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Client Alert

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SECURITIES LAW

SEC Proposes Accelerated Filing Deadlines, Website Access Disclosure, and 8-K Disclosure of Management Transactions¹

On April 12, 2002, the Securities and Exchange Commission (SEC) published for comment two sets of rule amendments that will affect many public companies' disclosure obligations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"):

- One proposed rule will, if adopted, accelerate, for certain companies, the deadlines for filing of Annual Reports on Form 10-K from the current 90 days to 60 days after the end of a company's fiscal year, and for Quarterly Reports on Form 10-Q from the current 45 days to 30 days after the end of a company's quarter. The rule would also require certain disclosures with regard to where investors can obtain access to company filings.
- The second proposed rule will, if adopted, require most public companies to disclose in a Form 8-K, on an accelerated basis, (i) directors' and executive officers' transactions in and arrangements for the purchase and sale of company equity securities, and (ii) loans of money to directors or executive officers that are made or guaranteed by the company or an affiliate of the company.

This Client Alert describes the significant elements of each proposed rule and includes suggestions for addressing the rules' requirements should they be adopted in their proposed forms.

These proposed rules are still subject to a public comment process, and subsequent revisions by the SEC, before being implemented in final form. As currently proposed, following final adoption of the rules, the accelerated filing rules and website access disclosure rules would take effect after October 31, 2002, and the Form 8-K rules will have at least a 60-day phase-in period. Mintz Levin will continue to monitor the status of these proposals as developments occur.

¹ This follows up on the SEC's February 13, 2002 Press Release which announced its intentions to propose significant changes to corporate reporting and disclosure rules, which was the subject of a Mintz Levin Client Alert dated March 8, 2002.

Proposed Rule: Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports²

In this Release, the SEC has proposed accelerating the filing dates for Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q for domestic reporting companies³ that:

- have a public float of more than \$75 million;
- have been subject to the reporting requirements of the Exchange Act for at least 12 calendar months preceding the filing of the report; and
- have filed at least one annual report.

These companies would be called “accelerated filers.”

The accelerated time deadlines are being proposed for these companies only because the SEC believes that they will find it to be less of a burden than smaller or less experienced issuers to comply with quicker turnaround times on production of their period-end financial statements and disclosures. The filing deadlines would be shortened from the current 90 days after a company’s fiscal year end to 60 days after its fiscal year end for Annual Reports on Form 10-K, and from the current 45 days after a company’s quarter end to 30 days after its quarter end for Quarterly Reports on Form 10-Q.

If a company is not already an accelerated filer, the company would determine its public float as of a date no more than 60 and no less than 30 days before the end of its fiscal year. Once a company becomes an accelerated filer, it would remain so unless it subsequently became eligible (gener-

ally as a small business issuer) to file Forms 10-KSB and 10-QSB for its annual and quarterly reports.

The SEC is not currently proposing to accelerate the 120-day period that companies have to file their definitive proxy or information statements involving the election of directors to allow the incorporation by reference of the management compensation and transaction information required by Part III of Form 10-K, although the SEC did solicit commenters’ opinions as to whether that deadline should also be accelerated.

The SEC states in this Release that it believes the accelerated filing deadlines are necessary to provide investors with more real-time disclosure regarding significant developments in a company’s business. If implemented, these requirements will require issuers to significantly speed up their year-end and quarter-end reporting procedures, which will require a coordinated effort on the part of issuers and issuers’ legal counsel, accountants, audit committees, and service providers such as financial printers and public relations firms.

The SEC has also proposed in this Release that issuers who are subject to the accelerated filing deadlines be required to disclose in their annual reports where investors can obtain access to company filings, including whether the company provides real-time, free-of-charge access to its reports on its Internet site. If the company does not provide access to those reports on its Internet site, it would be required to state why it does not do so and where else investors can access its Exchange Act reports. Issuers subject to this rule will also be required to provide their Internet address in their Forms 10-K.

The SEC has submitted this proposal for public comment for 30 days. If adopted, this proposal would become effective for companies that meet the public float and reporting history requirements as of the end of their first fiscal year ending after October 31, 2002.

