SEC Approves Accelerated Filing Deadlines for Section 16(a) Reports, Executive Officer Certification of Periodic Reports and Phase In of Accelerated Filing Deadlines for Periodic Reports

On August 27, 2002, the Securities and Exchange Commission (the “SEC”):

- adopted rule and form amendments to implement the accelerated filing deadline applicable to change of beneficial ownership reports required to be filed by officers, directors and principal security holders under Section 16(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), as amended by Section 403 of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”);
- adopted rules under the Exchange Act and the Investment Company Act of 1940 (the “Investment Company Act”) that will require a company's principal executive officer and principal financial officer to certify the contents of the company's quarterly and annual reports;
- adopted rules under the Exchange Act that require companies to establish and maintain an overall system of disclosure controls and procedures that is adequate to meet its Exchange Act reporting obligations;
- adopted amendments to accelerate the filing deadlines for quarterly reports on Form 10-Q, and annual reports on Form 10-K, required under the Exchange Act; and
- adopted new disclosure requirements that will require a company to disclose on Form 10-K whether or not it provides free access to its periodic reports on its Web sites.

The final rule relating to beneficial ownership reports required to be filed under Section 16 of the Exchange Act (Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release Nos. 34-46421; 35-27563; and IC-25720) is available at the SEC’s Web site at http://www.sec.gov/rules/final/34-46421.htm.

The final rule relating to certification of periodic reports (Certification of Disclosure in Companies' Quarterly and Annual Reports, Release Nos. 33-8124; 34-46427; and IC-25722) is available at the SEC’s Web site at http://www.sec.gov/rules/final/33-8124.htm.

The SEC is studying whether it should extend the certification requirement to other documents filed under the Exchange Act, such as definitive proxy and information statements and registration statements on Forms 10 and 10-SB. Comments on the extension of the certification requirement are due on or before 30 days after publication in the Federal Register.

Section 16(a) Reports

The Sarbanes-Oxley Act amended Section 16(a) of the Exchange Act to require, effective August 29, 2002, that insiders (i.e., executive officers, directors and beneficial owners of more than 10% of a class of an issuer’s registered equity securities) file reports of changes in beneficial ownership (i.e., Forms 4) with the SEC by the end of the second business day after the day on which the transaction was executed. Previously, the deadline for filing a Form 4 was the 10th day of the month following the month in which the ownership change occurs.

Pursuant to authority granted by the Sarbanes-Oxley Act, the SEC extended the two-business day filing requirement in the following instances:

- discretionary transactions under an employee benefit plan (e.g., intra-plan transfers or plan cash-outs) where the insider does not select the date of execution; and
- transactions pursuant to a contract, instruction or plan that satisfies the requirements of Rule 10b5-1 under the Exchange Act where the insider does not select the date of execution.

In both instances, the date that the insider is notified of the trade will be deemed to be the date of the trade that triggers the two-business day Form 4 filing requirement, as long as the notification date is not later than the third business day following the actual trade date. However, if an insider pre-selects a specific transaction date (e.g., the first business day of each month), this deferred filing deadline is not available.
Trade v. Settlement Date

The SEC indicated that, for purposes of Section 16(a), market transactions will be deemed to have occurred on the trade date, rather than the settlement date. This means that the Form 4 may be due before an insider receives a written confirmation of a market trade from his or her broker.

Amendment to Form 4

Form 4 will be amended to incorporate the new filing deadlines and reflect the fact that it is a transactional form rather than a monthly form. In addition, the revised Form 4 will include a new column that permits insiders who are eligible to rely on the three-business day notification exemption to specify the date that they were notified of a trade. The revised Form 4 is not available as of the date of this publication. Prior to the availability of the revised Form 4, the SEC will accept filings on the current Form 4 as long as the transaction date and deemed execution date are clearly stated.

Transactions Reportable on Form 5

Certain transactions that are exempt from the short-swing profit liability provisions of Section 16(b) were previously eligible for delayed reporting on a Form 5 within 45 days following the end of the year in which the transaction occurred. For example, delayed reporting was available for equity award grants and other acquisitions from the issuer, dispositions to the issuer, discretionary transactions under employee benefit plans and transactions under non-qualified deferred compensation plans, provided those transactions met the conditions for exemption from short-swing profit liability. Effective August 29, transactions between an insider and an issuer or a plan maintained by the issuer will be reportable on a current basis within two business days. Form 5 will remain available to report transactions such as gifts, acquisitions and dispositions pursuant to domestic relations orders and certain small acquisitions that satisfy the requirements of Rule 16a-6.

