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# Advisory

August 21, 2002

## SECURITIES LAW

### Accelerated Filing of Forms 4

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 President Bush on July 30, 2002. This Advisory is the second in a series of updates on the Act for our clients and friends, to advise you of various issues and developments arising from the ongoing process of interpretation of, and rulemaking related to, the Act. The principal purpose of this Advisory is to bring to your attention supplemental information recently provided by the Securities and Exchange Commission (SEC), which addresses the amendments to Section 16(a) of the Securities Exchange Act of 1934 (the "Exchange Act") implemented by Section 403 of the Act, and requires your immediate attention. **In particular, you should be aware that beginning 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.**

### SEC Issues Supplemental Information Relating to Ownership Reports (Section 16 Reports) and Trading by Officers, Directors and Principal Security Holders.

On August 6, 2002, the SEC issued supplemental information<sup>1</sup> (the "Supplement") 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"). These reports are commonly referred to as "Section 16 reports." The Supplement addresses the amendments to Section 16(a) of the Exchange Act enacted by Section 403 of the Act, as well as information known to date regarding changes to the related rules, which the SEC has stated it will adopt no later than August 29, 2002.

As noted in Mintz Levin's August 2, 2002, Advisory, "Update on the Sarbanes-Oxley Act,"<sup>2</sup> the Act mandates that beginning August 29, 2002, Insiders must file Forms 4 before the end of the *second*

<sup>1</sup> "Ownership Reports and Trading by Officers, Directors and Principal Security Holders," Release No. 34-46313, dated August 6, 2002.

<sup>2</sup> Our August 2, 2002 Advisory is available at <http://www.mintz.com/newspubs/Bus-Fin&Sec/SecAdv080202.pdf>.

*business day* after a purchase, sale or other transaction, instead of the current deadline of the tenth day after the end of the month in which the transaction occurs.<sup>3</sup> We also noted that under the Act, the SEC has the power to establish a different filing deadline for some transactions which require a Form 4 filing if it believes that the two-business day period is not feasible.

### The SEC's Implementation of Amended Section 16(a)

To satisfy the Act's purpose of requiring near-immediate disclosure of Insider transactions, the SEC intends to promulgate rules to require both that transactions currently reportable on a Form 4 (such as open market or private purchases and sales) and most transactions currently reportable on a year-end Form 5 (such as option issuances and cancellations) must be reported on the accelerated two-business day timeframe. The SEC notes in the Supplement that it intends to adopt amendments to Rule 16a-3(f), which permits deferred reporting of some transactions on a year-end Form 5, so that transactions currently exempted by Rule 16b-3 that have been allowed to be reported within 45 days after an issuer's fiscal year end on Form 5, will instead be required to be reported within two business days on Form 4. As a result, reportable transactions between officers or directors and the issuer, which are currently exempted by Rule 16b-3, such as stock option issuances, exercises, cancellations and regrants, including repricings, will be subject to two-day reporting on Form 4. The

SEC also anticipates that the final rules will adopt one or more new rules under Section 16(a) that will provide different Form 4 due dates for narrowly defined specified transactions as to which the SEC determines that the two-business day reporting period is not feasible. In this regard, the SEC appears willing to permit an extended reporting deadline only for transactions under which "objective criteria prevent the insider from controlling (and in many cases, from knowing) the timing of transaction execution." The following transactions were specified by the SEC as possibly being granted a delayed reporting date:

- a transaction pursuant to a single market order that is executed over more than one business day, but does not exceed a specified number of days;
- a transaction involving a pre-existing arrangement (for example, a Rule 10b5-1 trading plan) under which the timing is outside the knowledge of the Insider prior to the receipt by the Insider, within a specified number of days, of a confirmation or other notice of the transaction; and
- a "discretionary transaction" involving an employee benefit plan, whether or not exempted under Rule 16b-3, where the delay is tied to notice of the transaction.

The SEC noted that it does not currently intend to consider exemptions to the accelerated reporting requirement based on the type of issuer,

the type of insider or the size of the transaction. It is our understanding based on comments from the SEC, that other than as set forth above, no other rule changes in connection with Section 16(a) will be effected. Accordingly, transactions such as employee stock purchases under a Section 423 Employee Stock Purchase Plan or the expiration of a stock option, that are not currently required to be reported on a Section 16 form 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 stated in the Supplement that it will abandon its previously proposed amendments, discussed in Securities Act Release No. 8090, "Form 8-K Disclosure of Certain Management Transactions," which would have required companies to report directors' and executive officers' transactions in company equity securities on current reports on Form 8-K.<sup>4</sup> However, the SEC will continue to consider the other amendments proposed in that Release, which would require companies to disclose information about (i) directors' and executive officers' 10b5-1 trading plans and other arrangements intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and (ii) company loans and loan guarantees to directors and executive officers that are not prohibited by Section 402 of the Act.

