

SEC ACCELERATES FILING DEADLINES FOR PERIODIC REPORTS

Website Access to Public Reports Also Required

At the end of last week, the Securities and Exchange Commission (“SEC”) adopted final rules¹ that accelerate the timetables for filing quarterly and annual reports under the Securities Exchange Act of 1934 (the “Exchange Act”) for domestic reporting companies that (1) have a common equity public “float” of at least \$75 million, (2) have been subject to the Exchange Act’s reporting requirements for at least 12 calendar months, (3) have previously filed at least one annual report and (4) do not qualify as “small business issuers” under SEC rules (“accelerated filers”). Companies that satisfy the eligibility requirements for use of short-form registrations on Form S-3 would generally be deemed “accelerated filers.”

The new deadlines will be phased-in over three years. The annual report deadline will remain 90 days for the first year, change from 90 days to 75 days for the second year and change from 75 days to 60 days for the third year and thereafter. The quarterly report deadline will remain 45 days for the first year, change from 45 days to 40 days for the second year and change from 40 days to 35 days for the third year and thereafter. The phase-in period will begin for accelerated filers with fiscal years ending on or after December 15, 2002.

Companies subject to the accelerated filing timetables will also be required, in their annual reports on Form 10-K filed for fiscal years ending on or after December 15, 2002, to disclose whether or not (and, if not, why not) the company provides access to its reports on its website, as soon as reasonably practicable after the reports are electronically filed with or furnished to the SEC.

Accelerated Filing Deadlines

Companies that qualify as accelerated filers, as of the end of their fiscal year, will be subject to accelerated filing deadlines for their periodic reports according to the following phased-in schedule:

¹ SEC Release No. 33-8128; 34-46464 (September 5, 2002). These implement the rules originally proposed in April. See SEC Release No. 33-8089; 34-45741 (April 12, 2002).

For Fiscal Years Ending On or After	Form 10-K Deadline (for the fiscal year just ended)	Form 10-Q Deadline (for the following fiscal year)
December 15, 2002	90 days after fiscal year end	45 days after fiscal quarter end
December 15, 2003	75 days after fiscal year end	40 days after fiscal quarter end
December 15, 2004	60 days after fiscal year end	35 days after fiscal quarter end

- A company with a calendar year fiscal year-end that determines it is an accelerated filer as of December 31, 2002² (its first fiscal year ending on or after December 15, 2002) must file its annual report on Form 10-K for that fiscal year within 90 days of its fiscal year-end (by March 31, 2003). Each of the Form 10-Q reports for the first three quarters of its 2003 fiscal year will continue to have the existing 45-day deadline.
 - o The Form 10-K for the fiscal year ending December 31, 2003 will have a 75-day deadline and will be due by March 15, 2004. Each of the Form 10-Q reports for the first three quarters in the 2004 fiscal year will have a 40-day deadline.
 - o The Form 10-K for the fiscal year ending December 31, 2004 will have a 60-day deadline and will be due by March 1, 2005. Each of the Form 10-Q reports for the first three quarters in the 2005 fiscal year will have a 35-day deadline. All subsequent reports on Forms 10-K and 10-Q by the accelerated filer will be subject to a 60- and 35-day deadline, respectively.
- The SEC has stated that the phased-in schedule is intended to give companies sufficient time to prepare for accelerated deadlines. Companies that face extenuating circumstances can obtain an extension of five calendar days for quarterly reports and fifteen calendar days for annual reports under Rule 12b-25 under the Exchange Act.

² With its public float determined as of June 30, 2002, as discussed below.

- o The disclosure controls and procedures mandated by the Sarbanes-Oxley Act, described in our previous client memoranda, for the collection and reporting of information required to be disclosed in periodic reports must take into account these accelerated reporting deadlines.

Definition of Accelerated Filer

A domestic reporting company will be deemed an “accelerated filer” subject to the accelerated filing dates for periodic reports after it first meets the following conditions as of the end of its fiscal year:

1. Its common equity public float³ was \$75 million or more as of the last business day of its most recently completed *second* fiscal quarter;
 2. The company has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
 3. The company has previously filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
 4. The company is not a small business issuer eligible to use Forms 10-KSB and 10-QSB.
 - o Companies which satisfy the eligibility requirements for use of short-form registrations on Form S-3 would generally be deemed “accelerated filers.”
- Companies must determine if they are accelerated filers beginning with the fiscal year that **ends on or after December 15, 2002**. A company that does not initially fall within the scope of the definition of an accelerated filer must re-evaluate its status at the end of each subsequent fiscal year, but at no other point other than the end of its fiscal year.
 - o For example, a calendar year-end company that did not qualify as an accelerated filer as of December 31, 2002 will remain subject to existing filing deadlines. But if, as of December 31, 2003, the company qualifies as an accelerated filer, the accelerated deadlines will apply for its 2003 annual report (75 days after year-end 2003), 2004 quarterly reports (40 days after the end of each quarter) and all periodic reports thereafter according to the above schedule.
 - Once a company qualifies as an accelerated filer, it remains one until it subsequently becomes eligible to use the periodic report forms (Forms 10-KSB and 10-QSB) for

³ The SEC defines public float as “the aggregate market value of a company’s outstanding voting and non-voting common equity (*i.e.*, market capitalization) minus the value of common equity held by affiliates of the company.”

