



FENWICK & WEST LLP

CORPORATE & SECURITIES LAW UPDATE

Alert: Electronic Filing and Website Posting of Forms 3, 4 and 5 Required Starting June 30, 2003

June 17, 2003



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On May 7, 2003, the SEC issued its final rule requiring electronic filing of all Section 16 reports by public company insiders and the posting of those reports on the public company's website. The complete text of this rule is available at www.sec.gov/rules/final/33-8230.htm.

When do these new Section 16 rules go into effect?

June 30, 2003. Filings on or after that date must comply.

What Section 16 forms will be required to be filed electronically?

All Section 16 reports — Forms 3, 4 and 5 — will be required to be filed electronically on the SEC's online database, known as EDGAR.

Will the filing deadlines for Section 16 forms change?

The due dates of the forms have not changed, but the time deadline on the due date will be later. The filing deadline will be extended to 10:00 p.m. Eastern Time (7:00 p.m. Pacific Time); the previous deadline was 5:30 p.m. Eastern Time (2:30 p.m. Pacific Time).

Due dates remain:

- Form 3 — within 10 calendar days of a person's becoming an insider;
- Form 4 — by the end of the second business day following the date of the applicable transaction; and
- Form 5 — within 45 days after the end of the company's fiscal year.

Has the online format for filing these Section 16 reports changed?

Yes. The SEC recently issued Release 8.5 to its EDGAR system, which contains the new online filing system for Forms 3, 4 and 5. As part of this software upgrade, the SEC changed the format and required fields for online Section 16 reports. These modifications change the way information and transactions are presented on electronic Forms 3, 4 and 5, compared to how information was disclosed by many insiders in the past.

The SEC also issued guidance entitled "Section 16 Electronic Reporting Frequently Asked Questions" to help answer questions that have arisen due to the changes made in the electronic filing of Forms 3, 4 and 5. The complete text of this FAQ is available at www.sec.gov/divisions/corpfin/sec16faq.htm. The SEC has indicated that it will make further changes to the format of its electronic Section 16 forms in the near future to address additional questions and issues that have been raised by electronic filers.

What do insiders need in order to file Section 16 reports electronically?

In order to file their Forms 3, 4 and 5 electronically, insiders need EDGAR codes and access to and familiarity with the SEC's or a third party's Section 16 electronic filing system or software.

How do insiders determine if they have EDGAR codes and, if they do not have them, how do they obtain them?

An insider who has not yet obtained EDGAR codes *will need to do so immediately*, as it may take a week or more for the SEC to process requests for new EDGAR codes. Insiders can check to see whether they were previously issued EDGAR codes by entering the insider's last name in the "Company Name" field on the SEC's website at:

<http://www.edgarcompany.sec.gov/servlet/CompanyDBSearch?page=main>.

It is important for insiders to know whether they already have EDGAR codes — and to use the same codes for all issuers and filing services that may make filings on the insider's behalf. A second application for EDGAR filing codes will invalidate any EDGAR codes previously issued — which could cause filing complications for whoever attempts to use the old codes. This is a particular concern for directors who serve on two or more public company boards.

Obtaining EDGAR filing codes is easy - insiders simply complete and file a Form ID with the SEC. The Form ID is available from the SEC at <http://www.sec.gov/about/forms/formid.pdf>. Completed forms should be faxed to the SEC at (202) 504-2474.

How do insiders obtain access to the systems or software needed to make electronic filings?

An insider can file Forms 3, 4 and 5 electronically through the SEC's website (at <https://www.onlineforms.edgarfiling.sec.gov>). Many companies assist their affiliated insiders with making these filings. Some companies file directly through the SEC's website, while others work with a third-party service provider or third-party software to make the filings. There are many services available, and they vary in features and prices. Most of these filing services provide enhancements to the SEC's online filing system, such as the ability to save electronic versions of the Section 16 report.

Given the new format and filing requirements for Forms 3, 4 and 5 — and the short filing deadline for Forms 4 — whoever is handling the Section 16 filings should test *in advance* the operation of the filing service or software it will be using. Well in advance of the need to make the first electronic filing, a company assisting its insiders with their filings should evaluate the different filing alternatives in order to determine which filer or service the company wants to use, test that system and understand how to prepare and transmit a filing using that system.

