

SEC ADOPTS FINAL RULES REQUIRING ELECTRONIC FILING AND WEBSITE POSTING FOR FORMS 3, 4 AND 5

The Securities and Exchange Commission (the “SEC”) has adopted final rules¹ requiring the electronic filing and posting on corporate websites of beneficial ownership reports on Forms 3, 4 and 5 required under Section 16 of the Securities Exchange Act of 1934 (the “Exchange Act”). The new requirements are mandated by Section 403 of the Sarbanes-Oxley Act of 2002. The final rules will become effective on June 30, 2003 (the “Effective Date”).

Mandatory Electronic Filing of Forms 3, 4 and 5

Commencing on the Effective Date, beneficial ownership reports for corporate insiders² will be required to be filed electronically. Until such time, insiders may continue to file paper reports or file electronically on a voluntary basis in accordance with the new electronic filing system (described below) implemented on May 5th of this year. Paper reports will no longer be accepted after the Effective Date. In order to file a report electronically, corporate insiders will need to apply for and obtain their own Central Index Key (CIK) and CIK Confirmation Code (CCC) numbers. These codes can be obtained by completing and submitting a Form ID to the SEC. We understand that, with the added volume of EDGAR filers, the turnaround time at the SEC for obtaining these codes has increased to two days or more. This delay could increase further as the June 30 deadline approaches.

Elimination of Temporary Hardship Exemption. The final rules make the “temporary hardship exemption” contained in Rule 201 of Regulation S-T unavailable to filers of Forms 3, 4 and 5. This self-executing exemption allows an electronic filer who experiences unanticipated technical difficulties with the electronic filing to file a paper copy on the day after the date the filing was due, followed by an electronic filing within six days of the paper filing. After the Effective Date, this exemption will remain available only for other types of electronic filings. “Continuing

¹ SEC Release No. 33-8230 (May 7, 2003).

² The term “insiders” is defined for purposes of Section 16 of the Exchange Act to include a registrant’s directors, certain senior officers and beneficial owners of more than 10% of any class of equity security issued by the registrant.

hardship exemptions”³ and “filing date adjustments,”⁴ which must be requested and approved by the SEC, will continue to be available in theory for beneficial ownership reports, although the SEC is of the view that beneficial ownership report filings will not ordinarily satisfy the requirements for a continuing hardship exemption.

Temporary Relief from Disclosure of Late Filings. The SEC has granted limited temporary relief from the disclosure requirements under Rule 405 of Regulation S-K for delinquent filings of beneficial ownership reports. Rule 405 requires the disclosure, in an issuer’s Form 10-K and proxy statement, of beneficial ownership reports by its insiders that were not filed on a timely basis during the last fiscal year. Pursuant to this limited temporary relief, issuers need not make such disclosure for reports that (i) are no more than one day late and (ii) were filed during the first twelve months following the Effective Date.

Extension of 5:30 p.m. Filing Deadline. The final rules also extend the daily electronic filing acceptance deadline until 10:00 p.m. Eastern time. Currently, paper filings will not be accepted after 5:30 p.m. Eastern time and electronic filings made after 5:30 p.m. Eastern time are deemed filed on the next business day. Beneficial ownership reports that are filed electronically on and after the Effective Date by 10:00 p.m. Eastern time will be deemed filed on the date of receipt.

New Electronic Filing System and Third-Party Filing Services

On May 5, 2003, the SEC implemented a new filing system for Forms 3, 4 and 5 (EDGAR Release 8.5) on its website, at www.onlineforms.edgarfiling.sec.gov, to allow corporate insiders to log in with their CIK and CCC codes and submit beneficial ownership reports electronically. For corporate insiders who have already been voluntarily submitting electronic filings, the EDGARLink system through which they have previously submitted such filings will no longer be available for Forms 3, 4 and 5. Alternatively, corporate insiders can file their beneficial ownership reports in a customized “reduced content filing” through third-party service providers (such as financial printers) or special filing and tracking software created and marketed by such entities.

The new filing system has experienced software problems that the SEC is currently working to correct. In addition, comments received by the SEC in response to tests of the filing system conducted in March of this year revealed a number of drawbacks to the filing system’s current

³ Where an electronic filer cannot complete a filing without undue burden or expense, a “continuing hardship exemption” may be requested by submitting a written application for exemption to the SEC at least ten days prior to the filing due date. The SEC may approve the exemption if it determines that the exemption is appropriate and consistent with the public interest and the protection of investors.