<sup>3</sup>The Act did not change the filing deadline for Forms 3 (Initial Statement of Beneficial Ownership of Securities), which still must be filed with the SEC within 10 calendar days after the event by which the person becomes a Section 16 reporting person.

<sup>4</sup> See Securities Act Release No. 8090, "Form 8-K Disclosure of Certain Management Transactions" (April 12, 2002). For Mintz Levin's Advisory discussing Release No. 8090, see <http://www.mintz.com/newspubs/Bus-Fin&Sec/SecAlert-04-02.pdf>.

## Electronic Filing of Section 16 Reports

As noted in Mintz Levin's August 2, 2002 Advisory, the Act amends Section 16(a) to require, by July 30, 2003, electronic filing of Section 16 reports on the SEC's EDGAR System,<sup>5</sup> 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 the Supplement, the SEC reiterated its intention to begin rulemaking to make the filing of Section 16(a) reports on EDGAR mandatory,<sup>6</sup> and indicated that it would "proceed expeditiously" with such rulemaking and with the related EDGAR filing system programming changes necessary to accommodate the increased volume of Forms 3, 4 and 5 filings expected within the one year period mandated by the Act. In the meantime, the SEC encourages voluntary electronic filing and will accept electronically filed Section 16 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.

## Practical Guidance in Preparing for Accelerated Disclosure of Section 16 Reports

We recommend that companies take several steps now in order to ensure compliance with the new accelerated reporting requirements of the Act:

- Companies should institute securities trading mandatory pre-clearance procedures, if such procedures are not already in place. A pre-clearance procedure or policy will typically provide that directors and executive officers of the company and any other person designated

by the company as being subject to the company's pre-clearance procedures, together with their family members, may not engage in any transaction involving the company's securities (including a stock plan transaction, such as an option exercise, or a gift, a loan, pledge or hedge, a contribution to a trust or any other transfer) without first obtaining pre-clearance of the transaction from the company's compliance officer. A request for pre-clearance should be submitted at least two days in advance of the proposed transaction. Pre-clearance procedures have the additional benefit of allowing the company's compliance officer to analyze the application of Section 16 and Rule 144 to the transaction, and now, most importantly, to commence preparing the Form 4 to report the transaction. The compliance officer should be the company's general counsel, chief financial officer or some other high-level officer who is familiar with the legal restrictions on trading. The person designated as such must always be kept fully informed of material developments at the company and must be in direct communication with the person preparing the Forms 4.

- Companies should alert their Section 16 reporting persons of the accelerated filing requirements immediately. A sample memorandum that may be used to provide such notice is attached to this Advisory as Annex A.
- Companies should consider the use of a "captive broker" to handle trades for their Section 16 reporting persons. The use of one broker who is knowledgeable of

the company's procedures may help to ensure compliance with pre-clearance procedures and help to prevent inadvertent violations of the federal securities laws.

- Companies should periodically send out preventative e-mail alerts and reminders to all of their Section 16 reporting persons.
- Companies should maintain on file powers of attorney for all of their Section 16 reporting persons to ensure timely completion and filing of the Forms 4. In general, companies should periodically review the powers of attorney maintained on file to ensure that they are current and that at least three individuals are granted authority to sign all Section 16 forms on behalf of each reporting person.
- Finally, in order to assist issuers with meeting the accelerated Form 4 filing deadline, on an emergency basis, Mintz Levin's Washington D.C. office will be able to provide issuers with "same day" filing of Forms 4, if the forms are faxed to a designated person in that office with enough time for hand-delivery to the SEC before the filing desk closes.

We will continue to update our friends and clients with respect to the adoption of the final rules or any other supplemental information provided by the SEC in connection with reporting changes in beneficial ownership.

\* \* \* \* \*

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

<sup>5</sup> Currently, Section 16 reports may voluntarily be filed electronically, but most filers still file on paper.

<sup>6</sup> See Securities Act Release No. 7803 (Feb. 25, 2000).

