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# Advisory

September 5, 2002

## SECURITIES LAW

### Section 16 Amendments

As our clients and friends know, the Sarbanes-Oxley Act of 2002 (the "Act") was passed by the U.S. Congress on July 25, 2002, and signed into law by the President on July 30, 2002. This Advisory is the third in a series of updates on the Act, the principal purpose of which is to advise you that the Securities and Exchange Commission (SEC) has adopted final rules which implement the amendments to Section 16(a) of the Securities Exchange Act of 1934 (the "Exchange Act") enacted by Section 403 of the Act, with the result that, as previously reported, **effective August 29, 2002, all Section 16 reporting persons must file Forms 4 before the end of the second business day after a purchase, sale or other transaction.** For example, if a transaction was executed any time on Tuesday, September 3, 2002, the Form 4 will be due by the close of business (5:30 p.m. Eastern time) at the SEC on Thursday, September 5, 2002.<sup>1</sup>

On August 27, 2002, the SEC adopted amendments to Forms 4 and 5 and final rules<sup>2</sup> (the "Final Rule") relating to the filing of ownership reports by officers, directors and beneficial owners of more than 10% of a class of equity securities that is registered under Section 12 of the Exchange Act ("Insiders"). The Final Rule applies to transactions that occur on or after August 29, 2002, and does not affect the time of reporting of any transactions that occurred prior to that date.

As noted in Mintz Levin's August 21, 2002 Advisory, "Update on the Sarbanes-Oxley Act (Second in a Series): Accelerated Filing on Forms 4 Begins August 29, 2002,"<sup>3</sup> the SEC indicated in supplemental information issued on August 6, 2002, that to satisfy the Act's purpose of requiring near-immediate disclosure of Insider transactions, it intended to promulgate rules to require both that transactions currently reportable on Form 4 (such as open market or private purchases and sales) and most transactions currently reportable on Form 5 (such as option issuances and cancellations) be reported on the accelerated two-business day timeframe. The Final Rule implements these changes.

<sup>1</sup> Because the Act does not change the due date for Forms 3, a situation may arise where the reporting person is required to file a Form 4 before the Form 3 is due. In this situation, the SEC is encouraging reporting persons to file the Form 3 along with the Form 4 at the time the Form 4 is due.

<sup>2</sup> "Final Rule: Ownership Reports and Trading by Officers, Directors and Principal Security Holders," Release Nos. 34-46421, 35-27563; IC-25720, dated August 27, 2002.

<sup>3</sup> Our August 21, 2002 Advisory is available at <http://www.mintz.com/newspubs/Bus-Fin&Sec/SecAdv082102.pdf>.

As previously discussed, the Final Rule amends Rule 16a-3(f), which permitted deferred reporting on Form 5 of certain transactions exempted from potential short-swing trading liability under Section 16(b) of the Exchange Act by Rule 16b-3 until 45 days after an issuer's fiscal year end. As a result, effective August 29, 2002, reportable transactions between officers or directors and the issuer, which are exempted from Section 16(b) by Rule 16b-3, such as stock option issuances, cancellations and reprints, including repricings, will no longer be reportable on a deferred basis on Form 5, but instead will be subject to two-day reporting on Form 4.

The SEC has also adopted amendments to Rule 16a-3(g) to calculate the Form 4 due date differently for the following transactions, as to which the SEC has determined that the two-business day reporting period is not feasible:

- transactions pursuant to a contract, instruction or written plan for the purchase or sale of equity securities that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c) [*i.e.* Rule 10b5-1 Trading Plans], where the Insider does not select the date of execution of the transaction (a "10b5-1(c) Transaction"); and
- "discretionary transactions" (as defined in Rule 16b-3(b)(1)) pursuant to employee benefit plans, where the reporting person does not select the date of execution of the transaction (a "Discretionary Plan Transaction").

The Final Rule provides that the deadline to file a Form 4 for a 10b5-1(c) Transaction or for a Discretionary Plan Transaction, is the

second business day following the date on which the executing broker, dealer or plan administrator, as the case may be, notifies the Insider that the transaction has been executed (the "Deemed Execution Date"), *provided that* the Deemed Execution Date is not later than the third business day following the actual trade date. The SEC noted that neither of the exemptions described above will be available if the Insider has selected the date of transaction execution, for example, where a Rule 10b5-1(c) arrangement provides for a sale on the first business day of each month. The SEC also highlighted the fact that although a broker or dealer has an obligation to provide the Insider with a transaction confirmation under Exchange Act Rule 10b-10, it is incumbent on the Insider to make specific arrangements for the broker, dealer or plan administrator to provide the Insider with actual notice of the transaction execution as quickly as possible, prior to the Rule 10b-10 notification, by any means of communication, including by telephone or electronically, to allow the Insider to report the transaction within the Section 16 time frame.

