

# Corporate and Securities Law Developments **NEWSLETTER**

SEPTEMBER 17, 2002

## NEW REQUIREMENTS FOR ACCELERATED REPORTING OF PERIODIC FILINGS

On September 5, 2002, the Securities Exchange Commission (the “SEC” or “Commission”) announced the adoption of new rules that accelerate the filing deadlines for quarterly and annual reports under the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>1</sup> The accelerated deadlines will be phased in over the next three years, with no change in deadlines for the first year. However, companies may opt to comply with the new filing deadlines and disclosure requirements before the compliance dates.

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

The accelerated reporting requirements only apply to those companies that meet the new definition of an “accelerated filer.” The rule defines an accelerated filer as a domestic reporting company that has a public float of at least \$75 million, has been subject to the Exchange Act’s reporting requirement for at

least 12 calendar months and previously has filed at least one annual report.<sup>2</sup> Once a reporting company becomes an accelerated filer it will remain an accelerated filer subject to the accelerated filing deadlines until it becomes eligible to use the small business issuer reporting 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 when it meets the definition of an accelerated filer.

The proposing release, dated April 12, 2002, proposed accelerating the deadline for annual reports from 90 days to 60 days after the end of the company’s fiscal year and accelerating the deadline for quarterly reports from 45 days to 30 days after the end of the company’s first three fiscal quarters. This would have applied to companies that met the definition of an “accelerated filer” at the end of their first fiscal year ending after October 31, 2002.

<sup>1</sup> *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, Exchange Act Release No. 34-46464 (September 9, 2002), available at <http://www.sec.gov/rules/final/33-8128.htm> (hereinafter *Accelerated Filings Release*).

<sup>2</sup> The public float requirement is measured as of the end of the second fiscal quarter of the preceding fiscal year. Filers will therefore have at least six months after they first exceed the public float requirement to prepare to meet the accelerated filing deadlines.

In response to commenters' objections, the final rule phases in the accelerated deadlines over three years, and lengthens the ultimate filing deadline for quarterly reports to 35 days after the end of the quarter instead of the 30 days originally proposed. Thus, for companies that meet the definition of accelerated filer as of the end of their first fiscal year

ending on or after December 15, 2002, the annual report deadline will remain 90 days for year one, and will then be reduced 15 days per year over the next two years. The quarterly reports deadline for these filers will remain 45 days for year one and then be reduced five days per year over the next two years. These changes are summarized in the following table:

<b>For Fiscal Years Ending on or After:</b>	<b>Form 10-K Deadline</b>	<b>Form 10-Q Deadline</b>
December 15, 2002	90 days after fiscal year end	45 days after fiscal quarter end
December 15, 2003	75 days after fiscal year end	45 days after fiscal quarter end
December 15, 2004	60 days after fiscal year end	40 days after fiscal quarter end
December 15, 2005	60 days after fiscal year end	35 days after fiscal quarter end

Thus, if a company with a calendar fiscal year-end qualifies as an accelerated filer as of December 31, 2002, its annual report for that fiscal year will continue to have a 90-day filing deadline and will be due March 31, 2003. Each of the Form 10-Qs filed for the first three quarters of its 2003 fiscal year will have a 45-day deadline. For the fiscal year ending December 31, 2003, the company will have a 75-day deadline for the annual report, and the report will be due March 15, 2004. Each of the quarterly reports filed for the first three quarters in 2004 will have a 40-day deadline so that reports will be due by May 10, 2004, August 9, 2004 and November 9, 2004. For the fiscal year ending December 31, 2004, the annual report will have a 60-day deadline, and will be due March 1, 2005. Each of the quarterly reports filed for the first three quarters in 2005 will have a 35-day deadline, and will be due May 5, 2005, August 4, 2005 and November 4, 2005. All subsequent reports for accelerated filers on Forms 10-K or 10-Q will be subject to the 60 and 35-day deadlines, respectively.

The SEC also amended the timeliness requirement for financial statements in registration statements filed under the Securities Act and for proxy statements to conform to the accelerated filing deadlines. The SEC did, however, make it clear that registrants who must file financial statements of unconsolidated subsidiaries need not file the financial statements of those subsidiaries that are not accelerated filers until the reports would be due under current deadlines.

The SEC left unchanged the due date for filing proxy statements that include information incorporated by reference into Part III of an issuer's annual report on Form 10-K, and also left unchanged the due date (after an acquisition) for filing financial statements of acquired companies.

#### *B. Website Access to Reports*

The SEC adopted the requirement to disclose website access to an issuer's SEC reports substantially as proposed. Accordingly, reporting companies that qualify as accelerated filers must disclose in their annual reports on Form 10-K the following:

- The company's website address, if any;
- Whether the company makes available free of charge on or through its website its annual report, quarterly reports, current reports and all amendments to those reports as soon as reasonably practicable after such reports are filed with the SEC; and
- If the company does not make its filings available in this manner, the reasons why it does not and whether the company will voluntarily provide electronic or paper copies of its filings free of charge upon request.

Accelerated filers must begin complying with the new disclosure requirement starting with their annual

reports to be filed for their fiscal years ending on or after December 15, 2002. The SEC now provides real-time access to companies' electronically filed periodic reports through its website, and companies may therefore comply with the new requirements by linking to their filings on the SEC's website. In addition, a company may provide access to its reports via a third-party service, as long as access to the reports is free of charge to the user and is available within the appropriate time frame.<sup>3</sup> Although the Accelerated Filings Release does not specify how long a company's report must be made available online, the SEC suggests that, at a minimum, reports remain available for a 12-month period.

### C. Consequences for Issuers

The extended phase-in period adopted by the SEC gives issuers that meet the definition of accelerated filer time to streamline their reporting systems. Nevertheless, the accelerated deadlines take effect against the backdrop of expected increased

disclosure requirements (particularly with regard to management's discussion and analysis of financial condition and results of operations)<sup>4</sup> and the need for increased review procedures to satisfy new certification requirements.<sup>5</sup> Accordingly, issuers must begin now to plan for the accelerated filing deadlines, which will take effect for most issuers beginning with the annual report due in March of 2004.

If you would like assistance with designing procedures that will meet the accelerated filings deadlines and support the new certification requirements, please contact either of the following, or any Wilmer, Cutler & Pickering attorney.

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<sup>3</sup> The SEC eliminated the requirement initially proposed in the proposing release that the reports must be made available on the same day they are filed with the Commission. The language has now been modified to read "as soon as reasonably practicable," which the SEC interprets to mean that a report would be available, barring unforeseen circumstances, on the same day it is filed.

<sup>4</sup> See *Disclosure in Management's Discussion and Analysis about the Application of Critical Accounting Policies*, Exchange Act Release No. 34-45907 (May 10, 2002), available at <http://www.sec.gov/rules/proposed/33-8098.htm>.

<sup>5</sup> See *Certification of Disclosure in Companies' Quarterly and Annual Reports*, Exchange Act Release No. 34-46427 (August 28, 2002), available at <http://www.sec.gov/rules/final/33-8124.htm>.

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