

## SEC PROPOSES REQUIRING CERTIFICATION OF QUARTERLY AND ANNUAL REPORTS AND NEW FORM 8-K DISCLOSURES AND FILING DEADLINES

On June 12, 2002, the Securities and Exchange Commission (the "SEC") held an open meeting which resulted in the proposal of new rules significantly affecting the disclosure obligations of reporting companies. The new rules would require management certification of quarterly and annual reports, would accelerate the deadlines for filing reports on Form 8-K and would add a number of new items or events for which Form 8-K filings would be required. The rules are being proposed as part of the SEC's comprehensive efforts to enhance investor confidence in the quality of companies' periodic reporting and to provide investors with prompt and accurate disclosure of information.

### 1. Certification of Quarterly and Annual Reports

As proposed, new Exchange Act Rule 13a-14 would require a domestic reporting company's principal executive officer and principal financial officer to certify, with respect to the company's quarterly and annual reports, that:

- the officer has read the report;
- to the officer's knowledge, the information in the report is true in all "important" respects; and
- the report contains all information about the company of which the officer is aware that the officer believes is "important to a reasonable investor."

In addition, under proposed Exchange Act Rule 13a-15, each company would be required to maintain procedures to provide reasonable assurances that it is able to collect, process and disclose the information required in its Exchange Act reports. Each company would also be required to review and evaluate these procedures annually and to present this evaluation to the company's principal executive officer and principal financial officer, who would be required to certify in the company's annual report that they have reviewed the results of the evaluation.

For purposes of the proposed certification, information is considered "important to a reasonable investor" if:

- there is a substantial likelihood that a reasonable investor would view the information as significantly altering the total mix of information in the report; and
- the report would be misleading to a reasonable investor if the information was omitted from the report.

In presenting this proposal to the SEC, the Division of Corporate Finance stated that although the proposal used the term “important” rather than “material,” it “does not seek to extend or expand the requirements for the disclosure of material information as reflected by current statutes and existing caselaw.” The Division also commented that the officers who sign the certification are potentially liable for a false certification, and that it is their expectation that these officers will more carefully evaluate their company’s disclosure and participate more extensively in its preparation, with the benefit to investors of higher quality disclosure and greater transparency.

The proposed management certification rules would apply only to domestic issuers that are subject to Exchange Act reporting requirements.

## **2. New Form 8-K Disclosure Requirements and Deadlines**

### **(a) Accelerated Filing Deadline**

The proposed revisions to Form 8-K are a substantial step in the SEC’s movement toward a system of “current disclosure.” The Form 8-K proposals follow the SEC’s already-published proposal that would accelerate the filing of annual reports from 90 to 60 days, and quarterly reports from 45 to 30 days, after the respective fiscal period ends.

The Form 8-K proposal would create a uniform filing period of two business days for all mandated Form 8-K disclosure items. This includes accelerating both the current five-business-day deadline for disclosures with respect to the resignation of directors and a change in the company’s independent accountant and the 15-calendar-day deadline for other required disclosures.

However, the proposal would grant an “of right” two-business-day extension to a company that provides proper notice on Form 12b-25 of its inability to timely file a Form 8-K. The proposal also would amend Exchange Act Rule 13a-11 to create a safe harbor for late filings where the company meets all safe harbor requirements.

### **(b) Expanded Coverage of Form 8-K**

The SEC is proposing to expand the coverage of Form 8-K by adding new categories of items and events to be reported, by moving certain disclosures from annual and quarterly reports into Form 8-K and by expanding certain disclosures currently mandated by Form 8-K. Many of the new Form 8-K items are matters that companies have reported in the past under Form 8-K’s “Other Matters” item, but if the proposal is adopted these disclosures will be mandated and subject to the two-business-day deadline.

The proposals would require current reports on Form 8-K to report 11 new items or events:

- entry into a material agreement not made in the ordinary course of business;
- termination of a material agreement not made in the ordinary course of business;

- termination or reduction of a business relationship with a customer that constitutes a specified amount of the company's revenues;
- creation of a direct or contingent financial obligation that is material to the company;
- events triggering a direct or contingent financial obligation that is material to the company, including any default or acceleration of an obligation;
- exit activities including any material write-off or restructuring;
- any material impairment;
- a change in a rating agency decision, issuance of a credit watch or change in a company outlook;
- movement of the company's securities from one national securities exchange or inter-dealer quotation system of a registered national securities association to another, delisting of the company's securities from an exchange or quotation system, or a notice that a company does not comply with a listing standard;
- notice to the company from its currently or previously engaged independent accountant that the independent accountant is withdrawing a previously issued audit report or that the company may not rely on a previously issued audit report; and
- any material limitation, restriction or prohibition, including the beginning and end of lock-out periods, regarding the company's employee benefit, retirement and stock ownership plans.

The following two items that currently are required to be disclosed in a company's annual and quarterly reports would be moved to Form 8-K:

- unregistered sales of equity securities by the company; and
- material modifications to rights of holders of the company's securities.

The proposals also would amend several existing Form 8-K disclosure items to include:

- disclosure regarding the departure of a director for reasons other than a disagreement or removal for cause;
- the appointment or departure of a principal officer and the election of new directors; and
- disclosure regarding any material amendment to a company's certificate of incorporation or bylaws.

Most of these proposals for expanding the coverage of Form 8-K had previously been suggested in the SEC's February 13, 2002 press release announcing its plans for improving financial reporting and the periodic disclosure system. One item suggested in that release – waivers of corporate ethics and conduct rules for officers, directors and other key employees – was not included in this or earlier proposals. The SEC made clear at its June 12, 2002 meeting, however, that this proposal is still on the horizon, but is being deferred while various bodies, including the New York Stock Exchange and the NASD, examine ethics and conduct requirements.

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The SEC invites public comment on all of the above proposed rules. Comments should be received within 60 days of publication of the proposed rules in the Federal Register.

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If you wish to obtain additional information regarding these proposed rules, please contact Michael A. Schwartz (212-728-8267, [mschwartz@willkie.com](mailto:mschwartz@willkie.com)) or the corporate partner who regularly works with you.

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