

SEC Proposes Acceleration and Expansion of Periodic Reports

The Securities and Exchange Commission has proposed several rule amendments designed to expedite the filing of annual and quarterly reports and to expand the types of events requiring Form 8-K filings. Although these proposals are still subject to public comment and possible revisions, companies should prepare for these accelerated filing deadlines and increased reporting obligations. This alert summarizes the two recent proposals. We invite our clients and friends to contact us for further information and assistance in connection with these pronouncements.

Introduction

On February 13, 2002, the SEC announced its intention to propose amendments to modernize and improve the corporate disclosure system, and on April 12, 2002, the SEC formally proposed some of these changes. The first proposal would accelerate the deadlines for the filing of periodic reports by seasoned public companies. Under this proposed rule, annual reports on Form 10-Ks must be filed within 60 days after fiscal year end and quarterly reports on Form 10-Q must be filed within 30 days after period end. The SEC is also proposing that those public companies subject to the accelerated filing requirements disclose in their annual reports certain information regarding the accessibility of the companies' public reports.

The second proposed change is an amendment to Form 8-K that requires companies to report certain transactions by executive officers and directors in the company's equity securities, the adoption or modifica-

tion of Rule 10b5-1(c) arrangements for the purchase and sale of company securities, and loans to officers and directors made or guaranteed by the company or an affiliate.

Acceleration of Periodic Report Filing Dates; Web Site Access

Proposed Changes

Accelerated files. Only seasoned companies would be subject to the accelerated deadlines under the proposal. These accelerated filers include domestic public companies that have a public float (i.e., the aggregate value of the company's outstanding equity minus the value of common equity held by affiliates) of at least \$75 million, have been subject to Exchange Act reporting requirements for at least 12 calendar months, and have filed at least one annual report on Form 10-K. The SEC's proposal conforms to the current standard of eligibility for a company to register an offering of securities using Form S-3. Under the proposal, companies that do not satisfy that definition continue to comply with the existing filing deadlines.

Accelerated deadlines. The SEC proposal would shorten the due date for annual reports on Form 10-K from 90 to 60 calendar days following the accelerated filer's fiscal year end and the due date for quarterly reports on Form 10-Q from 45 to 30 days following the end of the quarter. If an accelerated filer changes its fiscal year end,

similar deadlines would apply to its transition reports.

Website access. The proposed rule requires an accelerated filer to disclose in its annual reports on Form 10-K:

- that the public may read and copy the company's filings at the SEC's public reference room and electronically on the SEC's website;
- the company's website address, if it has one;
- whether the company makes available free of charge on its website its annual report, quarterly reports and current reports and amendments as soon as practicable after, or at least no later than, the day these reports are filed with the SEC;
- why the company does not make its filings available on its website, if that is the case;
- where (i.e., at least one location) the public can access these filings on the internet (if the company does not have a website or does not put such filings on its website) and whether there is a charge for access; and
- whether the company will voluntarily provide electronic or paper copies of these filings free of charge upon request.

Effective dates. Comments on the proposed rulemaking are due by May 23, 2002. If the proposed changes regarding accelerated filings are adopted, these changes would become effective for any company meeting the accelerated filer test as of the end of its first fiscal year ending after October 31, 2002. The website access rulemaking

would become effective three months after the rule is adopted.

[Proposed Rule: Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports](#), Rel. No. 33-8089; 34-45741 (April 12, 2002)

Form 8-K Disclosure Requirements for Certain Transactions by Executive Officers and Directors

The SEC has proposed to amend Form 8-K to require public companies to file a current report describing directors' and executive officers' transactions in company equity securities, directors' and executive officers' Rule 10b5-1(c) arrangements, and loans to directors and executive officers made or guaranteed by the company or its affiliates.

Proposed Changes

Reporting of Securities Transactions.

Under proposed Item 10(a) to Form 8-K, reportable transactions would be substantially similar, but not identical, those required under the short-swing trading provisions Section 16(a) of the Exchange Act.

Rule 10b5-1(c) arrangements. When a director or officer enters into a Rule 10b5-1(c) arrangement, companies would be required to report such transaction on Form 8-K, identifying the name and title of the director or executive officer and disclosing the date on which the arrangement was adopted and a description of the arrangement. When these arrangements are modified or terminated, the proposal would require that a Form 8-K be filed to disclose the date of termination or modification and the nature of the modification, in general terms (e.g., an increase in the applicable limit order price, not the actual price).