“small business issuers,” defined as U.S. or Canadian non-investment companies with revenues or public float of less than \$25 million.

- o A reporting company would have to satisfy this definition at the end of two consecutive fiscal years before it will be considered a small business issuer for purposes of Form 10-KSB and Form 10-QSB and thus cease to be an accelerated filer.
- Although many publicly traded companies (nearly half according to the SEC) currently fall below the \$75 million public float threshold, stronger equity markets in the future may well lift their public float and thereby trigger accelerated filing deadlines for them.⁴
- Small business issuers, and foreign private issuers filing annual reports on Form 20-F,⁵ are currently excluded from the definition of accelerated filers and therefore not subject to the accelerated filing deadlines.
 - o In the implementing release, the SEC stated that it is continuing to consider whether to expand the scope of accelerated filers to include these issuers, but SEC staff members have publicly indicated that this is not an immediate concern of the SEC.
- Form 10-K has been revised so that, regardless of whether it qualifies as an accelerated filer, every company must disclose on the cover of its annual report of Form 10-K its public float as computed on the last business day of the company’s most recently completed second fiscal quarter. Also, each company must check a box on the cover of its quarterly reports on Form 10-Q (also revised) and annual reports on Form 10-K if it is an accelerated filer.

Conforming Amendments

The SEC also conformed certain other filing deadlines for accelerated filers to parallel the deadlines of their quarterly and annual reports.

- ***Year-End Audited Financial Statements.*** Currently, registration statements filed or declared effective, or proxy statements mailed, after the 45th day following the fiscal year end must include audited financial statements for the most recent fiscal year end.⁶

⁴ Note that a decline in a company’s public float will not relieve it of its accelerated filing requirements until it qualifies as a “small business issuer.”

⁵ Foreign private issuers that elect to file periodic reports on Forms 10-Q and 10-K are subject to the same filing deadlines as domestic companies.

⁶ If the audited financial statements for the most recently completed fiscal year are available or become available before effectiveness or mailing, they must be included in the filing.

However, certain companies are not required to include such audited financial statements until the 90th day after the end of their fiscal year.⁷ Following the 90th day after the end of the fiscal year, all companies must include year-end audited financial statements.

The SEC has shortened this 90-day deadline for accelerated filers to conform to their phased-in periods for annual reports. Thus, for example, accelerated filers as of December 31, 2002 would, under the circumstances, have to include audited year-end financial statements in registration statements filed after 90 days of year-end 2002, but after only 75 days of year-end 2003 and after 60 days of year-end 2004.

- ***Interim Period Financial Statements.*** Registration statements filed 134 days subsequent to the end of a company's fiscal year currently must include interim financial information as of a date within 135 days of the date of the filing, the same deadline for the company's first quarterly report on Form 10-Q. For accelerated filers, the SEC has conformed this timetable with that of the new deadlines for their quarterly reports on Form 10-Q. Thus, for example, accelerated filers as of December 31, 2002 would have to include interim financial information in registration statements filed 134 days subsequent to the year-end 2002 and also year-end 2003, but only 129 days subsequent to the year-end 2004 and 124 days subsequent to the year-end 2005.
 - Although the SEC release clearly indicates that changes conforming to the new accelerated deadlines were intended, the implementing rules themselves are ambiguous. We have raised this issue with the SEC and expect clarification before these new deadlines take effect.
- ***Unconsolidated Subsidiaries.*** Separate financial statements of unconsolidated subsidiaries (including 50% or less owned persons) required by Rule 3-09 of Regulation S-X will not be accelerated for inclusion in a company's annual report on Form 10-K if the subsidiary itself is not an accelerated filer. In that instance, the financial statements of the subsidiary can be filed by amendment within 90 days, or within six months if the subsidiary is a foreign business, after the end of the registrant's fiscal year.⁸
- ***No Change to Proxy Statement Deadline.*** Companies will continue to have 120 days following the end of the fiscal year covered by their 10-K to file a definitive proxy

⁷ See Rule 3-01 of Regulation S-X for the conditions the registrant must satisfy to take advantage of this provision.

