,275 shares of common stock directly owned by Triarc. The aggregate holdings of Triarc constitute approximately 9.1% of the outstanding shares of our common stock. Triarc shares with Madison West, Mr. Peltz, Mr. May and DWG voting and dispositive power over the 1,901,590 shares of common stock beneficially owned by Madison West and shares with Mr. Peltz, Mr. May and DWG voting and dispositive power over the 101,275 shares of common stock directly owned by Triarc. Of the shares included in this offering, 600,000 shares are being offered by Madison West.
- (6) According to the Madison West 13D, DWG is the direct beneficial owner of approximately 27.2% of the outstanding voting common stock of Triarc, and in such capacity shares with Mr. Peltz and Mr. May voting and dispositive power over the 2,002,865 shares of common stock beneficially owned by Triarc (see note (5) above). As a result, pursuant to Rule 13d-3, DWG may be deemed the indirect beneficial owner of 2,002,865 shares of common stock, which would constitute approximately 9.1% of the outstanding shares of our common stock. DWG disclaims beneficial ownership of such shares. Of the shares included in this offering, 600,000 shares are being offered by Madison West.
- (7) According to the Madison West 13D, Madison West may be deemed the beneficial owner of 1,901,590 shares of common stock, which constitute approximately 8.6% of the outstanding shares of our common stock. Madison West shares with Triarc, Mr. Peltz, Mr. May and DWG voting and dispositive power over the 1,901,590 shares of common stock beneficially owned by Madison West. Of the shares included in this offering, 600,000 shares are being offered by Madison West.
- (8) According to the Madison West 13D, Mr. Albert is a co-trustee of each of the NP Trust, the JM Trust and the LM Trust (see note (4) above), and in such capacity Mr. Albert shares with Mr. Peltz voting and dispositive power over the 581,310 shares of common stock directly owned by the NP Trust, and shares with Mr. May voting and dispositive power over the 479,794 shares of common stock directly owned by the JM Trust and the 479,794 shares of common stock directly owned by the LM Trust. As a result, pursuant to Rule 13d-3, Mr. Albert may be deemed the beneficial owner of 1,540,898 shares, which constitute approximately 7.0% of the outstanding shares of our common stock. Mr. Albert disclaims beneficial ownership of such shares. Of the shares included in this offering, 200,000 shares are being offered by the JM Trust and 200,000 shares are being offered by the LM Trust.
- (9) According to Amendment No. 3 to Schedule 13D filed on September 29, 2003 by Robert Michael Whyte to further supplement and amend the Schedule 13D originally filed on March 4, 2002 by Mr. Whyte, as supplemented and amended by Amendment No. 1 dated April 18, 2002 and by Amendment No. 2 dated August 29, 2003 and updated to reflect a sale reported on Form 4 filed by Mr. Whyte on October 21, 2003, Mr. Whyte is the beneficial owner of 1,100,897 shares of common stock, or approximately 5.0% of the outstanding shares of our common stock. Of the shares included in this offering, 200,000 shares are being offered by Mr. Whyte. Mr. Whyte has served as a director of Encore since February 1998.
- (10) Consists of 210,077 shares held directly and 16,667 shares issuable upon exercise of vested stock options. Mr. Kogan has served as Chairman of the Board of Directors of Encore since February 1998. From April 1993 until April 2002, Mr. Kogan was an officer of Triarc.
- (11) Mr. Garden is an Executive Vice President of Triarc and is the son-in-law of Mr. Peltz.
- (12) Amy B. Schorr is the spouse of Brian L. Schorr. Includes 23,810 shares directly owned by Mrs. Schorr and 3,379 shares directly owned by Mr. Schorr. Mrs. Schorr disclaims beneficial ownership of the 3,379 shares of common stock owned directly by Mr. Schorr and Mr. Schorr disclaims beneficial ownership of the 23,810 shares of common stock directly owned by Mrs. Schorr. Mr. Schorr is Executive Vice President, General Counsel and Assistant Secretary of Triarc.