In the release adopting the Final Rule, the SEC confirmed that it was not adopting any rules providing exemptions to the accelerated reporting requirement based on any other categories of transactions, including a transaction pursuant to a single market order executed over more than one business day, as discussed in our August 21, 2002 Advisory. The SEC also confirmed that transactions such as employee stock purchases under a Section 423 Employee Stock Purchase Plan or the expiration of a stock option, that have not previously been

required to be reported, will continue not to be reportable. Similarly, gifts, inheritances and small acquisitions that are exempted by Rule 16a-6 will continue to be reportable on Form 5 within 45 days after an issuer's fiscal year end. The SEC also did not amend a company's disclosure obligation to report the late filing of a Section 16(a) report.

### Conforming Amendments to Forms 4 and 5

The SEC has amended Form 4 (including the general instructions) to reflect that Form 4 is no longer a monthly form and to conform all filing deadline references to the new deadline provided by the Act. In addition, a column has been added to Form 4 to require reporting of the Deemed Execution Date, if the transaction is a 10b5-1(c) Transaction or a Discretionary Plan Transaction, which will enable investors and the SEC to determine for such a transaction whether the Form 4 was filed on a timely basis. The SEC has likewise added an additional column to Form 5, in the event that a 10b1-5(c) Transaction or a Discretionary Plan Transaction is reported on a Form 5 because the Insider failed to file the required Form 4. The revised Form 4 and general instructions which can be found at the SEC's web site at <http://www.sec.gov/divisions/corpfin/forms/4.htm>, is attached to this Advisory as Annex A.

### Electronic Filing and Website Posting

As noted in Mintz Levin's August 2<sup>4</sup> and August 21, 2002 Advisories, the Act amends Section 16(a) to require, no later than July 30, 2003, electronic filing of Section 16 reports on

<sup>4</sup> Our August 2, 2002 Advisory is available at <http://www.mintz.com/newspubs/Bus-Fin&Sec/SECAdv080202.pdf>.

the SEC's EDGAR System, and website posting of such reports by both the SEC and issuers no later than the end of the business day following the filing. In its release adopting the Final Rule, the SEC reiterated its intention to begin rulemaking to make the filing of Section 16(a) reports on EDGAR mandatory,<sup>5</sup> and indicated that it is "proceeding expeditiously" with such rulemaking and with the related EDGAR filing system programming changes necessary to accommodate the increased volume of Forms 4 expected within the one year period mandated by the Act.<sup>6</sup> In the meantime, the SEC continues to encourage voluntary electronic filing and emphasized that it will accept electronically filed Section 16(a) reports

that are not presented in the standard box format and that omit the horizontal and vertical lines separating the information items, as long as all required information is presented in the proper order. In this regard, Insiders who plan to file their Section 16(a) reports electronically should submit Forms ID requesting EDGAR access codes as soon as possible, if they do not already have them, to minimize processing delays. The SEC has cautioned that applicants should indicate whether the Insider for whom the code is being requested is a reporting person with respect to any other company, and whether a CIK number has previously been assigned to that person. (This is to help ensure that one person does not inadvertently get multi-

ple EDGAR access codes assigned). Finally, the SEC encourages companies to post Section 16 reports on their websites prior to the July 30, 2003 implementation date.

We will continue to update our friends and clients with respect to any other supplemental information provided by the SEC in connection with reporting changes in beneficial ownership under Section 16(a).

\* \* \* \* \*

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

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<sup>5</sup> See Securities Act Release No. 7803 (Feb. 25, 2000).

<sup>6</sup> The SEC may require electronic filing and website posting well before the July 30, 2003 deadline.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

**FORM 4**  
**Statement of Changes of Beneficial Ownership of Securities**

The Commission is authorized to solicit the information required by this Form pursuant to Sections 16(a) and 23(a) of the Securities Exchange Act of 1934, Sections 17(a) and 20(a) of the Public Utility Holding Company Act of 1935, and Sections 30(h) and 38 of the Investment Company Act of 1940, and the rules and regulations thereunder.

Disclosure of information specified on this Form is mandatory, except for disclosure of the I.R.S. identification number of the reporting person if such person is an entity, which is voluntary. If such numbers are furnished, they will assist the Commission in distinguishing reporting persons with similar names and will facilitate the prompt processing of the Form. The information will be used for the primary purpose of disclosing the transactions and holdings of directors, officers, and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The Commission can use it in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the Federal securities laws and rules.

