

# Corporate and Securities Developments **NEWSLETTER**

MAY 6, 2002

## SEC PROPOSES SIGNIFICANT CHANGES TO DISCLOSURE RULES ON PERIODIC REPORTING

Following Enron's bankruptcy filing, the Securities and Exchange Commission (the "SEC" or the "Commission") pledged to modernize and improve the regulatory system for public disclosure under the Securities Exchange Act of 1934 ("Exchange Act"). On February 13, 2002, the Commission announced that it planned to propose an array of changes to the disclosure system and on April 12, 2002, the Commission issued two releases that propose the first of the changes announced in February. The first release<sup>1</sup> proposes to accelerate the filing of quarterly reports and annual reports under the Exchange Act.<sup>2</sup> The second release<sup>3</sup> proposes to require reporting companies to disclose promptly transactions by insiders in the issuer's securities. This newsletter discusses the Accelerated Filings Release. We discuss the Insider Trading Release in a separate newsletter. *The Commission will receive public comments on the Accelerated Filings Release for 30 days.*<sup>4</sup>

### I. Background

The proposals outlined in the Accelerated Filings Release represent the SEC's response to significant changes in the corporate finance world since the regulatory system was implemented. Over 30 years have passed since the SEC significantly modified the reporting deadlines. In the interim, communication and technological advancements have enabled companies to process and disseminate information swiftly. Many reporting companies issue press releases that announce quarterly and annual results before they file their formal reports with the Commission.<sup>5</sup> At the same time, the Enron situation has intensified demand for prompt, clear and complete disclosure. The SEC's proposals seek to address this situation by requiring most filers to file their quarterly and annual reports approximately one-third sooner than currently required and by encouraging issuers to make these reports available on their websites.

<sup>1</sup> *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, Exchange Act Release No. 8089 (Apr. 12, 2002), available at <http://www.sec.gov/rules/proposed/33-8089.htm> (hereinafter *Accelerated Filings Release*).

<sup>2</sup> The Commission has indicated that it is considering accelerating financial statement deadlines under the Securities Act of 1933, as well.

<sup>3</sup> *Form 8-K Disclosure of Certain Management Transactions*, Exchange Act Release No. 8090 (Apr. 12, 2002), available at <http://www.sec.gov/rules/proposed/33-8090.htm> (hereinafter *Insider Trading Release*).

<sup>4</sup> The SEC proposed accelerated filing deadlines in the Aircraft Carrier Release in 1998 and has previously solicited comments on the matter. As such, the comment period for the Accelerated Filings Release has been shortened from the usual 45 to 60 day period. The Aircraft Carrier Release is formally known as *The Regulation of Securities Offering*, Exchange Act Release No. 7606 (Nov. 13, 1998), available at <http://www.sec.gov/rules/proposed/337606a1.txt>. Similar to the proposals at hand, in the Aircraft Carrier Release, the SEC requested comment on accelerating the due date for Form 10-Q to 30 days after the end of each of the first three fiscal quarters and for Form 10-K to 60 days after the end of the registrant's fiscal year.

<sup>5</sup> The SEC Office of Economic Analysis has determined that over the past 10 years, issuers announce their year-end earnings approximately 43 days after fiscal year end and their quarterly earnings approximately 27 days after fiscal period end. See Accelerated Filings Release, note 27.

## WILMER, CUTLER & PICKERING

## II. Description of Proposals

The Accelerated Filings Release proposes changes in filing deadlines for periodic reports and enhanced disclosure regarding website access to these reports, as described below.

### A. Accelerated Filing Deadlines for Periodic Reports.

The proposals shorten the filing deadlines for certain issuers by requiring that Forms 10-Q be filed 30 calendar days after the end of each fiscal quarter (down from the current 45-day period) and that Forms 10-K be filed 60 days after the end of each fiscal year (down from the current 90-day period).

