

Client Advisory

May 2003

SEC Adopts Final Rules Mandating Electronic Filing and Web Site Posting for Forms 3, 4 and 5

The SEC released its final rules mandating electronic filing and, for issuers with corporate Web sites, Web site posting of beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Securities Exchange Act of 1934. The new rules, released on May 7, 2003, and issued pursuant to Section 403 of the Sarbanes-Oxley Act of 2002, generally become effective June 30, 2003. The rules:

- Require that all Forms 3, 4 and 5 be electronically filed with the SEC via the EDGAR system;
- Extend the filing hours for Forms 3, 4 and 5 that are submitted by direct electronic transmission to 10:00 p.m. Eastern time;
- Make the temporary hardship exemption unavailable to these forms; and
- Require an issuer that maintains a corporate Web site to post on its Web site all Forms 3, 4 and 5 filed with respect to its equity securities by the end of the business day after filing.

Required Electronic Filing of Forms 3, 4 and 5 on EDGAR

Section 16 of the Securities Exchange Act of 1934 applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Section 12 of the Exchange Act and to each officer and director of the issuer (collectively, “insiders”). The new SEC rules amend Regulation S-T to require insiders to file electronically Forms 3, 4 and 5 on the EDGAR system. Any related correspondence or supplemental information pertaining to a Form 3, 4 or 5 must also be filed electronically. The related correspondence or supplemental information is not publicly disseminated but is available to the SEC staff.

Required Web Site Posting of Forms 3, 4 and 5

Under the new rules, a new paragraph (k) was added to Rule 16a-3 to require an issuer that maintains a corporate Web site to post on its Web site all Forms 3, 4 and 5 filed with respect to its equity securities by the end of the business day after filing. Each form is required to remain accessible on the issuer’s Web site for at least a 12-month period. A “corporate website” refers to an issuer’s public (Internet) site.

The requirement to post Forms 3, 4 and 5 applies to an investment company that does not maintain its own Web site if the company’s investment adviser, sponsor, depositor, trustee, administrator,

principal underwriter, or any affiliated person of the investment company maintains a Web site that includes the name of the investment company.

An issuer can satisfy the Web site posting requirement by providing direct access to the insiders' reports. Alternatively, an issuer can hyperlink to the reports via a third-party service if the following conditions are met:

- the forms are made available in the required time frame;
- access to the reports is free of charge to the user;
- the display format allows retrieval of all information in the forms, including exhibits and attachments;
- the medium to access the forms is not so burdensome that the intended user cannot effectively access the information provided;
- access to the forms is through the issuer's Web site address that the issuer normally uses for disseminating information to investors;
- any hyperlink is direct to the Section 16 forms, or to a list of the Section 16 forms, relating to the posting issuer (not just to the home page or general search page of a third-party service)—an intermediate screen stating that the viewer is leaving the issuer's Web site is, however, permissible; and
- any hyperlink caption must clearly indicate that the link leads to the issuer's insiders' Section 16 forms

One way of satisfying the above-mentioned conditions is for an issuer to hyperlink to the Section 16 forms relating to the issuer in the SEC's EDGAR database, which can be done in a manner that does not require an update each time another Section 16 form is filed as to that issuer.

Extended Filing Hours for Forms 3, 4 and 5

Rule 13(a) has been amended to provide that any Form 3, 4 or 5 submitted by direct transmission on or before 10 p.m. Eastern time is deemed filed on the same business day. The EDGAR system will be programmed to provide that a form filed between 5:30 p.m. and 10:00 p.m. Eastern time is assigned a filing date on the same business day and disseminated that evening. The SEC expects that this programming will be completed around the end of July 2003. Until then, EDGAR will assign the next business day to these filings as their filing date and disseminate them on the next business day. However, from June 30, 2003 until the programming is completed, the SEC will apply amended Rule 13(a) to consider a Form 3, 4 or 5 to be timely filed based on the time of receipt displayed on the SEC's Web site.

