

Client Alert: SEC Proposes New Rules On Acceleration of Periodic Report Filing Dates and Disclosure of Certain Management Transactions

A. Introduction

On April 12, 2002, the SEC published for comment proposed amendments to the disclosure rules under the Securities Exchange Act that would require many public companies to file annual reports on Form 10-K and quarterly reports on Form 10-Q on an accelerated timeline, and to disclose their policies regarding electronic distribution of their Forms 10-K, 10-Q and 8-K to the investing public.¹ At the same time, the SEC published for comment proposed amendments that would require all public companies to file current reports on Form 8-K reporting:

- transactions by directors and executive officers in company equity securities;
- arrangements for the purchase and sale of company equity securities by directors and executive officers; and
- loans to a director or executive officer made or guaranteed by the company or an affiliate of the company.²

B. Acceleration of Quarterly and Annual Report Due Dates

The SEC has proposed to accelerate the dates for filing annual reports on Form 10-K and quarterly reports on Form 10-Q for companies:

- with a public float³ of \$75 million or more as of a date within no more than 60 and no less than 30 days before the end of the company's last fiscal year;⁴

¹ See Securities and Exchange Commission Release Nos. 33-8089; 34-45741; File No. S7-08-02. A copy of the Release is available on the SEC website at: <http://www.sec.gov/rules/proposed/33-8089.htm>

² See Securities and Exchange Commission Release Nos. 33-8090; 34-45742; File No. S7-09-02. A copy of the Release is available on the SEC website at: <http://www.sec.gov/rules/proposed/33-8090.htm>

³ Public float is 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. Public float is also one of the key determinants for eligibility for short-form registration under the Securities Act (Form S-3 and Form F-3).

- that have 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 preceding the filing of the report; and
- that have filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act.

For a company meeting these requirements (an “accelerated filer”), the SEC proposes to shorten the due date for annual reports on Form 10-K to 60 calendar days (from the current 90 calendar days) after the company’s fiscal year-end and to shorten the due date for quarterly reports on Form 10-Q to 30 calendar days (from the current 45 calendar days) after the end of each of the first three quarters of the company’s fiscal year. Similar changes are proposed for the transition reports that an accelerated filer must make when it changes its fiscal year.

C. Website Access to Information

The SEC encourages companies to make their SEC filings as broadly available to the public as possible. In particular, the SEC is encouraging every reporting company to make its filings available to investors free of charge on its Internet website, if it has one, as soon as reasonably practicable after, and in any event on the same day as, such material is filed electronically with the SEC.

The SEC has proposed to require accelerated filers to disclose in their annual reports on Form 10-K the following:

- that the public may read and copy the company’s filings at the SEC Public Reference Room, and can access information filed electronically on the SEC website;
- the company’s website address, if it has one;
- whether the company makes available free of charge on its website, if it has one, its annual reports 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 practicable after, and in any event on the same day as, such material is electronically filed with or furnished to the SEC;

⁴ The company could select any date within this period to establish whether it met the public float requirement for purposes of establishing the due date for that year’s Form 10-K and the subsequent year’s Form 10-Q reports.

- if the company does not make its filings available in this manner, the reasons why it does not do so (including, where applicable, that it does not have an Internet website);
- if the company does not make its filings available in this manner, one or more locations where the public can access these filings electronically immediately upon filing, if any, and whether there is a fee for such access; and
- whether the company voluntarily will provide electronic or paper copies of its filings free of charge upon request.

It is important to note that providing a link to the SEC website (where EDGAR filings are subject to a potential 24-hour delay), or any other system that does not have the information available immediately upon filing with the SEC, would not allow a company to state that it provides website access to its reports on the same day as such material is electronically filed with the SEC. The current proposal does not actually require that a reporting company maintain a website or publish its reports on its website; rather, it requires that the company disclose to the public, whether or not it does so, and if it does not, the rationale behind that policy.