The accelerated filing requirements apply only to those issuers who meet the new definition of an “accelerated filer.” Those reporting companies that do not meet the definition of accelerated filer will remain subject to the existing filing deadlines. The proposal defines an accelerated filer as a domestic<sup>6</sup> reporting company:

- With a public float of \$75 million or more as of a date within no more than 60 and no less than 30 days before the end of the registrant’s last fiscal year;<sup>7</sup>
- That has been subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months preceding the filing of the report; and

- That has filed at least one annual report pursuant to Sections 13(a) or 15(d) of the Exchange Act.<sup>8</sup>

The proposed public float and reporting history standard is substantially the same as the eligibility requirements for registration of primary offerings for cash on Form S-3. The Commission reasons that issuers that file on Form S-3 have the financial resources and infrastructure in place to generate the necessary financial data quickly without undue burden or expense. The SEC is soliciting comments on other criteria and thresholds to be considered in the definition of an accelerated filer.

### B. Website Access to Reports.

The SEC views the Internet as an invaluable resource for investors to access corporate information efficiently and economically. Many reporting companies provide website access to their SEC reports<sup>9</sup>, and the SEC seeks to encourage all registrants to take advantage of electronic media to communicate with investors. Accordingly, in the Accelerated Filings Release the SEC proposes to require reporting companies that qualify as accelerated filers to disclose on their annual reports on Form 10-K the following:

- That the public may access company filings on the SEC website;
- The registrant’s website address, if it has one;
- Whether the registrant makes its annual reports, quarterly reports, current reports and all amendments to

<sup>6</sup> The proposed accelerated filing deadlines do not apply to foreign issuers, but the Commission has requested comment on whether it should shorten the filing deadlines for foreign issuers as well.

<sup>7</sup> The proposal is not entirely clear on how this standard is applied. In particular, it is not clear whether an issuer can choose any day in the 30-day window so that as long as its public float was less than \$75 million on any one day in the period it will not be an accelerated filer, or whether an issuer is an accelerated filer if its public float was more than \$75 million on any one day in the period.

<sup>8</sup> Once a reporting company becomes an accelerated filer it would remain an accelerated filer subject to the heightened filing deadlines until it became eligible to use the small business issuer reporting forms, Forms 10-KSB and 10-QSB, for its annual and quarterly reports. If the company subsequently becomes ineligible to file Forms 10-KSB and 10-QSB, it would again become an accelerated filer upon meeting the requirements as discussed above.

<sup>9</sup> The SEC Office of Economic Analysis examined a sample of 152 reporting companies with at least \$75 million public float and concluded that all of the companies maintained an Internet website and approximately 83% of those provided access to their public filings through their websites, a hyperlink to a third-party service or a hyperlink to the SEC’s EDGAR site. See Accelerated Filings Release, p. 16.

those reports available on its website, free of charge, no later than the same day such material is electronically filed with the Commission<sup>10</sup>;

- If the registrant does not make its filings available online, the reasons why;
- Where an investor can access these filings electronically immediately upon filing, and whether there is a fee for such access; and
- Whether the registrant provides electronic or paper copies of these filings free of charge upon request.

The Accelerated Filings Release notes that an issuer cannot currently make the disclosure that it provides same-day access to its reports if it only provides a hyperlink to the SEC's EDGAR site, because filings on EDGAR are currently posted after a 24-hour delay. However, the Commission anticipates eliminating this delay in the near future, insuring real-time postings of filed reports.

### III. Potential Implications to Reporting Companies

If adopted in their current form, the shortened filing deadlines would have a substantial impact on issuers and the market at large.

As an accelerated filer, a reporting company would have to prepare and verify detailed disclosures within a more limited amount of time than under current rules. Following the Aircraft Carrier Release, commentators objected to a similar proposal because the quality and accuracy of the reports might be compromised. Several commentators were concerned that technological advances were offset by more complex financial structures and reporting requirements. Thus, compa-

nies may have an inadequate amount of time to prepare and verify their disclosures. If issuers face difficulty meeting the accelerated filing deadlines, the quality of reporting may suffer, and issuers may fail to meet filing deadlines more often than they do today. Indeed, the National Investors Relations Institute recently reported that only 40% of respondents to a survey of its members said they would "not anticipate significant problems" meeting accelerated filing deadlines.<sup>11</sup>

The SEC appears to have considered these objections to its earlier proposals, and determined that the risk of degraded reporting and more missed deadlines is small.<sup>12</sup> Accordingly, it appears likely that the rule will be adopted in substantially the form proposed.

The Commission has proposed a transition period to give affected issuers sufficient time to prepare for the accelerated filing deadlines. The accelerated filings proposal, once adopted, would be effective for accelerated filers at the end of the first fiscal year ending after October 31, 2002. The website access proposal would be effective three months after the adoption date. The SEC is soliciting comment on the appropriate length of these transition periods.