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- (13) Consists of 117,044 shares held by Mr. Gregory as trustee of a trust for his benefit, 100 shares held by a daughter who shares Mr. Gregory's household, and 141,667 shares issuable upon vested stock options. Mr. Gregory has served as a director and as President and Chief Executive Officer of Encore since May 2000.
- (14) Consists of 37,162 shares held by Mr. Barkley as trustee of a trust for his benefit and 116,667 shares issuable upon vested stock options. Mr. Barkley joined Encore in May 2000 and serves as Executive Vice President and Chief Financial Officer.
- (15) Consists of 37,581 shares held directly and 101,667 shares issuable upon exercise of vested stock options. Mr. Black joined Encore in May 2000 and serves as Executive Vice President and Chief Operating Officer.

RELATED PARTY TRANSACTIONS

Guarantees of Line of Credit

Until October 14, 2003, we maintained a facility with Bank of America, NA, formerly NationsBank, NA, for a revolving line of credit of up to \$5.0 million. Among others, some of the selling stockholders and their affiliates had guaranteed this facility, including Messrs. Garden, May, Peltz, Schorr and Kogan, Triarc and Consolidated Press Holdings Limited. In connection with such guarantee, an aggregate fee of \$75,000 per quarter was paid to the guarantors during the second and third quarters of 2003. The line of credit was terminated on October 14, 2003.

Guarantees of Senior Notes

On January 12, 2000, we issued \$10 million in principal amount of 12% Series No. 1 Senior Notes to an institutional investor. The Senior Notes were our unsecured obligations but were guaranteed by Triarc, one of the selling stockholders. As of July 31, 2004, Triarc beneficially owned approximately 9.1% of the outstanding shares of our common stock. In connection with the issuance of the Senior Notes, we issued warrants to Triarc to acquire up to 100,000 shares of our common stock of at an exercise price of \$0.01 per share. The warrants contained anti-dilution provisions. In addition, we paid a fee to Triarc in the amount of \$0.2 million in consideration of Triarc's guarantee of this indebtedness. We engaged an independent valuation firm to determine the allocation of the \$10 million principal amount between the Senior Notes and the warrants. Based upon the valuation, the warrants were valued at approximately \$3.05 per share. This valuation of \$3.05 per share results in the warrants being included as a component of stockholders' equity in the amount of \$1.6 million with the same amount recorded as a debt discount to the \$10 million note payable. The Senior Notes bore interest at 8% per annum until January 15, 2007, when the entire unpaid amount is due. The Senior Notes required semi-annual interest payments on January 15 and July 15. Since February 2002, we made the interest payments in cash. On October 1, 2003, the Senior Notes were repaid in full, at par, in accordance with their terms, with the proceeds of a secondary public offering of our common stock.

Preferred Stock

On February 22, 2002, certain existing stockholders and their affiliates made an additional \$5.0 million investment in us, including, among others, Messrs. Kogan, Schorr, and Whyte, entities affiliated with Messrs. Peltz and May, and entities affiliated with Triarc Companies, Inc. and Consolidated Press International Holdings Limited. Immediately prior to such investment, all of the investors participating in the transaction on a collective basis beneficially owned in excess of 50% of our common stock. In a related transaction, our Senior Notes lender forgave \$5.3 million of outstanding debt. The terms of the investment were negotiated by a committee of the board of directors composed of an independent director, with the assistance of independent advisors.

These investors purchased 1,000,000 shares of our Series A Convertible Preferred Stock at a price of \$5.00 per share. Each share of Series A Convertible Preferred Stock is convertible at the option of the holder at any time into ten shares of common stock at a conversion price of \$0.50 per share of common stock, subject

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to customary anti-dilution adjustments. The last reported sale price of our common stock prior to such investment was \$0.35 per share. The Series A Convertible Preferred Stock had a cumulative dividend, payable semi-annually. Until February 15, 2004, dividends were payable in cash and/or additional Series A Convertible Preferred Stock, at our option, at the rate of 10.0% per annum. Thereafter, dividends would have been payable only in cash, at a rate of 10.0% per annum. Since issuance, all dividends with respect to our Series A Convertible Preferred Stock have been paid in cash. The dividend rate would have increased to 15.0% per annum in the event of a qualified public offering, a change of control (each as defined) or the sale of all or substantially all of our assets. In the event dividends were not declared or paid, the dividends would have accumulated on a compounded basis. The Series A Convertible Preferred Stock had a liquidation preference equal to the sum of the stated value of the Series A Convertible Preferred Stock (\$5.0 million in the aggregate) plus all accrued and unpaid dividends thereon and also a participation payment equal to shares of common stock at the conversion price and/or such other consideration that would be payable to holders of the Series A Convertible Preferred Stock if their shares had been converted into shares of our common stock immediately prior to such liquidation or sale event.