## MEMORANDUM

**To:** Directors and Executive Officers of [COMPANY NAME]  
**From:** [CHIEF EXECUTIVE OFFICER or GENERAL COUNSEL NAME]  
**Date:** [DATE]  
**Subject:** The Two-Day Form 4 Filing Requirement Becomes Effective on August 29, 2002

As you may know, the recently enacted Sarbanes-Oxley Act of 2002 requires that you report on a Form 4 changes in beneficial ownership of [COMPANY NAME] securities before the end of the **second business day** following the day on which the transaction occurs (the “New Requirement”) (the old deadline was the tenth day after the end of the month in which the transaction occurred). The New Requirement becomes effective for transactions occurring on or after August 29, 2002.

*Covered Persons.* The New Requirement applies to all Section 16 reporting persons (including family members and others in your household), that is, the same people that are now subject to Section 16.

*Covered Transactions.* In addition to purchases and sales, the New Requirement, as it stands, applies to any change in beneficial ownership, including, but not limited to, option grants, option exercises and cancellations and regrants of stock options. The SEC has stated that it will adopt new rules to become effective no later than August 29, 2002, that will provide different Form 4 due dates for narrowly defined specified transactions for which it deems the New Requirement to be unfeasible.

*Sanctions.* As is currently the case, any late or delinquent Form 4 filings are required to be reported in our proxy statement in a separate captioned section, naming names of those who have made late or delinquent filings. In addition, the SEC has been granted broad authority by the new legislation to seek “any equitable relief that may be appropriate or necessary for the benefit of investors” for violations of any provisions of the securities laws.

To ensure compliance with the New Requirement and to help prevent any inadvertent violations of the federal securities laws, we are implementing the following:

#### 1. Our Mandatory Pre-clearance Procedure

Directors and executive officers of the Company and any other persons designated by [Compliance Officer Name], our [Compliance Officer or other title], as being subject to the Company’s pre-clearance procedures, together with their family members, may not engage in any transaction involving the Company’s securities (including a stock plan transaction such as an option exercise, any gift, loan or pledge, hedge, contribution to a trust, or any other transfer) without first obtaining pre-clearance of the transaction from the [Compliance Officer]. Prior to submitting a request for pre-clearance, be sure that you review the attached Section 16 Transaction Checklist and complete the Transaction Summary, which is also attached. We will provide you with a packet of blank Transaction Summaries to be completed each time you or your family member propose to enter into a transaction. A request for pre-clearance should be submitted to the [Compliance Officer] along with the completed Transaction Summary at least two business days in advance of the proposed transaction. The [Compliance Officer] will then determine whether the transaction may proceed and, if so, assist you in complying with the New Requirement.

**[Note: Companies that permit transactions in compliance with Rule 10b5-1 trading plans should consider including the following provision:**

[As set forth in our Insider Trading Policy,] Any person subject to the pre-clearance requirements who wishes to implement a trading plan under SEC Rule 10b5-1 must first pre-clear the plan with the [Compliance Officer]. As required by Rule 10b5-1, you may enter into a trading plan only when you are not in possession of material

nonpublic information. In addition, you may not enter into a trading plan during a blackout period. Transactions effected pursuant to a pre-cleared trading plan will not require further pre-clearance at the time of the transaction if the plan specifies the dates, prices and amounts of the contemplated trades, or establishes a formula for determining the dates, prices and amounts. Those transactions, of course, must be reported immediately to the [**Compliance Officer**], who will assist you in complying with the New Requirement.

**2. Periodic Preventive E-mail Alerts/Reminders**

Because the risk of inadvertent Form 4 filing violations is now so high and because public scrutiny has been heightened, we will be sending you periodic preventive Reminders and Alerts during the course of the year.

**[3. Power of Attorney**

In order to enable the Company to prepare and file the Forms 4 on a timely basis, it is important that you sign and return immediately the enclosed power of attorney.]

[**Note: a sample form of power of attorney is attached to this form of memorandum as Exhibit A.**]

**4. Company Assistance**

Should you have any questions about this memorandum or its application to any proposed transaction, you may obtain additional guidance from our [**Compliance Officer**] or from the Company's counsel, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ([**ATTORNEY NAME**], Esq., telephone number, 617-542-6000).

Please indicate your understanding of, and intent to comply with, the procedures set forth in this memorandum by signing where indicated below and returning the signed memorandum to the [**Compliance Officer**] immediately. Please retain a copy for your files.