Proposed Rule: Form 8-K Disclosure of Certain Management Transactions⁴

In this Release, the SEC proposes to require issuers to report the following transactions by directors and executive officers on a Current Report on Form 8-K, under a new Item 10 of that Form:

- Transactions in company equity securities (whether or not of the class that is registered under Section 12), including the acquisition and disposition of derivative securities, such as stock options, and the exercise, termination or settlement of derivative securities;
- Adoption, modification or termination of a contract, instruction or written plan for the purchase or sale of company equity securities adopted under Rule 10b5-1(c) of the Exchange Act (commonly known as Rule 10b5-1 trading plans); and
- Loans of money to a director or executive officer that are made or guaranteed by the company or an affiliate of the company.

The SEC acknowledged that issuers are already required by Section 16 of the Exchange Act to report some information with respect to the transactions described under the first bullet above. However, the SEC believes that the periodic reports required to be

² Release No. 33-8089; 34-45741; File No. S7-08-02; dated April 12, 2002.

³ These proposed changes would not affect foreign private issuers. However, the SEC states in the Release that it is continuing to consider timeliness of disclosure and Exchange Act filing requirements generally for foreign issuers.

⁴ Release No. 33-8090; 34-45742; File No. S7-09-02; dated April 12, 2002.

filed by Section 16 may be filed too slowly for the public to obtain the maximum benefit from the information, and also that those reports are not always readily accessible to the public because they are not required to be filed electronically. Nevertheless, Section 16 reports (e.g., Forms 3, 4 and 5) would still be required.

What kinds of transactions in company equity securities would have to be reported?

Companies would be required to report details of any acquisition or disposition of company equity securities by a director or officer, unless the transaction fell within an exemption from the requirement. Exempt transactions would include receipt of stock dividends, transactions pursuant to domestic relations orders, transfers by will or the laws of descent and distribution, transactions involving voting trusts, and acquisitions pursuant to broad-based, tax-conditioned employee benefit plans.

The disclosure requirement would extend to transactions in all classes of the issuer's equity securities, and not just the class that is registered under Section 12. For example, if a company has a class of common stock registered under Section 12, and also has outstanding preferred stock that is owned by directors and officers, transactions by executive officers and directors in the preferred stock would be subject to reporting under Item 10 of Form 8-K.

What information would we need to disclose for transactions in company equity securities?

Under paragraph (a) of Item 10, issuers would be required to report the following with respect to any transactions in company equity securities by directors and executive officers:

- name and title of the director or executive officer;
- date of the transaction;

- title and number of securities acquired or disposed of;
- per share acquisition or disposition price, if any;
- aggregate value of the transaction;
- nature of the transaction (e.g., open market sale or purchase, sale to or purchase from the registrant, gift); and
- any other material information regarding the transaction.

Issuers would also be required to provide similar information for acquisitions, dispositions, conversions or exercises of derivative securities, such as stock options, held by directors and officers.

What information would we need to disclose for Rule 10b5-1 plans?

Under paragraph (b) of Item 10, issuers would be required to report the following information when a director or executive officer enters into, or later terminates or modifies, a contract, instruction or written plan relating to the purchase or sale of company equity securities under Exchange Act Rule 10b5-1.

When the director or executive officer enters into the contract, instruction or written plan, the company would report:

- the name and title of the director or executive officer;
- the date on which the director or executive officer entered into the contract, instruction or written plan; and
- a description of the contract, instruction or written plan, including its duration, the aggregate number of securities to be purchased or sold, and the name of the counterparty or agent.

When the director or executive officer later terminates or modifies the contract, instruction or written plan, the company would report:

- the date of the termination or modification; and
- a description of the modification, including any modification to the duration, the aggregate number of securities to be purchased or sold, the interval at which securities are to be purchased or sold, the number of securities to be purchased or sold in each interval, the price at which securities are to be purchased or sold, and the identity of the counterparty or agent.

What information would we need to disclose for loans to directors and officers?

Under paragraph (c) of Item 10, issuers would be required to report the following information with respect to any loan of money to a director or executive officer by the company or an affiliate of the company, or a guarantee by the issuer or an affiliate of such a loan.

