

Client Alert: New SEC Rules Implement Certification Requirements and Accelerate Periodic Filings

On August 27, 2002, the SEC approved rules implementing a provision of the Sarbanes-Oxley Act of 2002 requiring an issuer's principal executive and financial officers to make certifications in connection with the filing of quarterly and annual reports under the Securities Exchange Act of 1934, as amended, and rules accelerating the deadlines for many companies to file annual reports on Form 10-K and quarterly reports on Form 10-Q.¹ The SEC also approved new rules requiring Form 10-K disclosure regarding access to SEC reports on company websites and requiring issuers to establish a system of disclosure controls and procedures. The certification requirements are effective for annual and quarterly reports filed after August 29, 2002. The accelerated Form 10-K and 10-Q filing deadlines will be phased in over a three-year period, with the current deadlines remaining unchanged for the first year.

Certification Requirement

The SEC has adopted rules requiring an issuer's principal executive officer and principal financial officer to certify the contents of the issuer's quarterly and annual reports (*e.g.*, Forms 10-K and 10-Q). The new rules implement Section 302 of the Sarbanes-Oxley Act and apply to reports filed after August 29, 2002. The new certifications do not affect the certification required under Section 906 of the Sarbanes-Oxley Act, which remains a separate stand-alone certification.² Under the new rules, the CEO and CFO are required to certify that they have reviewed the report and that, based on their knowledge:

¹ See Securities and Exchange Commission Release No. 33-8124 with respect to CEO and CFO certifications. A copy of the Release is available on the SEC website at <http://www.sec.gov/rules/final/33-8124.htm>. The SEC is expected to issue a release with respect to accelerated reporting deadlines for Form 10-K and Form 10-Q shortly.

² Section 906 requires that each periodic report containing financial statements filed with the SEC be accompanied by a written statement by the issuer's CEO and CFO that the report fully complies with the requirements of Section 13(a) or 15(d) of the 1934 Act and that the financial statements fairly present, in all material respects, the financial condition and results of operations of the issuer. Noncompliance with Section 906 may result in criminal penalties.

- the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and
- the financial statements and other financial information included in the report fairly present in all material respects the financial condition, results of operations and cash flows of the issuer.

The officers must also certify in any quarterly report and annual report for a period ending after August 29, 2002 that they:

- are responsible for and have established "disclosure controls and procedures" (a newly-defined term reflecting the concept of controls and procedures related to SEC disclosure requirements) designed to ensure that material information is made known to them;
- have evaluated and presented in the report their conclusions about the effectiveness of the disclosure controls and procedures; and
- have disclosed to the issuer's auditors and audit committee (i) all significant deficiencies in the issuer's internal controls regarding financial reporting and (ii) any fraud involving employees with a significant role in such internal controls.

The certification requirements apply to any issuer required to file quarterly and annual reports with the SEC under Section 13(a) or 15(d) of the 1934 Act, including foreign private issuers and small business issuers. The forms of certification are set forth in the release and wording changes to the forms are not permitted. The certifications must be included in the applicable SEC report and should follow immediately after the signature sections of the report. These new rules supersede the certification proposal included in the SEC's June 14, 2002 release.

Disclosure Controls and Procedures

New SEC rules also require issuers to establish and maintain an overall system of disclosure controls and procedures adequate to meet their 1934 Act reporting obligations. These rules are intended to complement existing requirements for reporting companies to have in place internal controls regarding their financial reporting obligations. Quarterly reports and annual reports will have to include disclosure concerning the evaluation of the issuer's disclosure controls and procedures and any changes to the issuer's internal controls regarding its financial reporting obligations.

Accelerated Deadline for Filing*

The SEC has accelerated the Form 10-K and 10-Q filing deadlines for domestic companies that:

- have a public float of at least \$75 million;
- have been reporting under the 1934 Act for at least 12 months;
- have previously filed at least one annual report; and
- are not eligible to use the SEC's special forms for small business issuers (*i.e.*, Form 10-KSB and Form 10-QSB).

For companies meeting these requirements ("accelerated filers"), the new filing deadlines will be phased in over three years. The existing due dates for annual reports on Form 10-K (90 days after fiscal year-end) and quarterly reports on Form 10-Q (45 days after end of first three quarters in fiscal year) remain unchanged for the first year. The Form 10-K deadlines will change to 75 days for year two, and change to 60 days for year three and thereafter. The Form 10-Q deadline will change to 40 days for year two, and change to 35 days for year three and thereafter. The first reductions—to 75 days for annual reports and 40 days for quarterly reports—would occur for accelerated filers with fiscal years ending on or after December 15, 2003.

Disclosure of Website Access to Reports*

Under the new rules, accelerated filers will be required to disclose in their annual reports on Form 10-K for fiscal years ending on or after December 15, 2002 whether the company makes available free of charge on its website its periodic and current reports as soon as reasonably practicable after such material is electronically filed with the SEC.

September 4, 2002

* Please note that this description is based on an SEC press release and is subject to the SEC's formal final rule release.

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at http://www.chadbourne.com/publications/sub_Publications.html. If you have any questions regarding the new SEC rules, please contact any of the following:

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