### General Instructions

#### 1. When Form Must Be Filed

- (a) This Form must be filed before the end of the second business day following the day on which a transaction resulting in a change in beneficial ownership has been executed (see Rule 16a-1(a)(2) and Instruction 4 regarding the meaning of “beneficial owner”, and Rule 16a-3(g) regarding determination of the date of execution for specified transactions). This Form and any amendment is deemed filed with the Commission or the Exchange on the date it is received by the Commission or Exchange, respectively. *See*, however, Rule 16a-3(h) regarding delivery to a third party business that guarantees delivery of the filing no later than the specified due date.
- (b) A reporting person no longer subject to Section 16 of the Securities Exchange Act of 1934 (“Exchange Act”) must check the exit box appearing on this Form. However, Form 4 and 5 obligations may continue to be applicable. *See* Rule 16a-3(f); *see also* Rule 16a-2(b) (transactions after termination of insider status). Form 5 transactions to date may be included on this Form and subsequent Form 5 transactions may be reported on a later Form 4 or Form 5, provided all transactions are reported by the required date.
- (c) A separate Form shall be filed to reflect beneficial ownership of securities of each issuer, except that a single statement shall be filed with respect to the securities of a registered public utility holding company and all of its subsidiary companies.
- (d) If a reporting person is not an officer, director, or ten percent holder, the person should check “other” in Item 6 (Relationship of Reporting Person to Issuer) and describe the reason for reporting status in the space provided.

#### 2. Where Form Must be Filed

- (a) File three copies of this Form or any amendment, at least one of which is manually signed, with the Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549. (*Note:* Acknowledgment of receipt by the Commission may be obtained by enclosing a self-addressed stamped postcard identifying the Form or amendment filed.) Alternatively, this Form is permitted to be submitted to the Commission in electronic format at the option of the reporting person pursuant to § 232.101(b)(4) of this chapter.

- (b) At the time this Form or any amendment is filed with the Commission, file one copy with each Exchange on which any class of securities of the issuer is registered. If the issuer has designated a single Exchange to receive Section 16 filings, the copy shall be filed with that Exchange only.
- (c) Any person required to file this Form or amendment shall, not later than the time the Form or amendment is transmitted for filing with the Commission, send or deliver a copy to the person designated by the issuer to receive the copy or, if no person is so designated, the issuer's corporate secretary (or person performing similar functions) in accordance with Rule 16a-3(e).

### 3. Class of Securities Reported

- (a)
  - (i) Persons reporting pursuant to Section 16(a) of the Exchange Act must report each transaction resulting in a change in beneficial ownership of any class of equity securities of the issuer and the beneficial ownership of that class of securities following the reported transaction(s), even though one or more of such classes may not be registered pursuant to Section 12 of the Exchange Act.
  - (ii) Persons reporting pursuant to Section 17(a) of the Public Utility Holding Company Act of 1935 must report each transaction resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered holding company and all of its subsidiary companies and the beneficial ownership of that class of securities following the reported transaction(s). Specify the name of the parent or subsidiary issuing the securities.
  - (iii) Persons reporting pursuant to Section 30(h) of the Investment Company Act of 1940 must report each transaction resulting in a change in beneficial ownership of any class of securities (equity or debt) of the registered closed-end investment company (other than "short-term paper" as defined in Section 2(a)(38) of the Investment Company Act) and the beneficial ownership that class of securities following the reported transaction(s).
- (b) The title of the security should clearly identify the class, even if the issuer has only one class of securities outstanding; for example, "Common Stock," "Class A Common Stock," "Class B Convertible Preferred Stock," etc.
- (c) The amount of securities beneficially owned should state the face amount of debt securities (U.S. Dollars) or the number of equity securities, whichever is appropriate.

### 4. Transactions and Holdings Required To Be Reported

#### (a) General Requirements

- (i) Report, in accordance with Rule 16a-3(g):
  - (1) all transactions not exempt from Section 16(b);
  - (2) all transactions exempt from Section 16(b) pursuant to §240.16b-3(d), §240.16b-3(e), or §240.16b-3(f); and
  - (3) all exercises and conversions of derivative securities, regardless of whether exempt from Section 16(b) of the Act.

Every transaction must be reported even though acquisitions and dispositions are equal. Report total beneficial ownership following the reported transaction(s) for each class of securities in which a transaction was reported.