Form 3

The amendments to Section 16(a) do not affect the due date of a Form 3 initial statement of beneficial ownership, which is 10 days after an individual first becomes an insider. Consequently, it is possible that a Form 4 will be due before a Form 3. The SEC acknowledges this and encourages insiders to file the Form 3 at the same time as the Form 4.

No Reporting for Non-discretionary Transactions in Tax-Conditioned Plans

Non-discretionary transactions pursuant to tax-conditioned plans (e.g., ESOPs, 401(k) plans and 423 stock purchase plans) that are currently exempt from Section 16 liability under Rule 16b-3(c) will continue to be exempt altogether from reporting. As is currently the case, holdings through such plans should be updated when the insider’s next Form 4 or Form 5 is otherwise filed.

Electronic Filing

The Sarbanes-Oxley Act provides that, effective July 30, 2003:

- all filings under Section 16(a) must be effected electronically;
- the SEC will make all Forms 4 available on a publicly accessible Internet site no later than the end of the business day following the date of the filing; and
- any issuer who maintains a corporate website must provide all Forms 4 on the website no later than the end of the business day following the date of filing.

The SEC has indicated that it intends to propose rules in the coming months that would mandate electronic filing prior to July 30, 2003.

Certification of Disclosure in Companies’ Quarterly and Annual Reports

As directed by the Sarbanes-Oxley Act, the SEC adopted new Exchange Act Rules 13a-14 and 15d-14 which will require a company’s principal executive officer(s) and principal financial officer(s) (or persons performing similar functions) each to certify the disclosure in each of the company’s annual and quarterly reports.

Issuers Subject to the Certification Requirement

Exchange Act Rules 13a-14 and 15d-14 apply to the principal executive officers and principal financial officers (or persons performing similar functions) of any company that files quarterly and/or annual reports with the Commission under either Section 13(a) or 15(d) of the Exchange Act, including foreign private issuers, banks and savings associations, issuers of asset-backed securities and small business issuers.

Reports Subject to the Certification Requirement

The certification statement is to be included in each annual or quarterly report filed or submitted under either Section 13(a) or 15(d) of the Exchange Act. Accordingly, the certification requirement applies to annual reports on Forms 10-K, 10-KSB, 20-F and 40-F. The certification requirement also applies to quarterly reports on Forms 10-Q and 10-QSB. Finally, the certification requirement applies to amendments to, and transition reports on, any of the foregoing reports. The certification requirement does not apply to current reports on Forms 6-K and 8-K.
Location of Certification

The relevant Exchange Act forms have been amended so that the certification follows immediately after the signature sections. The certification is in addition to the current signature requirements of those forms.

Form of Certification

The SEC has made it clear that the certification must be in the exact form set forth in the amendments to the affected reports. The language of the required certification may not be changed in any respect (even if the change would appear to be inconsequential in nature).

Each certifying officer must state that:

- he or she has reviewed the report being filed;
- based on his or her knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;
- based on his or her knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- he or she and the other certifying officers are responsible for establishing and maintaining disclosure controls and procedures for the issuer and have:
  i. designed such disclosure controls and procedures to ensure that material information relating to the issuer, including its consolidated subsidiaries, is made known to them by others within those entities, particularly during the period in which the periodic reports are being prepared;
  ii. evaluated the effectiveness of the issuer's disclosure controls and procedures as of a date within 90 days prior to the filing date of the report ("Evaluation Date"); and
  iii. presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on their evaluation as of the Evaluation Date;
- he or she and the other certifying officers have disclosed, based on their most recent evaluation, to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function):
  i. all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and
  ii. any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and
- he or she and the other certifying officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Certification of Material Accuracy and Completeness of the Periodic Report

The SEC stated that the certification statement concerning the material accuracy and completeness of the periodic reports that are covered by the statement mirrors current standards for "material" accuracy and completeness of information contained in reports.

Financial Information Covered by Certification

The SEC stated that the certification made by a certifying officer stating that the financial statements and other financial information included in the report fairly present in all material respects the financial condition, results of operations and cash flows of the company includes a certification of the following: (i)
financial statements (including footnote disclosure), (ii) selected financial data, (iii) management's discussion and analysis of financial condition and results of operations and (iv) any other financial information included in a report.

The only difference between the original Section 302 certification language of the Sarbanes-Oxley Act and the certification language of the adopted rule is that the adopted rule has been expanded to specifically include a company’s cash flows. The SEC believes that this change is consistent with Congressional intent to include both income or loss and cash flows within the concept of "fair presentation" of a company's results of operations.