The Accelerated Filings Release is part of the Commission's larger plan to enhance periodic reporting requirements. In addition to the companion release on accelerated reporting of insider transactions, the Commission is proposing on April 30 enhanced disclosure in management's discussion and analysis regarding the effect of critical accounting judgments on an issuer's reported results, and the staff of the SEC has indicated that it expects to issue a proposal in the next month to require disclosure of additional events on Form 8-K. We will update you as new proposals are released and rules are modified.

<sup>10</sup> The Commission encourages companies to provide website access to previous reports for a 12 month period, at a minimum. The Commission further recommends that company websites provide access to older filings through a link to an archive.

<sup>11</sup> See NIRI Releases Survey Results on SEC Proposed Changes to Corporate Disclosure, *Executive Alert* (National Investor Relations Institute, Vienna, VA), Mar. 20, 2002.

<sup>12</sup> Recognizing the possibility of increased difficulty in meeting the accelerated deadlines, however, the SEC did request comment on whether issuers should be given more time to make a late filing without penalty. Currently, an issuer may file a Form 10-Q up to five days late, or a Form 10-K up to 15 days late, if it files a Form 12b-25 with the SEC and meets the criteria set out in the form. In the Accelerated Filing Release, the SEC asked for comment on whether the five and 15-day deadlines should be extended.

The comment period for the Accelerated Filings Release expires on May 23, 2002. If you would like a copy of the SEC's Accelerated Filings Release or if you have any questions, please do not hesitate to contact:

**Roger J. Patterson** (202) 663-6246  
rpatterson@wilmer.com

**Keren Levy** (202) 663-6462  
klevy@wilmer.com

**WILMER, CUTLER & PICKERING**

2445 M Street, N.W.  
Washington, D.C. 20037-1420  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363

**Corporate and Securities Practice Group Partners**

Jorge E. Alers	Stuart F. Delery	Satish Kini	John W. Ryan
James E. Anderson	Mark A. Dewire	Michael R. Klein	Kurt L. Schmoke
Philip D. Anker	Colleen Doherty-Minicozzi	Alexander Kollmorgen	Klaus Schubert
Robert G. Bagnall	Stephen P. Doyle	Yoon-Young Lee	Mark S. Shelton
Brandon Becker	Jennifer M. Drogula	Lewis Liman	Marianne K. Smythe
Joseph K. Brenner	Van W. Ellis	Martin E. Lybecker	Roland Steinmeyer
Russell J. Bruemmer	Paul Engelmayer	Eric R. Markus	Charles D. Toy
J. Beckwith Burr	Gregory J. Ewald	Robert B. McCaw	Peter K. Vigeland
Mark D. Cahn	Simon Firth	William McLucas	Andrew N. Vollmer
Richard W. Cass	Andrew N. Goldman	Thomas E. D. Millspaugh	Paul A. von Hehn
Georg Graf Zu Castell-Castell	C. Thomas Hicks III	Duane D. Morse	John B. Watkins
Gregorio B. Cater	Michael R. Holter	Andrew K. Parnell	Harry J. Weiss
Louis R. Cohen	Robert F. Hoyt	William J. Perlstein	Andrew B. Weissman
Bruce E. Coolidge	Andrew Kaizer	Mark Pollak	Thomas W. White
Meredith Cross	Glynn D. Key	Erika L. Robinson	William A. Wilson III
Charles E. Davidow	R. Scott Kilgore	Frank E. Roitzsch	Soo J. Yim

*This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments.*

2445 M Street, N.W.	520 Madison Avenue	100 Light Street	1600 Tysons Boulevard	4 Carlton Gardens	Rue de la Loi 15 Wetstraat	Friedrichstrasse 95
Washington, D.C. 20037-1420	New York, NY 10022	Baltimore, MD 21202	McLean, VA 22102-4826	London SW1Y5AA	B-1040 Brussels, Belgium	D-10117 Berlin
Telephone: (202) 663-6000	Telephone: (212) 230-8800	Telephone: (410) 986-2800	Telephone: (703) 251-9700	Telephone: 011 (44207) 872-1000	Telephone: 011 (322) 285-4900	Telephone: 011 (49-30) 2022-6400