**Note:** The amount of securities beneficially owned following the reported transaction(s) specified in Column 5 of Table I and Column 9 of Table II should reflect those holdings reported or required to be reported by the date of the Form. Transactions and holdings eligible for deferred reporting on Form 5 need not be reflected in the total unless the transactions were reported earlier or are included on this Form.

- (ii) Each transaction should be reported on a separate line. Transaction codes specified in Item 8 should be used to identify the nature of the transaction resulting in an acquisition or disposition of a security. A deemed execution date must be reported in Column 2A of Table I or Column 3A of Table II only if the execution date for the transaction is calculated pursuant to §240.16a-3(g)(2) or §240.16a-3(g)(3).

**Note:** Transactions reportable on Form 5 may, at the option of the reporting person, be reported on a Form 4 filed before the due date of the Form 5. (*See* Instruction 8 for the code for voluntarily reported transactions.)

(b) *Beneficial Ownership Reported (Pecuniary Interest)*

- (i) Although for purposes of determining status as a ten percent holder, a person is deemed to beneficially own securities over which that person exercises voting or investment control (*see* Rule 16a-1(a)(1)), for reporting transactions and holdings, a person is deemed to be the beneficial owner of securities if that person has the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the securities (“pecuniary interest”). *See* Rule 16a-1(a)(2). *See also* Rule 16a-8 for the application of the beneficial ownership definition to trust holdings and transactions.
- (ii) Both direct and indirect beneficial ownership of securities shall be reported. Securities beneficially owned directly are those held in the reporting person’s name or in the name of a bank, broker or nominee for the account of the reporting person. In addition, securities held as joint tenants, tenants in common, tenants by the entirety, or as community property are to be reported as held directly. If a person has a pecuniary interest, by reason of any contract, understanding or relationship (including a family relationship or arrangement), in securities held in the name of another person, that person is an indirect beneficial owner of the securities. *See* Rule 16a-1(a)(2)(ii) for certain indirect beneficial ownerships.
- (iii) Report transactions in securities beneficially owned directly on a separate line from those beneficially owned indirectly. Report different forms of indirect ownership on separate lines. The nature of indirect ownership shall be stated as specifically as possible; for example, “By Self as Trustee for X,” “By Spouse,” “By X Trust,” “By Y Corporation,” etc.
- (iv) In stating the amount of securities acquired, disposed of, or beneficially owned indirectly through a partnership, corporation, trust, or other entity, report the number of securities representing the reporting person’s proportionate interest in transactions conducted by that entity or holdings of that entity. Alternatively, at the option of the reporting person, the entire amount of the entity’s interest may be reported. *See* Rule 16a-1(a)(2)(ii)(B) and Rule 16a-1(a)(2)(iii).
- (v) Where more than one beneficial owner of the same equity securities must report transactions on Form 4, such owners may file Form 4 individually or jointly. Joint and group filings may be made by any designated beneficial owner. Transactions with respect to securities owned separately by any joint or group filer are permitted to be included in the joint filing. Indicate only the name and address of the designated filer in Item 1 of Form 4 and attach a list of the names and addresses (or, if entities, IRS identification numbers instead of addresses) of each other reporting person. Joint and group filings must include all required information for each beneficial owner, and such filings must be signed by each beneficial owner, or on behalf of such owner by an authorized person. If the space provided for signatures is insufficient, attach a signature page. Submit any attached listing of names or signatures on another Form 4, copy of Form 4 or separate page of 8 1/2 by 11 inch white paper, indicate the number of pages comprising the report (Form plus attachments) at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3), and include the name of the designated filer and information required by Items 2 and 4 of the Form on the attachment.

(c) *Non-Derivative and Derivative Securities*

- (i) Report acquisitions or dispositions and holdings of non-derivative securities in Table I. Report acquisitions or dispositions and holdings of derivative securities (*e.g.*, puts, calls, options, warrants, convertible securities, or other rights or obligations to buy or sell securities) in Table II. Report the exercise or conversion of a

derivative security in Table II (as a disposition of the derivative security) and report in Table I the holdings of the underlying security. Report acquisitions or dispositions and holdings of derivative securities that are both equity securities and convertible or exchangeable for other equity securities (*e.g.*, convertible preferred securities) only in Table II.