Pursuant to an agreement between us and the holders of the Series A Preferred Stock, all of the preferred shares were converted into 10,000,000 shares of our common stock simultaneously with the closing of the public offering of our common stock on October 1, 2003. The holders of the Series A Preferred Stock were paid accrued dividends to the conversion date in accordance with the terms of the Series A Preferred Stock, but did not pay or receive any other consideration in connection with the conversion.

Temporary Line of Credit

Effective October 31, 2000, we executed an agreement with CTW Funding, LLC, for a \$2.0 million stand-by working capital line of credit secured by substantially all of our assets and those of our subsidiaries. The members of CTW Funding, LLC included, among others, Messrs. Garden, Kogan, Schorr and Whyte, entities affiliated with Messrs. Peltz and May, and entities and individuals affiliated with Triarc Companies, Inc. and Consolidated Press International Holdings Limited. In connection with this agreement, the lenders received warrants to acquire 250,000 shares of our common stock at \$0.01 per share. As of December 31, 2001, when our stand-by line expired, no indebtedness existed. The fair value of the warrants, \$0.1 million, was accounted for by recording deferred loan costs with an offset to additional paid-in capital as a component of stockholders' equity. All 250,000 warrants were exercised on April 16, 2002.

Public Offerings

In October 2003 we completed an underwritten public offering in which we sold 3,000,000 shares of our common stock and certain selling stockholders sold 2,750,000 shares of common stock (including the underwriters' over-allotment option). Pursuant to registration rights granted to such parties, we bore certain customary costs related to the offering on behalf of the selling stockholders. Among the selling stockholders were Messrs. Barkley, Black, Garden, Gregory, Kogan, Schorr and Whyte, entities affiliated with Messrs. May and Peltz, C. P. International Investments Limited, Madison West Associates Corp., an affiliate of Triarc and of Messrs. May and Peltz, certain current and former officers and employees of Triarc; and Peter Nigel Stewart Frazer, the father-in-law of Robert M. Whyte. Total offering expenses paid on behalf of Encore and the selling stockholders were approximately \$0.9 million.

The shares included in this offering are being sold by selling stockholders. Pursuant to registration rights granted to such parties, we are bearing certain customary costs related to the offering on behalf of the selling stockholders, estimated to be approximately \$0.4 million.

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DESCRIPTION OF COMMON STOCK

The following summary does not purport to be complete. You should read the applicable provisions of the Delaware General Corporation Law, our certificate of incorporation and by-laws.

We are authorized to issue up to 50,000,000 shares of common stock, par value \$0.01 per share. At July 31, 2004, we had 22,060,939 shares of our common stock outstanding. Holders of common stock are entitled to one vote per share on all matters submitted to a vote of stockholders generally. Stockholders have no right to cumulate their votes in the election of directors. Our certificate of incorporation gives holders of common stock no preemptive or other subscription or conversion rights, and there are no redemption provisions with respect to the shares. Each share of common stock is entitled to one vote on all matters submitted to a vote of stockholders. The issued and outstanding shares of common stock are fully paid and nonassessable.

PLAN OF DISTRIBUTION

The shares covered by this prospectus may be offered and sold from time to time by the selling stockholders and their successors, including their transferees, pledges or donees or their respective successors. The selling stockholders will act independently of us in making decisions with respect to the timing, manner and size of each sale. These sales may be made on one or more exchanges, on the Nasdaq National Market, or in the over-the-counter market or otherwise, at prices and under terms then prevailing or at prices related to the then current market price or in negotiated transactions. The selling stockholders may sell their shares by one or more of, or a combination of, the following methods:

to or through underwriters or dealers;

directly to one or more purchasers;

through agents;

block trade(s) in which a broker-dealer attempts to sell the shares as agent but may resell a portion of the block as principal to facilitate the transaction;

purchase(s) by a broker-dealer as principal and resale(s) by the broker-dealer for its account under this prospectus;

a distribution in accordance with the rules of any national securities exchange or quotation service on which the shares may be listed or quoted at the time of sale (including The Nasdaq National Market System);

ordinary brokerage transactions and transactions in which a broker solicits purchasers;

privately negotiated transactions between the selling stockholders and purchasers, without a broker dealer;

at the market to or through market makers or into an existing market for the shares; or

through a combination of any of such methods of sale.