Deleted the "Deemed Timely Filed" Provision

The deemed timely filed provision of Rule 16a-3(h) is being deleted because it is no longer necessary. Rule 16a-3(h) had allowed a Form 3, 4 or 5 to be deemed timely filed if the filing person could establish that the form was timely delivered to a third party providing delivery services that guaranteed delivery of the filing to the SEC no later than the required filing date. Because the "deemed timely filed" provision was designed for and applied to paper filings, the SEC determined that it was no longer needed once the electronic filing requirement becomes effective. Amended Rule 16a-3(h) will continue to state that the date of filing of the forms is the date of receipt by the SEC.

Hardship Exemptions and Adjustments of Filing Dates

The SEC amended Rule 201(a) of Regulation S-T to make temporary hardship exemptions unavailable for Forms 3, 4 and 5. Instead, relief will be available under the same limited circumstances a temporary hardship exemption would be available through a filing date adjustment (expected to be “few in number”).

Temporary Relief Under Item 405 of Regulations S-K and S-B

Item 405 disclosure regarding Section 16 reporting delinquencies is required in an issuer’s proxy or information statement for the annual meeting at which directors are elected, and its Form 10-K or 10-KSB (usually incorporated by reference from the proxy statement), or N-SAR. The SEC granted temporary limited relief from the Item 405 disclosure for a Form 4 that is filed not later than one business day following the regular due date and filed during the first 12 months following the June 30, 2003 effective date of mandated electronic filing.

Elimination of Electronic Cartridges as a Transmission Medium

Due to minimal use, the SEC has eliminated (effective June 27, 2003) magnetic cartridges as a transmission medium and has eliminated Form ET, the transmittal form that accompanied magnetic cartridge submissions.

Electronic Filing System to File Forms 3, 4 and 5

On May 5, 2003, EDGAR Release 8.5 became effective, and the SEC’s new online filing system for Forms 3, 4 and 5 went live to provide a method for insiders to file electronically. The SEC’s Web site for the online creation and submission of Forms 3, 4, and 5 is located at <<https://www.onlineforms.edgarfiling.sec.gov/>>. Filers are no longer able to make Forms 3, 4 or 5 filings using the EDGAR template system. Additionally, there are at least eleven third-party companies that offer electronic filing services for Forms 3, 4 and 5. Recently, the SEC’s Division of Corporation Finance released a list of frequently asked questions regarding the electronic filing of Forms 3, 4 and 5 (<<http://www.sec.gov/divisions/corpfin/faqs.htm>>). Many of the questions and answers provide temporary accommodations with respect to mandatory fields in the online filing system, particularly in reporting holdings and certain derivative securities transactions. The SEC intends to revise its software soon so that these accommodations will no longer be necessary.

EDGAR Access Codes Required to File Forms 3, 4 and 5

In order to electronically file Forms 3, 4 and 5 on EDGAR, each insider must have EDGAR access codes (a Central Index Key (“CIK”), a CIK Confirmation Code (“CCC”) and a separate password that must be annually updated). Filers without a current password should immediately obtain current passwords or confirm that their password is current in order to make use of the online Web site system in a timely manner. Questions regarding EDGAR access codes and passwords can be directed to EDGAR Filer Support at (202) 942-8900. Persons may acquire the EDGAR access codes only by submitting a Form ID via fax to the SEC at (202) 504-2474 or (703) 914-4240. Issuers applying for EDGAR codes on behalf of their insiders may use one Form ID by listing the full name and address of each insider on an attachment to the form.

The Form ID form is available at <<http://www.sec.gov/divisions/corpfin/forms/id.htm>> and in pdf format at <<http://www.sec.gov/about/forms/formid.pdf>>.

The SEC no longer returns a hard copy of the access codes through the mail but will notify parties of the codes via phone call. If written confirmation of the access codes is desired, either an e-mail

address or a fax number should be included on the request. Issuers and insiders can contact EDGAR Filer Support for additional information or assistance.

If they have not already done so, insiders should file the Form ID and obtain EDGAR access codes well in advance of when they may need them for filings. A failure to obtain timely EDGAR access codes will not justify a filing date adjustment. Insiders should keep track of their codes and advise all issuers that they are associated with of their existing codes. Issuers and other third parties involved in the filing process should inquire whether insiders already have EDGAR access codes before submitting a Form ID on the insider's behalf. Filers are cautioned that if new EDGAR access codes are requested for an insider that already has them and new access codes are generated by the SEC, the previously generated access codes will become invalid.

We Can Help

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