

## Securities Law

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### SEC Adopts Rules Implementing Accelerated Filings of Quarterly and Annual Reports and Section 16 Reports

#### QUARTERLY AND ANNUAL REPORTS

Displaying an unexpected degree of flexibility, the SEC's new rules for accelerated quarterly and annual reports will apply only to larger companies and will be phased in over two years after a grace period. Beginning in 2004 for larger calendar year companies, quarterly and annual reports will be due on an accelerated basis as shown below:

Type of Report	YEAR	
	2004 <sup>1</sup>	2005 and After
Quarterly (10-Q)	40 days	35 days
Annual (10-K)	75 days	60 days

The accelerated reporting requirements only apply to domestic companies that (i) have a public float of at least \$75 million, (ii) have been reporting for the previous 12 months, (iii) have previously filed at least one annual report and (iv) are not eligible to use forms for small business issuers. The filing dates are unchanged for companies not meeting all of these criteria.

The SEC amendments also require companies subject to accelerated reporting to disclose information about whether and how filings are available on the companies' websites. The SEC encouraged, but did not require, companies to provide free access to the companies' quarterly and annual reports on their websites.

#### SECTION 16 REPORTING

Effective August 29, 2002, Congress required a two business day filing requirement for Form 4 ownership reports under Section 16 of the Securities Exchange Act of 1934, as amended

("Exchange Act"). On August 27, 2002, the SEC adopted rules implementing Congress' mandate under the Sarbanes-Oxley Act ("Act").

Instead of the monthly reporting requirements under the old law, Form 4 reports must now be filed on the second business day after the transaction is executed. Moreover, many transactions previously exempt from immediate reporting now must be reported within two business days on Form 4. With limited exceptions, as noted below, the date of execution governs the timing of the filing, not the settlement date. As a result, most companies will be adopting new procedures for pre-clearance of transactions in company securities and to assist covered officers, directors and others in complying with the new Form 4 requirements.

Section 16 applies to officers, directors and greater than 10% shareholders ("insiders") of most public companies as well as to insiders and certain other affiliates of registered closed-end investment companies. Under prior law and SEC rules, most open market transactions were generally required to be reported monthly on Form 4 and many other transactions were eligible for deferred reporting on the year-end Form 5. Open market transactions, such as purchases of equity securities through a brokerage account, must now be reported in two business days, which is even likely to be before the settlement date. In addition, the two business day reporting requirement will now apply to transactions in stock options and other derivative securities, such as option grants, exercises, cancellations and re-grants, as well as to other stock transactions with the issuer that were previously eligible for deferred reporting. Neither the new SEC rules nor the Act change the exemptions from Section 16 reporting

<sup>1</sup> Technically, the accelerated reporting rules are effective beginning in 2004 for companies with fiscal years ending on or after December 15, 2003.

available to qualified plans, excess benefit plans and stock purchase plans under Rule 16b-3(c) and to dividend reinvestment plans under Rule 16a-11.

The new SEC rules amended Rule 16a-6, which permits certain acquisitions (but not dispositions) of securities under \$10,000 to be reported on Form 5, rather than Form 4. The amended Rule now specifies that acquisitions from the issuer (including from an employee benefit plan sponsored by the issuer) are not eligible for deferred reporting on Form 5 and must instead be reported in two business days on Form 4.

The new SEC rules also create an exception to the two business day rule for two types of transactions with respect to which an insider typically does not select the date of execution. The first exception is for “discretionary transactions,” as defined in Rule 16b-3(b)(1). Discretionary transactions are transactions pursuant to an employee benefit plan that involve a transfer into or out of a securities fund of a plan issuer, or a cash-out from a securities fund of an issuer. The second exception is for transactions pursuant to Rule 10b5-1(c) arrangements. Rule 10b5-1 defines when a purchase or sale occurs “on the basis of” material nonpublic information in insider trading cases under Section 10(b) of the Exchange Act. Rule 10b5-1(c) establishes a variety of affirmative defenses that allow a person to trade in cases where it is clear that the decision to trade is not based on material nonpublic information. These affirmative defenses apply to transactions pursuant to written trading plans, including limit orders, and some transactions pursuant to employee benefit plans and dividend reinvestment plans.

In these two instances, the Section 16 report is required two business days after the date of the notification to the insider by the plan administrator, broker-dealer or other party that the transaction has been executed – the deemed execution date – so long as the notification occurs no later than three business days after the trade date. Thus, even the modified rules applicable to discretionary transactions and Rule 10b5-1(c) transactions give insiders only a small amount of additional time to file their Section 16 report. In addition, in both cases the insider must not be able to select the date of execution for the transaction to be subject to the modified reporting rules. If the insider is able to select the date of execution, the execution date would be the actual execution date, not the date of notification.

In its adopting release, the SEC noted that the usual broker confirmations of transactions may not be timely enough to give insiders the information they need for Section 16 reporting. For example, a mailed confirmation could take several days to arrive. The SEC expects that brokers will provide the necessary information to insiders either electronically or by telephone. Issuers should review their Section 16 compliance procedures to ensure that they promote the timely flow of information from brokers to insiders.

The SEC release also amended Forms 4 and 5 to comply with the new reporting rules. As those forms are not yet available, in the meantime, insiders may continue using the current versions of the forms. However, when using the prior version of Form 4, insiders must specify in box 4 the month, day and year of the transaction. In addition, the reporting person should include an asterisk next to the trade date (in the transaction date column), and add a footnote to disclose the deemed execution date, when relying on an exception to the two business day reporting rule.

The Act also amended Section 16 to require, not later than one year after enactment (July 30, 2003), electronic filing of all Section 16 reports. Once the electronic filing is required, the company will be required to post the filings on its website. In the release announcing the amendments to the Section 16 rules, the SEC encouraged insiders to file reports electronically even prior to the date that electronic filing becomes mandatory.

At this time, the SEC release adopting the accelerated reporting requirements for quarterly and annual reports has not been formally released. Thus, the discussion of the accelerated reporting requirements above is primarily based on SEC Release Number 34-45741 and SEC Press Release 2002-128.

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