SIGNATURE: \_\_\_\_\_

PRINTED NAME: \_\_\_\_\_

DATE: \_\_\_\_\_



[COMPANY NAME]

**SECTION 16 TRANSACTIONS CHECKLIST**

Because you are an executive officer or director of [COMPANY NAME], any of the following transactions involving any of the following persons in any equity security of [COMPANY NAME] (for example, common stock, options, exchange-traded options, puts and calls, and *any* other form of derivative security), including swap agreements and securities futures based on the Company's equity securities, *may* be subject to Section 16 of the Securities Exchange Act of 1934, and therefore may be reportable by you on a Form 4 within two business days of the transaction occurrence. You must submit a request for pre-clearance to the [Compliance Officer] at least two business days in advance of the proposed transaction in order to ensure proper reporting, if required, on Form 4.

**TYPICAL TRANSACTIONS**

- Purchases (open market and private)
- Sales (open market and private)
- Gifts
- Option Grants
- Option Exercises
- Option Expirations
- Use of stock to pay option exercise price or withholding tax obligations
- Transfers to or by certain trusts
- Transfers as a result of divorce
- Acquisitions by inheritance
- Change from direct to indirect or indirect to direct beneficial ownership
- Swaps
- Securities futures based on the Company's equity securities
- Other acquisitions or dispositions (describe)

**PERSONS/ENTITIES**

- Yourself
- Partnership of which you are a partner
- Trust of which you are a beneficiary, settlor or trustee
- Corporation of which you are a controlling shareholder
- Members of your immediate family sharing the same household who hold [COMPANY NAME] securities directly or indirectly
- Any person or entity in which you have a pecuniary interest (*i.e.*, through which you have an opportunity to profit or share in any profit in [COMPANY NAME] securities, directly or indirectly)

NOTE: If you are a Director or executive officer of [COMPANY NAME], you should determine whether a Form 144 should also be filed with the SEC before any sale.

*Before proceeding with any purchase or sale, consider whether you are aware of material non-public information which could affect the price of the stock. If so, you are prohibited from trading.*



[COMPANY NAME]

**TRANSACTION SUMMARY**

Please describe below the proposed transaction and include:

1. The title and amount of securities
2. The persons or entities involved on both sides of the transaction
3. If the securities are indirectly held, indicate the nature of indirect ownership and the name of the individual or entity that holds the securities
4. The proposed transaction date (see Note below)
5. The nature of the transaction (acquisition or disposition)
6. The purchase or sale price per share or unit
7. If the transaction involves a derivative security, such as an option, include (a) the exercise or conversion price, (b) the date(s) on which the derivative security is exercisable and (c) the expiration date of the security.

Amount of securities owned prior to the transaction (List securities owned directly and indirectly separately): \_\_\_\_\_

Amount of securities owned after the transaction (List securities owned directly and indirectly separately): \_\_\_\_\_

**NOTE: Some Common Transaction Dates**

Brokerage transactions: Date of the trade (not the settlement date)

Other purchases and sales: Date firm commitment is made

Acquisitions under option plan or bonus plan: Date of grant

Option and SAR exercises: Date of exercise

Purchases under employee stock purchase plan: Generally, the date stock is purchased (*i.e.* the exercise date of the option, typically the last day of the exercise period)

Gift: Date the gift is made



SECTION 16 POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby constitutes and appoints each of [COMPANY OFFICER] and [COMPANY OFFICER] of [COMPANY NAME] (the "Company"), and [ATTORNEY NAMES] of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., signing singly, with full power of substitution, the undersigned's true and lawful attorney-in-fact to:

1. execute for and on behalf of the undersigned, in the undersigned's capacity as an officer, director and/or 10% shareholder of the Company, Forms 3, 4 and 5 in accordance with Section 16(a) of the Securities Exchange Act of 1934 and the rules thereunder;
2. do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to complete and execute any such Form 3, 4 or 5 and timely file such form with the United States Securities and Exchange Commission and any stock exchange or similar authority; and
3. take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interests of, or legally required by the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

The undersigned hereby grants to each such attorney-in-fact full power and authority to do and perform any and every act and thing whatsoever requisite, necessary, or proper to be done in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as the undersigned might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that such attorney-in-fact, or such attorney-in-fact's substitute or substitutes, shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted. The undersigned acknowledges that the foregoing attorneys-in-fact, in serving in such capacity at the request of the undersigned, are not assuming, nor is the Company assuming, any of the undersigned's responsibilities to comply with Section 16 of the Securities Exchange Act of 1934, as amended.

This Power of Attorney shall remain in full force and effect until the undersigned is no longer required to file Forms 3, 4 and 5 with respect to the undersigned's holdings of and transactions in securities issued by the Company, unless earlier revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