If agents or underwriters are used in the sale, the applicable prospectus supplement with respect to the offered shares of common stock will describe the terms of the offering, including:

the name or names of any agents or underwriters;

the purchase price of such shares and any proceeds to us from the exercise of options with respect to shares included in such sale;

any underwriting discounts and other items constituting underwriters or agents compensation;

any initial public offering price;

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any discounts or concessions allowed or reallocated or paid to dealers; and

any securities exchanges on which such shares may be listed.

Only agents or underwriters named in the prospectus supplement are deemed to be agents or underwriters in connection with the shares of common stock offered thereby. If underwriters are used in the sale, the shares will be acquired by the underwriters for their own account and may be resold from time to time in one or more transactions, either:

at a fixed public offering price or prices;

at market prices prevailing at the time of sale;

at varying prices determined at the time of sale; or

at negotiated prices.

The obligations of the underwriters to purchase the shares of common stock will be subject to various conditions precedent, and the underwriters will be obligated to purchase all of the shares offered by the applicable prospectus supplement if any of such shares are purchased. Any initial public offering price and any discounts or concessions allowed or reallocated or paid to dealers may be changed from time to time.

The selling stockholders may also sell shares of common stock directly or through agents designated from time to time. Any agent involved in the offering and sale of the offered shares of common stock will be named in the applicable prospectus supplement. Any commissions payable by the selling stockholders to such agent will be set forth in the applicable prospectus supplement. Unless otherwise indicated in such prospectus supplement, any such agent is acting on a best efforts basis for the period of its appointment.

If so indicated in a prospectus supplement, the selling stockholders will authorize agents, underwriters or dealers to solicit offers by certain institutional investors to purchase shares of common stock providing for payment and delivery on a future date specified in such prospectus supplement. There may be limitations on the number of shares that may be purchased by any such institutional investor or on the number of shares that may be sold pursuant to such arrangements.

Institutional investors to which such offers may be made, when authorized, include, commercial and savings banks, insurance companies, pension funds, investment companies, educational and charitable institutions and other institutions we may approve. The obligations of any such purchasers under this delayed delivery and payment arrangement will only be subject to the following two conditions:

at the time of delivery the purchase of the shares of common stock by an institution will not be prohibited under the laws of any jurisdiction in the United States to which such institution is subject; and

if the shares of common stock are being sold to underwriters, the selling stockholders will have sold to such underwriters the total number of shares less the number of shares covered by such arrangements.

Underwriters will not have any responsibility in respect of the validity of such arrangements or the performance of the selling stockholders or such institutional investors.

Shares of our common stock may be offered or sold in connection with the settlement of forward purchase contracts the selling stockholders enter into from time to time with a financial institution. The financial institution may be deemed to be an underwriter or may be deemed to be a selling stockholder. If any such sales are conducted, whether the third party is deemed to be an underwriter or a selling stockholder, the prospectus supplement related to such sales will set forth, as required, the following information:

the identity of the underwriter or selling stockholder;

the number of shares being sold;

the aggregate number of shares held by the financial institution before and after the proposed sale; and

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any material arrangements between us or the selling stockholder and the financial institution within the past three years.

The selling stockholders have acknowledged that they understand their obligations to comply with the provisions of the Exchange Act and the rules thereunder relating to stock manipulation, particularly Regulation M.

In addition, any securities covered by this prospectus which qualify for sale pursuant to Rule 144 of the Securities Act may be sold under Rule 144 rather than pursuant to this prospectus.

We will keep the registration statement, of which this prospectus is a part, effective until the earlier of (i) six months following the effective date of the registration statement of which this prospectus is a part, or (ii) such time as all of the shares of common stock registered pursuant to the registration statement, of which this prospectus is a part, have been sold hereunder or pursuant to Rule 144 under the Securities Act. No sales may be made pursuant to this prospectus after such period unless we amend the registration statement, of which this prospectus is a part, or supplement this prospectus, as required by law, to indicate that we have agreed to extend such period of effectiveness.

We have agreed, among other things, to bear all fees and expenses, other than selling expenses, discounts, concessions and commissions, in connection with the registration and sale of the shares of common stock under this prospectus.