⁴ If an electronic filer in good faith attempts to file a document with the SEC in a timely manner but the filing is delayed due to technical difficulties beyond the electronic filer’s control, the electronic filer may request an adjustment of the filing date, which the SEC may grant if it determines such adjustment to be appropriate and consistent with the public interest and the protection of investors.

design. The most significant operating issues with the current filing system are related to ease of use and certain user interface issues. These issues include (i) the automatic time-out feature that ends the user's session without warning one hour after the user's last activity on the system, (ii) the inability to archive reports or save recurring fields for future filings, (iii) the inability to complete forms offline and then file them online, (iv) the limited space in some fields and (v) the need for the user to manually input information contained in previously filed beneficial ownership reports rather than to have such information automatically input into any new filing when a user logs in with his CIK and CCC codes. The SEC has stated that it will consider implementing enhancements to deal with these and other types of user interface issues in future EDGAR software releases. It is not yet clear whether the SEC intends to address any of these issues in the next EDGAR software release currently scheduled for implementation in July. In the meantime, the SEC has suggested temporary work-arounds to many of the current operating problems in a Section 16 Electronic Reporting Frequently Asked Questions notice posted on the SEC's website at www.sec.gov/divisions/corpfin/sec16faq.htm.

The alternative filing methods provided by third-party service providers offer a broad range of helpful features, unavailable for the most part through the SEC's filing system, such as (i) the ability to complete forms offline prior to filing, (ii) the ability to track and automatically update single or multiple insiders' information and security holdings, (iii) automatic generation of forms upon the input of certain security acquisition and disposition events such as option exercises, and (iv) the ability to access an insider's information and file a beneficial ownership report from any computer with internet access. We believe that simple, single event transactions reported by individual insiders may be best filed via the new electronic filing system on the SEC's website, while insiders who have more complicated filings or who report more frequent transactions, and issuers who keep track of and file reports on behalf of their insiders could benefit from the added features offered by third-party service providers.

Website Posting

The final rules require issuers that maintain a corporate website to post on their websites all Forms 3, 4 and 5 filed with respect to their equity securities by the end of the business day immediately following the filing date. Issuers can also satisfy the website posting requirement by providing a hyperlink to another website containing the Forms 3, 4 and 5, provided certain conditions are met.⁵ The SEC noted that a hyperlink appropriately addressed to the SEC website would satisfy the website posting requirement and, in addition, be self-updating. It would appear

⁵ The following conditions must be met: (i) the forms must be available in the required time frame; (ii) access to the reports must be free of charge to the user; (iii) the display format must allow for retrieval of all information in the forms, including exhibits and attachments; (iv) the medium to access the forms must not be so burdensome that the intended users cannot effectively access the information; (v) access to the forms must be through the website address the issuer normally uses for disseminating information to investors; and (vi) the hyperlink must connect directly to the Section 16 forms (or a list of the forms) relating to the posting issuer, instead of just to the home page or general search page of the third-party service provider.

to be most logical for issuers to hyperlink to the SEC website, rather than take on the burden of formatting and downloading each beneficial ownership form filed or engaging a third-party service provider to track and record them. Website postings of beneficial ownership forms must remain on the issuer's website, or be available through hyperlinking, for the 12-month period beginning when the form is posted.

Although the website posting requirement applies only to issuers that maintain corporate websites, the SEC has imposed a separate requirement for investment companies. The requirement will be applicable to investment companies, even if they do not maintain a website, if their investment advisor, sponsor, depositor, trustee, administrator, principal underwriter or any affiliated person of the investment company maintains a website that includes the name of the investment company. In such a case, the forms must be posted, or appropriately hyperlinked, on at least one of the relevant websites.

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The foregoing is a summary of the principal provisions of the final rules. If you wish to obtain additional information regarding the final rules, please contact Frank A. Daniele (212-728-8216, fdaniele@willkie.com), Gordon Caplan (212-728-8266, gcaplan@willkie.com), J. Pasco Struhs (212-728-8109, pstruhs@willkie.com), Heath Golden (212-728-8456, hgolden@willkie.com) or the partner who regularly works with you.

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