Feel free to contact a member of your Fenwick & West team if you need assistance in evaluating the various filing alternatives. In addition, Fenwick & West will be able to file Section 16 reports on behalf of clients, as needed; please contact a member of your Fenwick & West team if you would like to discuss this client service.

How have these new rules changed the obligations of public companies?

The requirement to file Section 16 reports remains the obligation of public company insiders (officers, directors and holders of more than 10% of a registered class of equity securities). This has not changed. Many issuers already assist their insiders in making these filings, and this practice may become even more prevalent now that the filings must be made electronically.

Public companies remain obliged to report, in their annual proxy statements, whether any insiders were late in making filings or missed filings during the year.

The most significant impact of the new rule on public companies is that they will now also be required to provide access through their websites to all Section 16 reports made by their insiders.

What sort of website access to Section 16 reports will public companies be required to provide?

All public companies, effective June 30, 2003, must post on their corporate Internet websites all Section 16 reports filed by their insiders from that date forward, or provide an appropriate hyperlink to those reports through the investor relations page of the corporate Internet website.

If a company plans to use a hyperlink to the Forms 3, 4 and 5, rather than actually posting the reports on its website, the company should ensure that the hyperlink satisfies the following conditions:

- The hyperlink goes directly to the Section 16 forms (or to a list of the Section 16 forms) for the company, not just to the home page or general search page of a third-party service;
- The link caption clearly indicates that the link leads to the Section 16 reports of the company's insiders;
- The Section 16 reports are available on the third-party site within the required time frame;
- Access to the Section 16 reports is free of charge to the user;
- The third-party site allows retrieval of all information contained in the Section 16 reports, including exhibits and attachments; and

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- The medium to access the Section 16 reports must not inhibit effective access to the reports.

The hyperlink can be to a list of Section 16 reports on the SEC's EDGAR database on the SEC's website or to such a list on a third party's site. The SEC has suggested that issuers wishing to link to the EDGAR database use a link such as the following by inserting the issuer's CIK number where indicated in the following string:

[http://www.sec.gov/cgi-bin/browse-edgar?company=&CIK=\[insert issuer's CIK number\]&owner=only&action=getcompany](http://www.sec.gov/cgi-bin/browse-edgar?company=&CIK=[insert issuer's CIK number]&owner=only&action=getcompany).

Companies that use a hyperlink to a third-party site may wish to inform users that they are leaving the issuer's website when they access the hyperlink and disclaim responsibility for the accuracy of the information provided by the third-party service.

How quickly must public companies provide website access to their insiders' Section 16 reports?

Forms 3, 4 and 5 filed by company insiders must be accessible through the company's website no later than the end of the business day after those reports have been filed with the SEC.

For how long must issuers post the Section 16 reports on their websites?

Issuers must maintain website postings of (or hyperlinks to) Section 16 reports for at least 12 months after the time the Section 16 report is posted.

What can a company do to make sure it receives copies of Section 16 reports from insiders in time to post them on its website?

If a company uses a hyperlink to the SEC's EDGAR database, or to a third-party service that posts Section 16 filings as soon as they are made with the SEC, then the company should be able provide access to these filings within the required time frame.

Companies should also let their insiders know the name of the person at the company who should receive copies of any Section 16 reports that are filed, as well as how to provide those copies to the company electronically. The SEC suggests that issuers post this contact information on their websites.

What happens if a Section 16 report is filed late?

Forms 3, 4 and 5 that are filed late or not filed at all must be disclosed in the company's annual proxy statement under the heading "Section 16(a) Beneficial Ownership Reporting Compliance." In connection with the adoption of the rules mandating electronic filing, the SEC provided temporary limited relief from this disclosure requirement for Section 16

reports that are filed not later than one business day following the regular due date between June 30, 2003 and June 30, 2004.

The SEC has the authority to seek civil and criminal remedies against insiders who violate Section 16 reporting requirements, but these remedies have generally been sought only where an insider has repeatedly violated or intentionally disregarded the Section 16 reporting requirements.

What if I have more questions?

Should you have any questions about these new requirements, please feel free to contact any member of your Fenwick & West team. You may also contact Eileen Duffy Robinett (erobinett@fenwick.com), Horace Nash (hnash@fenwick.com), or Laird Simons (lsimons@fenwick.com), each of whom contributed to the preparation of this update.