In connection with an offering, the underwriters may purchase and sell shares of common stock in the open market. These transactions may include short sales, stabilizing transactions and purchases to cover positions created by short sales. Short sales involve the sale by underwriters of a greater number of shares than they are required to purchase in an offering. Stabilizing transactions consist of certain bids or purchases made for the purpose of preventing or retarding a decline in the market price of the securities while an offering is in progress.

The underwriters also may impose a penalty bid. This occurs when a particular underwriter repays to the underwriters a portion of the underwriting discount received by it because the underwriters have repurchased shares of common stock sold by or for the account of the underwriter in stabilizing or short-covering transactions.

These activities by the underwriters may stabilize, maintain or otherwise affect the market price of the shares of common stock. As a result, the price of the common stock may be higher than the price that otherwise might exist in the open market. If these activities are commenced, they may be discontinued by the underwriters at any time. These transactions may be effected on an exchange or automated quotation system, if the securities are listed on that exchange or admitted for trading on that automated quotation system, or in the over-the-counter market or otherwise.

Agents and underwriters may be entitled under agreements entered into with the selling stockholders to indemnification against certain civil liabilities, including liabilities under the Securities Act of 1933, or to contribution with respect to payments which the agents or underwriters may be required to make in respect thereof. Agents and underwriters may be customers of, may engage in transactions with, or perform services for, the selling stockholders in the ordinary course of business.

LEGAL MATTERS

The validity of the shares of common stock offered by this prospectus will be passed upon by Snell & Wilmer, L.L.P., Phoenix, Arizona.

EXPERTS

The consolidated financial statements appearing in the Annual Report on Form 10-K for the year ended December 31, 2003 incorporated by reference in this Prospectus and in the Registration Statement have been audited by BDO Seidman, LLP, independent certified public accountants, to the extent and for the periods set

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forth in their report incorporated by reference in this Prospectus and in the Registration Statement, and are included in reliance upon such report given upon the authority of said firm as experts in auditing and accounting.

WHERE YOU CAN FIND MORE INFORMATION

We file annual, quarterly and current reports, proxy statements, and other information with the SEC. You may read and copy any document we file at the SEC's public reference rooms in Washington, D.C. and New York, New York. Please call the SEC at 1-800-SEC-0330 for further information on the public reference rooms. Our SEC filings are also available to the public from the SEC's web site at <http://www.sec.gov>.

INCORPORATION OF CERTAIN DOCUMENTS BY REFERENCE

The SEC allows us to incorporate by reference the information that we file with the SEC, which means that we can disclose important information to you by referring you to those documents. The information that we incorporate by reference is considered to be a part of this prospectus.

Information that we file later with the SEC will automatically update and supersede this information. This means that you must look at all of the SEC filings that we incorporate by reference to determine if any of the statements in this prospectus or in any documents previously incorporated by reference have been modified or superseded. We incorporate by reference into this prospectus the following documents:

1. Our Annual Report on Form 10-K for the fiscal year ended December 31, 2003 (File No. 000-26489);
2. Our Quarterly Report on Form 10-Q for the three months ended March 31, 2004 (File No. 000-26489);
3. Our Quarterly Report on Form 10-Q for the three and six months ended June 30, 2004 (File No. 000-26489);
4. Our Proxy Statement filed with the SEC on April 1, 2004 (File No. 000-26489);
5. Our Current Report on Form 8-K filed with the SEC on May 5, 2004 (File No. 000-26489);
6. Our Current Report on Form 8-K filed with the SEC on July 2, 2004 (File No. 000-26489);
7. The description of our common stock contained in our Registration Statement on Form S-1, filed on September 2, 2003 (File No. 333-108423); and
8. All documents filed by us under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934 after the date of the initial registration statement and before effectiveness of this registration statement, and after the date of this prospectus and until the selling stockholders have sold all of the common stock covered by this prospectus or the date that this registration statement is withdrawn; provided, however, that we are not incorporating any information furnished under either Item 9 or Item 12 (or Item 2.02 or Section 7) of any current report on Form 8-K.

You may request a copy of these documents, which will be provided to you at no cost, by writing or telephoning us at the following address or telephone number:

Encore Capital Group, Inc.