- (ii) The title of a derivative security and the title of the equity security underlying the derivative security should be shown separately in the appropriate columns in Table II. The “puts” and “calls” reported in Table II include, in addition to separate puts and calls, any combination of the two, such as spreads and straddles. In reporting an option in Table II, state whether it represents a right to buy, a right to sell, an obligation to buy, or an obligation to sell the equity securities subject to the option.
- (iii) Describe in the appropriate columns in Table II characteristics of derivative securities, including title, exercise or conversion price, date exercisable, expiration date, and the title and amount of securities underlying the derivative security. If the transaction reported is a purchase or a sale of a derivative security, the purchase or sale price of that derivative security shall be reported in column 8. If the transaction is the exercise or conversion of a derivative security, leave column 8 blank and report the exercise or conversion price of the derivative security in column 2.
- (iv) Securities constituting components of a unit shall be reported separately on the applicable table (*e.g.*, if a unit has a non-derivative security component and a derivative security component, the non-derivative security component shall be reported in Table I and the derivative security component shall be reported in Table II). The relationship between individual securities comprising the unit shall be indicated in the space provided for explanation of responses. When securities are purchased or sold as a unit, state the purchase or sale price per unit and other required information regarding the unit securities.

## 5. Price of Securities

- (a) Prices of securities shall be reported in U.S. dollars on a per share basis, not an aggregate basis, except that the aggregate price of debt shall be stated. Amounts reported shall exclude brokerage commissions and other costs of execution.
- (b) If consideration other than cash was paid for the security, describe the consideration, including the value of the consideration, in the space provided for explanation of responses.

## 6. Additional Information

If the space provided in the line items of this Form or space provided for additional comments is insufficient, attach another Form 4, copy of Form 4 or separate page of 8 1/2 by 11 inch white paper to Form 4, completed as appropriate to include the additional comments. Each attached page must include information required in Items 1, 2 and 4 of the Form. The number of pages comprising the report (Form plus attachments) shall be indicated at the bottom of each report page (*e.g.*, 1 of 3, 2 of 3, 3 of 3). If additional information is not reported in this manner, it will be assumed that no additional information was provided.

## 7. Signature

- (a) If the Form is filed for an individual, it shall be signed by that person or specifically on behalf of the individual by a person authorized to sign for the individual. If signed on behalf of the individual by another person, the authority of such person to sign the Form shall be confirmed to the Commission in writing in an attachment to the Form or as soon as practicable in an amendment by the individual for whom the Form is filed, unless such a confirmation still in effect is on file with the Commission. The confirming statement need only indicate that the reporting person authorizes and designates the named person or persons to file the Form on the reporting person's behalf, and state the duration of the authorization.
- (b) If the Form is filed for a corporation, partnership, trust, or other entity, the capacity in which the individual signed shall be set forth (*e.g.*, John Smith, Secretary, on behalf of X Corporation).

## 8. Transaction Codes

Use the codes listed below to indicate in Table I, Column 3 and Table II, Column 4 the character of the transaction reported. Use the code that most appropriately describes the transaction. If the transaction is not specifically listed, use transaction Code “J” and describe the nature of the transaction in the space for explanation of responses. If a transaction is voluntarily reported earlier than required, place “V” in the appropriate column to so indicate; otherwise, the column should be left blank. If a transaction involves an equity swap or instrument with similar characteristics, use transaction code “K” in addition to the code(s) that most appropriately describes the transaction, *e.g.*, “S/K” or “P/K.”

### *General Transaction Codes*

P-Open market or private purchase of non-derivative or derivative security

S-Open market or private sale of non-derivative or derivative security

V-Transaction voluntarily reported earlier than required

### *Rule 16b-3 Transaction Codes*

A- Grant, award or other acquisition pursuant to Rule 16b-3(d)

D- Disposition to the issuer of issuer equity securities pursuant to Rule 16b-3(e)

F- Payment of exercise price or tax liability by delivering or withholding securities incident to the receipt, exercise or vesting of a security issued in accordance with Rule 16b-3

I- Discretionary transaction in accordance with Rule 16b-3(f) resulting in acquisition or disposition of issuer securities

M-Exercise or conversion of derivative security exempted pursuant to Rule 16b-3

### *Derivative Securities Codes (Except for transactions exempted pursuant to Rule 16b-3)*

C- Conversion of derivative security

E- Expiration of short derivative position

H- Expiration (or cancellation) of long derivative position with value received

O- Exercise of out-of-the-money derivative security

X- Exercise of in-the-money or at-the-money derivative security

### *Other Section 16(b) Exempt Transaction and Small Acquisition Codes (except for Rule 16b-3 codes above)*

G- Bona fide gift

L- Small acquisition under Rule 16a-6

W-Acquisition or disposition by will or the laws of descent and distribution

Z- Deposit into or withdrawal from voting trust

### *Other Transaction Codes*

J- Other acquisition or disposition (describe transaction)

K- Transaction in equity swap or instrument with similar characteristics

U- Disposition pursuant to a tender of shares in a change of control transaction