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CORPORATE & SECURITIES LAW UPDATE

SEC Proposes New Rules: Form 8-K Disclosure Of Management Transactions; Acceleration Of Periodic Filing Dates

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SEC Proposes New Rules: Form 8-K Disclosure Of Management Transactions; Acceleration Of Periodic Filing Dates

On April 12, 2002, the SEC proposed major changes in the public company disclosure regime. If adopted, these changes will:

- require companies to report on Form 8-K: stock transactions, Rule 10b5-1 plan activity and company loans involving directors or executive officers;
- accelerate filing deadlines for Forms 10-K and 10-Q for seasoned public companies known as “accelerated filers”; and
- require accelerated filers to disclose in their Forms 10-K where investors can obtain access electronically to Forms 10-K, 10-Q and 8-K.

These proposed changes are contained in two proposed rules which can be found at:

<http://www.sec.gov/rules/proposed/33-8090.htm>

<http://www.sec.gov/rules/proposed/33-8089.htm>

A summary follows.

Reporting Stock Transactions And Loans Involving Executive Officers Or Directors

What transactions will be covered?

The SEC proposes new reporting of:

- transactions in equity securities of the issuer (including options) by directors and executive officers, including a grant or award under an employee benefit plan;
- any adoption, modification or termination of a Rule 10b5-1 plan; and
- any company loan (or guarantee of a loan) to any director or executive officer of the company.

How will these transactions be reported?

The SEC proposes that companies report these stock or loan transactions on a Current Report on Form 8-K.

When will these transactions need to be reported?

The SEC proposes the following deadlines:

- stock transactions or loans with a value of \$100,000 or more would be reported within two business days;
- stock transactions or loans with a value below \$100,000 or transactions pursuant to an employee benefit plan, and any adoption, modification or termination of a Rule 10b5-1 plan, would be reported by the second business day of the following week; and
- stock transactions and loans with a value of less than \$10,000 would not need to be reported until the aggregate value for those types of transactions or loans exceeded \$10,000.

When will these new reporting requirements for management transactions take effect?

The proposed rules regarding the new Form 8-K disclosure of management transactions is open for public comment for 60 days after April 12, 2002. It is expected that the SEC will issue final rules on this topic shortly after the end of the comment period. While phase-in periods may be provided for limited aspects of these new rules, the SEC proposes that they will generally become effective upon adoption.

What information about the transactions would be reported?

For stock transactions, the company would identify the director or executive, the date of the transaction, number of securities acquired or disposed, acquisition or disposition price, aggregate value of the transaction, nature of the transaction (e.g., open market sale, gift, sale to company), and other material information.

For Rule 10b5-1 plans, the company would identify the director or executive, the date on which the plan was entered into, a description of the plan, including number of shares covered, duration and identity of the counterparty. Modifications would be described similarly.

For company loans or guarantees, the company would identify the director or executive, the date of the agreement and dollar amount and other material terms (including interest rate, terms of repayment and any provisions regarding forgiveness), number of shares pledged as collateral and material terms of any pledge, including whether it is with recourse.

Acceleration of Deadlines for Filing Forms 10-K and 10-Q

What reporting deadlines will be accelerated?

The SEC proposes that public companies fitting the definition of “accelerated filers” be required to file:

- annual reports on Form 10-K within 60 days after their fiscal year end, rather than the current 90 days; and
- quarterly reports on Form 10-Q within 30 days after the end of the first three fiscal quarters, rather than the current 45 days.

The SEC *is not* currently proposing to change the 120 day period after fiscal year end that companies have to file their definitive proxy statements to allow the incorporation by reference of information required by Part III of Form 10-K.

Which public companies will be “accelerated filers”?

The due dates of quarterly and annual reports will be accelerated only for public companies, referred to as accelerated filers, that have:

- a public float of at least \$75 million as of a date 30 – 60 days before the end of the company’s last fiscal year;
- been subject to the reporting requirements of the Exchange Act for at least 12 calendar months preceding the filing of the report; and
- filed at least one annual report under the Exchange Act.

These criteria are very similar to the current eligibility requirements for registration of primary offerings on Form S-3.

When will the new deadlines first take effect?

If the Form 10-K and Form 10-Q proposal is adopted, the SEC expects to make the rules effective for companies that meet the public float and reporting history requirements as of the end of their first fiscal year ending after October 31, 2002. As a result, most companies will first become subject to the accelerated filing rules with respect to their Forms 10-K as follows:

<u>Fiscal Year End 10-K</u>	<u>Due Date</u>
December 31, 2002	March 3, 2003*
March 31, 2003	May 30, 2003
June 30, 2003	August 29, 2003
September 30, 2003	December 1, 2003*

*Due date is the Monday following the 60th day, which falls on a Saturday.

All Forms 10-Q due after the above Form 10-K due dates will have to be filed within 30 days after the quarter end.

What other related SEC rules may be changed?

The SEC is also proposing to change the date by which all financial schedules required by Article 12 of Regulation S-X may be filed by accelerated filers as an amendment to an annual report from 120 calendar days to 90 calendar days after the due date of the report. In addition, the SEC is considering making conforming revisions to accelerate the timeliness requirements in Regulation S-X for the inclusion of financial statements by accelerated filers in other SEC filings, such as Securities Act registration statements.

What public companies would not be affected by the proposed accelerated deadlines?

Public companies that do not meet the accelerated filer criteria, such as small business issuers that file on Forms 10-KSB and 10-QSB, would not have their periodic reporting deadlines accelerated. In addition, the SEC is not currently proposing to change the due date for annual reports on Forms 20-F for foreign private issuers (6 months after fiscal year end), but the SEC continues to review Exchange Act filing requirements generally for foreign issuers.

Website Access to SEC Filings

What will the SEC require accelerated filers to do?

To make SEC filings broadly available to the public, the SEC proposes that each accelerated filer disclose in its Form 10-K whether it makes its Exchange Act filings available on its website on the same day as filing (and if not, why not), as well as the availability of those filings through the SEC, and whether the company will provide electronic or paper copies of its filings free of charge upon request. The SEC notes that hyperlinking to the SEC's EDGAR website would not allow a company to state that it provides website access to its reports on the same day as filing, because those reports are posted on EDGAR 24 hours after filing.

What else is the SEC suggesting that accelerated filers provide online?

In addition to "encouraging" companies to make their current Forms 10-K, 10-Q and 8-K available online in a timely fashion, the SEC is also suggesting that companies provide website access to their:

- previous Forms 10-K, 10-Q and 8-K for at least the last 12 months;
- older reports on Forms 10-K, 10-Q and 8-K on an appropriately archived portion of their website; and

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- other filings with the SEC, including proxy statements and registration statements.

When will the website access disclosure rules take effect?

The SEC expects to make the website access disclosure rules effective three months after the date of adoption, which is likely to be shortly after the 30 day comment period ends.

Next Steps

While many of these proposals will be controversial, the new leadership at the SEC has put significant energy into these proposals and has emphatically stated its intention to take action in this area. The rules that are finally adopted may be significantly modified from what is proposed. We would be happy to provide you with additional information on the proposals announced today and will provide further information on the finally-adopted rule changes when they are announced.

If you have any questions, please contact any member of the Fenwick & West team or fwscu@fenwick.com.