5775 Roscoe Court
San Diego, California 92123
Attn: Investor Relations
(877) 445-4581 ext. 5184

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The following table sets forth the expenses to be borne by us in connection with the offering being registered hereby:

Securities and Exchange Commission filing fee	\$ 6,239.45
Nasdaq National Market fee	n/a
Printing expenses*	50,000.00
Legal fees and expenses*	225,000.00
Accounting fees and expenses*	100,000.00
Miscellaneous*	18,760.55
	<hr/>
Total	\$400,000.00
	<hr/>

* Estimated

Item 15. Indemnification of Directors and Officers

Our Certificate of Incorporation provides that our directors shall not be personally liable to us or our stockholders for monetary damages for breach of fiduciary duty as a director, except for liability for: (i) any breach of the director's duty of loyalty to us or our stockholders; (ii) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) liability for payments of dividends or stock purchases or redemptions in violation of Section 174 of the Delaware General Corporation Law; or (iv) any transaction from which the director derived an improper personal benefit. In addition, our Certificate of Incorporation provides that we will, to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the corporation to provide broader indemnification rights than such law permitted the corporation to provide prior to such amendment), indemnify and hold harmless any person who was or is a party, or is threatened to be made a party to or is otherwise involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that such person is or was our director or officer, or is or was serving at our request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, including service with respect to an employee benefit plan (hereinafter an

Indemnitee) against expenses, liabilities and losses (including attorneys' fees, judgments, fines, excise taxes or penalties paid in connection with the Employee Retirement Income Security Act of 1974, as amended, and amounts paid in settlement) reasonably incurred or suffered by such Indemnitee in connection therewith; provided, however, that except as otherwise provided with respect to proceedings to enforce rights to indemnification, we shall indemnify any such Indemnitee in connection with a proceeding (or part thereof) initiated by such Indemnitee only if such proceeding or part thereof was authorized by our board of directors.

The right to indemnification set forth above includes the right for us to pay the expenses (including attorneys' fees) incurred in defending any such proceeding in advance of its final disposition; provided, however, that, if the Delaware General Corporation Law requires, an advancement of expenses incurred by an Indemnitee in his capacity as a director or officer (and not in any other capacity in which service was or is rendered by such Indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to us of an undertaking, by or on behalf of such Indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is not further right to appeal that such Indemnitee is not entitled to be indemnified for such expenses under this section or otherwise. The rights to indemnification and to the advancement of expenses conferred herewith are contract rights and continue as to an Indemnitee who has ceased to be a director, officer, employee or agent and inures to the benefit of the Indemnitee's heirs, executors and administrators.

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The Delaware General Corporation Law provides that indemnification is permissible only when the director, officer, employee, or agent acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the conduct was unlawful. The Delaware General Corporation Law also precludes indemnification in respect of any claim, issue, or matter as to which an officer, director, employee, or agent shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine that, despite such adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

See Item 17 for information regarding our undertaking to submit to adjudication the issue of indemnification for violation of the securities laws.

Item 16. Exhibits and Financial Statement Schedules

Exhibit Number	Description
3.1	Restated Certificate of Incorporation (incorporated by reference to Exhibit 2 to Amendment No. 2 to the Company's Registration Statement on Form S-1 filed on June 14, 1999)
3.2	Certificate of Amendment to the Certificate of Incorporation of the Company (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on April 4, 2002)
3.3	By-laws, as amended (incorporated by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed on August 13, 2003)
5.1	Opinion of Snell & Wilmer L.L.P.
23.1	Consent of Snell & Wilmer L.L.P. (included in Exhibit 5.1)
23.2	Consent of Independent Auditors, BDO Seidman, LLP
24	Powers of Attorney (set forth on signature page to this registration statement, as filed on May 17, 2004)

Item 17. Undertakings

The undersigned Registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) to include any prospectus required by Section 10(a)(3) Securities Act;

(ii) to reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the SEC pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement;

(iii) to include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

(2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof;

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(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of this offering;

(4) That, for purposes of determining any liability under the Securities Act of 1933, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective; and

(5) That, for the purpose of determining any liability under the Securities Act of 1933, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

The undersigned registrant further undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers, and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the SEC such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question of whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

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<u>Name and Signature</u>	<u>Title</u>	<u>Date</u>
*	Director	August 12, 2004
Nelson Peltz		
*	Director	August 12, 2004
Robert M. Whyte		
*By: <u>/s/ CARL C. GREGORY, III</u>		
Carl C. Gregory, III <i>Attorney-in-Fact</i>		

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