When the company makes such a loan, or enters into a lending arrangement or a guarantee or similar arrangement, the company would be required to report:

- the name and title of the director or executive officer;
- the date of each such agreement (or guarantee or similar arrangement) or loan thereunder;
- the dollar amount and other material terms of the agreement or loan, and, if applicable, guarantee or similar arrangement, including interest rate, terms of repayment, and any provisions with respect to forgiveness;
- the number and class of any securities pledged as collateral; and
- the material terms of any pledge, including whether it is made with or without recourse.

When forgiveness, foreclosure or the company's payment on its guarantee of

the loan occurs, the company would be required to report:

- the name and title of the director or executive officer; and
- the date on which the forgiveness, payment or foreclosure occurred, and the dollar amount of forgiveness or payment and the number and class of any securities foreclosed upon.

When would reports under Item 10 of Form 8-K be due at the SEC?

Reports of transactions and loans with an aggregate value of \$100,000 or more would be due within two business days of the date on which the transaction is entered into. Reports of transactions and loans with an aggregate value of less than \$100,000, grants and awards pursuant to employee benefit plans, and disclosure relating to Rule 10b5-1 trading plans generally would be due by the close of business on the second business day of the week following the day on which the transaction takes place. Reports of transactions and loans with an aggregate value of less than \$10,000 could be deferred until the aggregate cumulative value of those unreported events for the same director or executive officer exceeds \$10,000.

The date of a reportable event would be the date on which the parties enter into an agreement. For example, in the case of a sale of securities to the company or a loan from the company, the date would be the date of the agreement and not the date of completion of the sale or making of the loan. In the case of an open market securities transaction, the date would be the trade date and not the settlement date. In the case of a Rule 10b5-1 trading plan, the date would be the date on which the arrangement is made, modified or terminated.

To whose transactions would the new disclosure requirements apply?

The requirement to file an Item 10 Form 8-K would arise with respect to transactions by all directors and executive officers of an issuer that has a class of securities registered under Section 12 of the Exchange Act. The new disclosure requirements would not apply to transactions by significant stockholders who are not directors or executive officers.

Would a failure to file an Item 10 Form 8-K affect our eligibility to use a short-form registration statement or our stockholders' ability to use Rule 144 to sell their shares?

Isolated failures to file an Item 10 Form 8-K timely, that do not represent a pattern of failures to file, will not destroy an issuer's eligibility to use Registration Statements on Forms S-2, S-3 or S-8 to register their securities. In addition, isolated failures will not make Rule 144 under the Securities Act unavailable for sellers of the issuer's securities. Also, failure to file an Item 10 Form 8-K would not result in a private right of action.

Would a failure to file an Item 10 Form 8-K otherwise result in liability under the securities laws?

The SEC states in the Release that it will not find it to be in the public interest to impose sanctions on a company for violations of Item 10 of Form 8-K if the company has implemented procedures and systems to ensure Item 10 compliance. In order to demonstrate that it has implemented such procedures and systems, a company would have to show:

- at the time of the violation, it had designed procedures and a system for applying such procedures that was sufficient to provide reasonable

assurances that Item 10 events would be timely reported;

- at the time of the violation, the company followed those procedures; and
- as promptly as reasonably practicable, the company made a filing to correct any violation.

The SEC suggests that requiring directors and executive officers to give advance notice or receive advance approval of transactions from the issuer or its legal counsel would help companies to keep track of transactions that may be reportable under Item 10.

When will this proposed rule become effective?

The SEC expects that the final rule will become effective 60 days after publication in the Federal Register of the final rule. However, the SEC will delay for an additional 60 days compliance with the obligation to report transactions with an aggregate value in excess of \$100,000 within two business days. In addition, for the first 60 days after the effective date, all derivative securities transactions would be reportable no later than the close of business on the second business day of the week following the week in which the transaction occurred, regardless of the value of the transaction.

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Please contact the Mintz Levin attorney who handles your corporate and securities law matters if you have any questions or concerns regarding these proposed rules.