⁸ If the fiscal year of the subsidiary ends within the parent company's "number of filing days" before the date of the filing, or if the subsidiary's fiscal year ends after the date of the filing, the required financial statements may be filed as an amendment to the report within the subsidiary's "number of filing days" (or within six months if the subsidiary is a foreign business) after the end of such subsidiary's fiscal year. "Number of filing days" is equal to the number of days after the end of the parent company's fiscal year by which its annual report on Form 10-K is due.

statement with the SEC involving the election of directors to allow the incorporation by reference of information about directors and officers required by Part III of Form 10-K.

- **Form 10-K Schedules Required by Article 12 of Regulation S-X.** The SEC adopted conforming amendments to maintain a 30-day period following the due date of an annual report on Form 10-K for companies to file Article 12 Schedules, such as condensed financial information.
- **No Change to Requirements for Filing Financial Statements of Acquisitions.** After receiving strong, uniform objection to proposed conforming revisions to the financial statement filing requirements in Item 7 of Form 8-K and Rule 3-05 of Regulation S-X for financial statements of businesses acquired, the SEC left these rules unchanged.

Website Access to Information and Disclosure of Web Access to Company Reports

Beginning with their first annual report on Form 10-K filed for fiscal years **ending on or after December 15, 2002**, accelerated filers must disclose in the business description of each annual report on Form 10-K:

- The company's website address,⁹ if it has one;
- Whether the company makes available free of charge on or through its website, if it has one, its annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and all amendments to those reports as soon as reasonably practicable¹⁰ after such material is electronically filed with or furnished to the SEC;
- If the company does not make its filings available in this manner, the reasons it does not do so (including, where applicable, that it does not have an Internet website); and
- If the company does not make its filings available in this manner, whether the company voluntarily will provide electronic or paper copies of its filings free of charge upon request.
 - The SEC has stated that hyperlinking to a third-party service (including the SEC's EDGAR website)¹¹ is acceptable so long as the reports are made available in the appropriate timeframe and access to the reports is free of charge to the user. A company hyperlink to a third-party service should link directly to the company's

⁹ Companies should disclose the website normally used for its investor relations functions.

¹⁰ The SEC interprets "as soon as reasonably practicable" to mean that the report would be available, barring unforeseen circumstances, on the same day as filing.

¹¹ Note that the SEC EDGAR website does not enable reports to be viewed in PDF format.

- reports (or to a list of its reports) instead of simply to the home page or general search page of the third-party service. Companies may present the viewer with an intermediate screen stating that the visitor is leaving the company's website. According to the SEC, a disclaimer of responsibility for the accuracy of the third-party service will not make the website posting ineffective for purposes of this disclosure requirement.¹²
- o Website access must include access to all exhibits and supplemental schedules electronically filed with the reports or amendments. However, the use of a particular medium to access the reports should not be so burdensome that the intended recipients cannot effectively access the information provided. Information incorporated by reference is not required to be separately posted, but encouraged by the SEC to be made available if it will aid investor access to the information.
 - o While there are no formal requirements for how long reports must be made available, the SEC suggests at a minimum that companies provide website access to their previous reports for at least a 12 month period. Access to previous reports on an appropriately archived portion of companies' websites over an even longer timeframe is also desirable according to the SEC. Finally, while not required, the SEC encourages companies to provide website access to all of their public filings, including their filings under the proxy rules and their filings under the Securities Act of 1933.
 - o The SEC has emphasized that inclusion of the company's website address will not, by itself, include or incorporate by reference the information on the site into the company's annual report, unless the company otherwise acts to incorporate the information by reference.¹³
 - o These new disclosure obligations are designed to create duties only under Sections 13(a) and 15(d) of the Exchange Act. The new disclosure is not an antifraud rule, and it is not designed to create new duties under the antifraud provisions of the federal securities laws or in private rights of action or to alter any existing liability provisions. The new disclosure also does not separately create or otherwise affect a company's duty to update its prior statements.

¹² As a result of adding real-time EDGAR filing data to the SEC EDGAR website, new searches located on new webpages are now available that provide access to this real-time data. For companies that currently hyperlink to the SEC EDGAR website, they will need to revise their hyperlink scripts if they have not already done so to refer to the new search pages providing real-time data.

¹³ This position does not change the SEC's earlier guidance that inclusion of hyperlinks in prospectuses filed under Section 10 of the Securities Act may cause hyperlinked information to be part of the prospectus. See SEC Release No. 33-7856 (April 28, 2000), n.41 and accompanying text.

- o While this disclosure requirement only applies to companies that qualify as accelerated filers, the SEC has noted that it will consider extending these disclosure requirements to all filers, including foreign private issuers and small business issuers, after evaluating its initial experience with the accelerated filers.

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If you wish to obtain additional information regarding this new legislation or other initiatives, assistance in developing a detailed program to help ensure compliance or copies of any of our previous client memoranda, please contact John S. D'Alimonte (212-728-8212, jd'alimonte@willkie.com), Yaacov M. Gross (212-728-8225, ygross@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com), or the partner who regularly works with you.

Willkie Farr & Gallagher is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

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