D. Additional 8-K Disclosure With Respect to Certain Management Transactions

The SEC has proposed to amend Form 8-K to provide for the addition of a new Item 10, which would require companies with a class of equity securities registered under Section 12 of the Exchange Act to report on Form 8-K:

- each director's and executive officer's transactions in company equity securities (whether or not the class is registered under Section 12), including the acquisition, disposition, exercise, termination or settlement of derivative securities (including stock options);
- each director's and executive officer's adoption, modification or termination of a contract, instruction or written plan for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c);⁵ and

⁵ For purposes of insider trading liability under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, Rule 10b5-1 provides that "a purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale." Compliance with the affirmative defense conditions of Rule 10b5-1(c) allows a person to plan securities transactions in advance while not aware of material nonpublic information, and later execute the transactions as planned without Section 10(b) and Rule 10b-5 liability, even if aware of material nonpublic information at the time a planned transaction occurs.

- any loan to a director or executive officer made or guaranteed by the company or an affiliate of the company.

The SEC has proposed that most Item 10 events be reportable early in the week following the event, while certain events that would be of heightened importance to investors would be reportable on an accelerated basis, and *de minimis* events would be reportable on a deferred basis. Specifically:

- an Item 10 Form 8-K would be due within two business days following a covered transaction or loan with an aggregate value of \$100,000 or more with respect to a director or executive officer, other than a grant or award pursuant to an employee benefit plan;
- employee benefit plan grants and awards, transactions and loans with an aggregate value of less than \$100,000, and Rule 10b5-1 arrangements generally would be reportable not later than the close of business on the second business day of the week following the week in which the event occurred; and
- the report of a transaction or loan with an aggregate value not exceeding \$10,000 could be deferred until the aggregate cumulative value of unreported transactions and loans with respect to the same director or executive officer exceeds \$10,000.

As a practical matter, a company would need to institute procedures and systems to assure Item 10 compliance, which the SEC has agreed to take into account when assessing fines and penalties in the event of a violation.

Comments Sought

The staff of the SEC invites interested persons to submit written comments on the proposed amendments and any other matters that might have an impact on the proposed amendments. Comments with regard to “Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports” (Release No. 33-8089) should be received on or before 30 days after publication of that Release in the *Federal Register*, and comments with regard to “Form 8-K Disclosure of Certain Management Transactions” (Release No. 33-8090) should be received on or before 60 days after publication of that Release in the *Federal Register*. Comments may be submitted electronically at the following electronic mail address: rule-comments@sec.gov. All comment letters relating to Release No. 33-8089 should refer to File No. S7-08-02 and all comment letters relating to Release No. 33-8090 should refer to File No. S7-09-02; these file numbers should be included in the subject line, if electronic mail is used.

For Additional Information

If you have any questions regarding the proposed amendments, please contact:

Peter R. Kolyer
(212) 408-5564
pkolyer@chadbourne.com

Marc A. Alpert
(212) 408-5491
malpert@chadbourne.com

Sey-Hyo Lee
(212) 408-5122
shlee@chadbourne.com

Ven Medabalmi
(212) 408-1056
vmedabalmi@chadbourne.com

Chadbourne & Parke LLP

New York
30 Rockefeller Plaza
New York, New York 10112
Telephone (212) 408-5100
Facsimile (212) 541-5369

Washington
1200 New Hampshire Ave. N.W.
Washington, D.C. 20036
Telephone (202) 974-5600
Facsimile (202) 974-5602

Los Angeles
350 South Grand Ave, Suite 3300
Los Angeles, CA 90071
Telephone (213) 892-1000
Facsimile (213) 622-9865

Hong Kong
Suite 2203, Tower 1
Lippo Centre, 89 Queensway
Hong Kong
Telephone: (852) 2842-5400
Facsimile: (852) 2521-7257

Moscow
53/5 Kosmodamianskaya Naberezhnaya
Moscow, Russian Federation 115054
Telephone: (7-095) 974-2424
Facsimile: (7-095) 974-2425

London
Chadbourne & Parke (a multinational partnership)
Regis House
45 King William Street
London EC4R 9 AN
Telephone: (44-20) 7337-8000
Facsimile: (44-20) 7337-8001

If you would like additional copies of this client alert or should you have any related questions, please contact:
Doreen Norden, Director of Marketing and Creative Services at (212) 408-5190 or e-mail: dnorden@chadbourne.com