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Advisory

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SECURITIES LAW

Accelerating Filing of, and Website Access to, Periodic Reports Will Also Require Disclosure Regarding Web Site Access to SEC Reports

On August 27, 2002, the Securities and Exchange Commission (SEC) approved rule changes, initially proposed on April 12, 2002,¹ that accelerate the filing deadlines for annual reports on Form 10-K and quarterly reports on Form 10-Q for certain issuers. The new accelerated filing deadlines apply only to so-called "accelerated filers," which are issuers that meet specific criteria as discussed in the following paragraph. The amendments also require that accelerated filers disclose whether or not they provide access to their periodic reports on Forms 10-K and 10-Q and current reports on Form 8-K on their company's web site. The SEC heralded the amendments as an important step in modernizing the periodic reporting system and improving the usefulness of periodic reports to investors.

Who are "accelerated filers" under the new rules?

The new rules define accelerated filers as domestic companies that:

- have a common equity public float of at least \$75 million;²
- have been subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") for at least 12 months;
- have previously filed at least one annual report; and
- do not qualify as small business issuers under SEC rules.

Foreign private issuers will not have to comply with the accelerated filing deadlines, nor will companies that do not have a class of publicly traded common equity.

What are the accelerated filing deadlines?

The SEC will phase in changes to the periodic report deadlines over a period of three years, as set forth in the following table, with the first reductions in the filing deadlines occurring for accelerated filers with fiscal years ending on or after December 15, 2003.

For Fiscal Years Ending On or After	Form 10-K Deadline	Form 10-Q Deadline
December 15, 2002	90 days after fiscal year end*	45 days after fiscal quarter end*
December 15, 2003	75 days after fiscal year end	45 days after fiscal quarter end
December 15, 2004	60 days after fiscal year end	40 days after fiscal quarter end
December 15, 2005	60 days after fiscal year end	35 days after fiscal quarter end

* These are the current deadlines.

¹ For further details on the amendments as initially proposed, see the Mintz Levin Client Alert dated April 17, 2002, "SEC Proposes Accelerated Filing Deadlines, Website Access Disclosure, and 8-K Disclosure of Management Transactions," available at <http://www.mintz.com/newspubs/Bus-Fin&Sec/SECAAlert-04-02.pdf>.

² Public float is the aggregate market value of a company's outstanding voting and non-voting common equity, excluding the value of the common equity held by the company's affiliates.

The SEC had originally proposed to accelerate the filing deadlines from 90 days to 60 days after the end of an issuer's fiscal year for an annual report, and from 45 days to 30 days after the end of an issuer's fiscal quarter for a quarterly report, with no gradual shortening of the deadlines. However, in response to concerns raised as part of the public comment process that issuers would need time to adjust to the new schedule, the SEC has adopted a gradual approach to the accelerated filings, as well as an ultimate 10-Q filing deadline of 35 days rather than 30 days.

When will a company have to determine if it is or has become an accelerated filer?

The accelerated filing deadlines will apply to an issuer after it first meets the definition of an accelerated filer, as set forth above, as of the end of its first fiscal year ending on or after December 15, 2002 (although the first accelerated filing is not required until one year later). For purposes of the definition, however, the issuer's public float will be determined as of the last business day of its most recently completed *second fiscal quarter*. The SEC states that this is intended to allow an issuer to know further in advance whether it will become an accelerated filer at the end of its fiscal year, and to make the necessary preparations to meet the accelerated filing deadlines. If an issuer meets the definition of an accelerated filer at the end of its fiscal year, it will become subject to the accelerated filing deadlines and web access disclosure requirements for that fiscal year and all subsequent annual and quarterly reports.

Once a company becomes an accelerated filer, it will remain so unless it subsequently becomes eligible to be treated as a small business issuer under SEC regulations. Companies that are not accelerated filers are not subject to the accelerated filing deadlines and will continue to file in accordance with the existing deadlines.

What disclosure must we make about access to our public filings?

Citing the importance to investors of the information contained in a company's periodic reports on Forms 10-K and 10-Q and current reports on Form 8-K, the rule amendments also will require accelerated filers to provide disclosure regarding Internet access to those reports. Beginning on December 15, 2002, each accelerated filer must disclose in its annual report its web site address, if it has one, and whether the company makes its periodic reports and current reports available on its web site free of charge "as soon as reasonably practicable" after such reports are electronically filed with, or furnished to, the SEC. An accelerated filer may satisfy this requirement by providing access to its periodic and current reports via hypertext link on its web site to a third party web site (such as the SEC's EDGAR site).³

The rule amendments do not cover how long a company's reports must be made available on or through its web site, but the SEC suggests that companies provide web site access to their previous reports for at least 12 months. The SEC also recommends that companies provide access to their previous reports on an appropriately archived portion of their web site for even longer than 12 months. Finally, the SEC encourages companies to provide web site access to all of their SEC filings, including proxy materials and filings under the Securities Act of 1933 (the "Securities Act").

If an accelerated filer does not make those reports available on its web site, it must state why it does not do so (stating, if applicable, that it does not maintain a web site), and indicate whether the company will voluntarily provide electronic or paper copies of those reports upon request and free of charge. Although companies that are not accelerated filers are not subject to these disclosure requirements, the SEC encourages them to provide

their Internet address in their annual report on Form 10-K.

Conforming Amendments

The SEC also approved conforming amendments to accelerate the timeliness requirements in Regulation S-X regarding the inclusion of financial statements by accelerated filers in other SEC filings, such as registration statements filed under the Securities Act and the Exchange Act, and proxy and information statements filed under Section 14 of the Exchange Act. The conforming amendments harmonize the filing deadlines under Regulation S-X with the accelerated periodic report filing deadlines. The purpose of these conforming amendments is to ensure that financial information included or incorporated by reference in these other SEC filings is as current as the financial information included in an accelerated filer's Exchange Act periodic filings. For example, under the current rules, a company meeting certain requirements⁴ that files a registration statement between 45 days and 90 days after the end of its fiscal year is not required to include audited financial statements for its most recent fiscal year; under the new rules, the 90-day period is shortened to 75 days and then 60 days under the same phase-in schedule as described above.

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Please contact the Mintz Levin attorney who handles your corporate and securities law matters if you have any questions regarding this information.

³ The link, however, must take the user directly to the company's reports (or a list of reports) on the third party web site, not just to the home page or general search page of the third party web site.

⁴ Under Rule 3-01(c) of Regulation S-X, the requirements are that (i) the company has filed all required Exchange Act reports, (ii) the company reasonably, and in good faith, expects income, after taxes but before extraordinary and cumulative effect of a change in accounting principle, for its most recent fiscal year, and (iii) for at least one of the two immediately preceding fiscal years, the company has reported income, after taxes but before extraordinary items and cumulative effect of a change in accounting principle.