



**FENWICK & WEST LLP**

*CORPORATE & SECURITIES LAW UPDATE*

## **Faster Filings Required for Forms 10-K and 10-Q; New Disclosures Required About Website Posting of Reports**

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## Faster Filings Required for Forms 10-K and 10-Q; New Disclosures Required About Website Posting of Reports

On September 5, 2002, the SEC published final rules that shorten the filing deadlines for Forms 10-K and 10-Q and require disclosure of whether these filings are being made available on company websites at the same time as they are filed with the SEC. The full text of these final rules can be found at the following link:

<http://www.sec.gov/rules/final/33-8128.htm>

At the same time that it adopted these rules, the SEC also adopted final rules requiring CEO and CFO certifications of annual and quarterly reports and requiring accelerated filing of Forms 4. These other rules were published earlier, and our updates regarding the SEC's rules are available at:

[http://www.fenwick.com/pub/corp\\_pubs/SEC\\_Proposes\\_New\\_Rules/SEC\\_9\\_3\\_02.htm](http://www.fenwick.com/pub/corp_pubs/SEC_Proposes_New_Rules/SEC_9_3_02.htm)

[http://www.fenwick.com/pub/corp\\_pubs/SEC\\_Proposes\\_New\\_Rules/SEC\\_8\\_29\\_02.htm](http://www.fenwick.com/pub/corp_pubs/SEC_Proposes_New_Rules/SEC_8_29_02.htm)

### What is the new Form 10-K filing deadline?

The SEC is phasing in new filing deadlines for the Forms 10-K of "accelerated filers" (described below) over the next three years. The phased-in deadlines are as follows:

Filings For Fiscal Years Ending (FYE)	Due Date
Before 12/15/03	90 days following FYE (current rule)
Between 12/15/03 and 12/14/04	75 days following FYE
After 12/14/04	60 days following FYE

### What is the new Form 10-Q filing deadline?

The SEC is phasing in new filing deadlines for the Forms 10-Q of "accelerated filers" (described below) over the next three years. The phased-in deadlines are as follows:

Filings For Fiscal Years Ending (FYE)	Due Date
Before 12/15/04	45 days following quarter end (current rule)
Between 12/15/04 and 12/14/05	40 days following quarter end
After 12/14/05	35 days following quarter end

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For example, if a company with a calendar year-end determines that it is an accelerated filer as of December 31, 2003, each of its Form 10-Q reports for the first three quarters of 2004 will have a 40-day deadline.

**Do the new filing deadlines apply to all public companies?**

No. These new filing deadlines apply only to “accelerated filers.” An accelerated filer is a company that, as of the end of an applicable fiscal year:

- had outstanding common equity held by non-affiliates with an aggregate market value of at least \$75 million as of last business day of the company’s most recently completed second fiscal quarter (e.g., as of June 30 for a calendar year filer);
- had been subject to the periodic reporting requirements for at least 12 months;
- was not eligible to file Forms 10-KSB and 10-QSB under the SEC’s small business issuer rules; and
- had previously filed at least one annual report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934.

The calculation of the market value of the company’s outstanding common equity is made by using the price at which the common equity was last sold, or the average of the bid and asked prices, in the principal market for the common equity.

The determination of whether a non-accelerated filer becomes an accelerated filer is made as of the end of the company’s fiscal year and governs the annual report to be filed for that year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter as long as the company remains an accelerated filer. Once a company becomes an accelerated filer, it remains an accelerated filer unless it becomes eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports.

To make it easier for the public to determine whether a company is an accelerated filer, the SEC revised the cover page of Form 10-K to require the company to provide the market value of its common equity held by non-affiliates as of the end of the most recently completed second fiscal quarter and revised the cover pages of Form 10-K and 10-Q to require the company to check a box indicating whether it is an accelerated filer.

Public companies that do not satisfy the “accelerated filer” requirements may continue to file their Forms 10-Q and 10-K under the existing deadlines--90 days following the end of the company’s fiscal year for Forms 10-K and 45 days following the end of the company’s fiscal quarter for Forms 10-Q. Small business issuers will also continue to be required to file their

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Forms 10-KSB and 10-QSB within the existing 90-day and 45-day deadlines. Foreign governments, foreign private issuers that elect to use Form 20-F and companies that do not have a common equity public float will also continue to file under the existing deadlines applicable to those companies.

Separate financial statements required by Rule 3-09 of Regulation S-X for subsidiaries not consolidated and 50% or less owned persons will not be accelerated for inclusion in an accelerated filer's annual report on Form 10-K if the subsidiary or 50% or less owned person is not itself an accelerated filer.

**Are companies required to post Forms 10-K and 10-Q on their websites?**

In annual reports on Form 10-K for fiscal years ending on or after December 15, 2002, each accelerated filer must disclose:

- the company's website address;
- whether it makes its Forms 10-K, 10-Q and 8-K (and amendments to each) available on or through its website free of charge at the same time as those reports are filed with the SEC (or as soon as reasonably practicable following that filing);
- the company's reasons, if it fails to make its reports available as described above; and
- whether the company voluntarily will provide electronic or paper copies of its filings free of charge upon request, if it fails to make its reports available as described above.

Presumably, most companies will wish to disclose that these reports are available on their websites, and will take steps to arrange for that in advance.

The SEC has indicated that hyperlinking to a third-party service is acceptable so long as the reports are made available in the appropriate time frame and access to the reports is free of charge to the user. The hyperlink should be direct to the company's reports (or a list of its reports), instead of to the home page or general search page of the service.

A company may also satisfy the posting requirements by hyperlinking directly to its reports (or a list of its reports) on the SEC's EDGAR website, but should make sure that the hyperlink scripts refer to the recently revised EDGAR search pages that now provide real-time data.

If a company chooses to hyperlink to a third-party service, it should make sure that it has carefully considered the reliability of the service in posting the reports, and the extent and nature of any information other than the reports that may be included on that site. To address concerns about "adopting" information provided by a third-party service that the company does not control, companies using a hyperlink may want to present the viewer with an intermediate

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screen stating that the viewer is leaving the company's website and disclaiming responsibility for the accuracy of the information provided by the third-party service. Companies should also consider designing the hyperlink so that it allows the viewer to access only the company's SEC reports, not other information that may be available on the third-party service's site.

**What should public companies do to prepare for these new filing deadlines?**

Accelerated filers will need to evaluate whether their current disclosure processes and resources are sufficient to allow them to comply with these new requirements. They should review their:

- data gathering processes;
- financial statement preparation processes;
- processes for preparing management's discussion and analysis and other disclosures included within Forms 10-K and 10-Q;
- processes for reviewing these reports by company personnel (including management and, where appropriate, the Board and Board committees), as well as outside advisers, such as independent auditors and legal counsel;
- processes for EDGARizing and filing reports with the SEC;
- processes for posting reports on the company's website at the same time as they are filed with the SEC; and
- compliance personnel, including the number and qualifications of those that are responsible for effecting these processes.

Please feel free to contact any member of your Fenwick & West team or Eileen Duffy Robinett ([erobinett@fenwick.com](mailto:erobinett@fenwick.com)), if you have questions about these new rules.