Company Loans. The proposal would require a company to report any of the following actions by the company or an affiliate of the company: loan of money to, guaranty of a loan to or forgiveness of a loan owed by, a director or executive officer of the com-

pany. Terms such as the dollar amount, interest rate, and collateral would be required to be disclosed in the Form 8-K filing.

Reporting Deadlines. For reportable securities transactions by or loans to a director or executive officer with an aggregate value of \$100,000 or more, the filing would be due within two business days of the loan or transaction, unless the transaction is a grant or award pursuant to an employee benefit plan. If the aggregate value is less than \$10,000, then the report could be deferred until the cumulative value of unreported transactions and loans for the same director or officer exceeds \$10,000. All other reportable events under the proposed Item 10 of Form 8-K would be due on the second business day of the week following the week in which the event occurred. Generally, the date of a reportable event is defined as the date on which the parties enter into an agreement.

Compliance and Filed Status. The SEC cautions that companies would need to institute procedures and systems to assure compliance with the proposed Form 8-K amendments. Information included under Item 10 of Form 8-K would be considered "filed" and subject the company to Section 18 liability, and would be incorporated by reference in registration statements filed on Forms S-2, S-3, S-4 and S-8. The SEC is proposing amendments to the applicable registration statement forms and Rule 144 so that an Item 10 Form 8-K delinquency would not affect form eligibility or the company's current reporting status under Rule 144(c).

The SEC also proposed to find that it is not in the public interest to impose sanctions on any company, notwithstanding isolated failures to comply with the rule, if the company has designed procedures sufficient to ensure timely filing, was following those procedures at the time of the violation, and made a filing to correct the violations promptly. Finally, similar to other Section 13(a) violations, if a company fails to file the required reports, a private right of action would not arise, although the SEC could institute an enforcement action against the company and possibly the executive officer or director.

Effective Date. The comment period for this proposal ends June 24, 2002. If adopted, the proposed reporting requirements would become effective 60 days after publication of the final rule amendments. Rule 10b5-1(c) arrangements and loans entered into before the effective date of the rule would need to be reported on, or shortly after, the effective date.

[Proposed Rule: Form 8-K Disclosure of Certain Management Transactions](#), Rel. No. 33-8090; 34-45742 (April 12, 2002)

Conclusion

The comment period expired May 23, 2002, for the accelerated filing deadline for the periodic reports proposal and expires June 24, 2002, for the Form 8-K proposal. It appears likely that, absent a compelling case against adoption, at a minimum, the accelerated filing deadlines will be adopted, and that some form of Form 8-K proposal will also be adopted. Companies should begin planning as soon as possible so that they will be in a position to comply with the rules, if and when adopted. We believe it is likely in connection with the accelerated filing deadline that the SEC will accelerate the filing deadlines in stages (e.g. immediately shorten the due date for annual reports on Form 10-K from 90 days to 80 days and the due date for quarterly reports on Form 10-Q from 45 days to 40 days) and then accelerate the time frames again in one year, and each year thereafter until the SEC reaches its desired due dates. ■

Referenced Links

- **Proposed Rule: Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports:** <http://www.sec.gov/rules/proposed/33-8089.htm>
- **Proposed Rule: Form 8-K Disclosure of Certain Management Transactions:** <http://www.sec.gov/rules/proposed/33-8090.htm>

Contact Information

Broomfield 720/566-4000

James Carroll jcarroll@cooley.com

Kirkland 415/693-2000

Christopher W. Wright cwwright@cooley.com

Palo Alto 650/843-5000

William Freeman wfreeman@cooley.com

Nancy Wojtas nwojtas@cooley.com

Reston 703/456-8000

Brian Lynch blynch@cooley.com

San Diego 858/550-6000

Barbara Borden bborden@cooley.com

San Francisco 415/693-2000

Susan Philpot sphilpot@cooley.com

Cydney Posner cposner@cooley.com

This information is a general description of the law and is not intended to provide specific legal advice.

© Cooley Godward LLP 2002. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley Godward LLP as the author. All other rights reserved.