The certification statement regarding fair presentation of financial statements and other financial information is not limited to a representation that the financial statements and other financial information have been presented in accordance with “generally accepted accounting principles,” but is intended to provide assurances that the financial information disclosed in a report, viewed in its entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under generally accepted accounting principles.

The SEC also stated in the release that a “fair presentation” of a company’s financial condition, results of operations and cash flows encompasses the selection of appropriate accounting policies, proper application of appropriate accounting policies, disclosure of financial information that is informative and reasonably reflects the underlying transactions and events and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete picture of an issuer's financial condition, results of operations and cash flows.

The new certification is not intended to require expansion of quarterly reports to satisfy the requirements of annual reports. The completeness of the disclosure will be determined through application of standards derived from the SEC’s existing rules, forms and interpretations.

**Certification of Disclosure Controls and Procedures**

The certification statement requires the signing officers to represent that they have established and maintained disclosure controls and procedures and designed such controls and procedures to ensure that material information is made known to them. In addition, the signing officers must evaluate the effectiveness of such disclosure controls and procedures within 90 days of the filing of each periodic report and disclose the results of such evaluation in the relevant report.

As discussed below, new Exchange Act Rules 13a-15 and 15d-15 will require companies to maintain the disclosure controls and procedures defined in Exchange Act Rules 13a-14(c) and 15d-14(c) which the signing officers are required to certify.

**Disclosure Controls and Procedures**

Under Exchange Act Rule 13a-14(c) and 15d-14(c), disclosure controls and procedures means “controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the Commission’s rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Exchange Act is accumulated and communicated to the issuer’s management, including its principal executive officer or officers and financial officer or officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure”.

The SEC distinguished between (1) accounting controls and (2) controls for disclosure in general. The new rule is intended to complement the internal accounting control systems already required with respect to financial information. These accounting controls have not been affected by the new rule. However, in addition to such accounting controls, a company must also design and establish controls and procedures (to the extent that it does not already have them) to ensure compliance with disclosure requirements generally.

**Disclosure Committee**

The SEC did not provide guidance as to what are adequate disclosure controls and procedures. However, the SEC recommended that each company, to the extent it has not already done so, create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. This committee would report to senior management, including the principal executive and financial officers, who bear express responsibility for designing, establishing, maintaining, reviewing and evaluating the company's disclosure controls and procedures.

**Applicability of Certification**

The certification relating to disclosure controls and procedures is only required for reports that cover periods ending on or after August 29, 2002. For example, any Form 10-Q covering a fiscal quarter ending on July 31, 2002 or any Form 10-K or Form
Current Reports (Forms 6-K and 8-K) and Proxy Materials

Disclosure controls and procedures are required to be designed, maintained and evaluated to ensure full and timely disclosure in current reports, including current reports on Forms 6-K and 8-K, as well as definitive proxy materials and definitive information statements, even though there is no specific certification requirement relating to reports on those forms.

Liability for False Certification

Any officer that knowingly provides a false certification could potentially be subject to Commission action (including criminal action) for violating Section 13(a) or 15(d) of the Exchange Act and to both Commission and private actions for violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. A false certification also may have liability consequences under Sections 11 and 12(a)(2) of the Securities Act of 1933 where Exchange Act documents are incorporated by reference into a registration statement or prospectus.

Phase in of Accelerated Filing Deadlines

The SEC adopted amendments to phase in accelerated filing deadlines for quarterly reports on Form 10-Q to 35 days (from the current 45 days), and annual reports on Form 10-K to 60 days (from the current 90 days). Accelerated disclosure will apply to companies that are not eligible to use the special forms for small business issuers and that have:

- a public float of at least $75 million;
- been subject to the periodic reporting requirements of the Exchange Act for at least 12 months; and
- previously filed at least one annual report on Form 10-K.

The changes to the filing deadlines will be phased in over three years, with no change for the first year. The Form 10-K deadline will be reduced to 75 days for year two and will be fully implemented beginning in year three. The Form 10-Q will be reduced to 40 days for year two and will be fully implemented beginning in year three. The first reductions to the filing deadlines (i.e. the end of year one) will occur after the end of a company’s first fiscal year ending on or after Dec. 15, 2003.

Disclosure Relating to Website Access to Information

Any company subject to the accelerated filing deadlines for periodic reports will be required to disclose in its Form 10-K, beginning with reports for fiscal years ending on or after December 15, 2002, whether the company makes its periodic and current reports available, free of charge, on its Web site as soon as reasonably practicable after such material is electronically filed with, or furnished to, the SEC.

A company’s posting of its reports on its Web site would not be a substitute for filing with the SEC.
This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For more information on the topics covered in this issue, please contact:

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