

SEC Issues Faster Filing, Website Disclosure Rules

On September 5, 2002, the SEC issued new rules (<http://www.sec.gov/rules/final/33-8128.htm>) requiring companies that meet certain tests to file their annual and quarterly reports faster. The new rules also require disclosure relating to availability of SEC reports on company websites. We summarized these on August 30, 2002, based on descriptions by SEC staff and commissioners at the SEC's open meeting on August 27, 2002 and the SEC's press release regarding that meeting. The final rules themselves included some surprises, so readers of our earlier summary should be sure to review this description.¹

Who is Covered?

Only companies that meet the SEC's definition of "accelerated filers" are subject to accelerated filing deadlines. Nearly half of all publicly traded companies do not meet this test. Further, foreign companies that file reports on Forms 20-F or 40-F are not subject to accelerated filing deadlines. In the future, it will be interesting to see if the purported benefits of faster filing can be measured through comparisons of the faster reporting segment of the market with the slower reporting segment.

The SEC has defined an "accelerated filer" as a U.S. company that satisfies each of the following four tests as of the last day of its fiscal year:

<ul style="list-style-type: none"> ▪ Public float of at least \$75 million (market capitalization minus equity held by affiliates) 	<p><i>Determined as of the last business day of the most recently completed second fiscal quarter</i></p>
<ul style="list-style-type: none"> ▪ Exchange Act reporting for at least 12 calendar months 	<p><i>A "calendar month" requires that the company be subject to reporting requirements on both the first and last day of the month²</i></p>
<ul style="list-style-type: none"> ▪ Annual report filed 	<p><i>The company must have filed at least one Form 10-K</i></p>
<ul style="list-style-type: none"> ▪ Not small business issuer 	<p><i>Not be eligible to use Forms 10-KSB and 10-QSB</i></p>

Even if a company currently does not meet these tests, it must nevertheless reevaluate whether it is an accelerated filer as of the last day of each subsequent fiscal year. A U.S. company that does meet these tests will be subject to accelerated filing deadlines for all subsequently filed annual and quarterly reports, including the Form 10-K for the fiscal year just completed.

¹ The SEC's release publishing these new rules did not appear until more than a week after the August 27, 2002 open meeting at which the rules were approved. This is fairly unusual and indicates that the rules continued to be perfected following the open meeting.

² For example, if the company becomes subject to Exchange Act reporting requirements on September 25, 2002, that company's first "calendar month" as a reporting company will not begin until October 1, 2002, and the twelfth calendar month as a reporting company will not be complete until September 30, 2003.

The new rules do not accelerate filing deadlines for current reports on Form 8-K, but accelerated filing deadlines for Form 8-K are forthcoming. The SEC has proposed additional disclosure requirements and acceleration of filing dates for Form 8-K (<http://www.sec.gov/rules/proposed/33-8090.htm> and <http://www.sec.gov/rules/proposed/33-8106.htm>), and the staff has indicated its intent to complete this project soon. The new rules also do not accelerate filing deadlines for annual reports of foreign private issuers on Forms 20-F or 40-F. While the SEC has indicated that a shorter filing deadline for Forms 20-F and Form 40-F may be appropriate, it has conceded that for now this is not a high-priority issue.

Once an Accelerated Filer, (Almost) Always an Accelerated Filer

Once a company becomes an accelerated filer, it can only leave the accelerated filing system by becoming eligible to file as a small business issuer (i.e. use Forms 10-KSB and 10-QSB). If an accelerated filer's public float drops below \$75 million that will not, by itself, cause an accelerated filer to leave the accelerated filing system.

Deadlines for Accelerated Filers

Following the transition period described below, the new rules will require an accelerated filer to file its Form 10-K within 60 days (versus 90 days currently) after the end of its fiscal year and its Form 10-Q within 35 days (versus 45 days currently) after the end of each of the first three fiscal quarters. The deadlines for transition reports and the rules relating to age of financial statements in registration statements have also been changed to match these shorter deadlines.

Transition Period

The SEC has provided for a phase-in period to ease the transition to the new filing deadlines. For the present, the filing deadlines remain unchanged - 90 days for Form 10-K and 45 days for Form 10-Q. The first report subject to an accelerated filing deadline will be the Form 10-K for an accelerated filer's first fiscal year ending on or after December 15, 2003. The filing deadline for this report will be 75 days. For the following fiscal year (ending on or after December 15, 2004), the filing deadlines will be 60 days for Form 10-K and 40 days for Form 10-Q. The final step in the transition period will come with respect to fiscal years ending on or after December 15, 2005, for which the filing deadline for Form 10-Q will accelerate to 35 days.

For calendar year companies, the first report subject to an accelerated filing deadline will be the Form 10-K for the year ending December 31, 2003, which will be due March 15, 2004.³ For June 30 companies, the first report subject to an accelerated filing deadline will be the Form 10-K for the year ending June 30, 2004, which will be due September 13, 2004.

The following chart illustrates the transition for filing deadlines:

Fiscal Year Ending On or After	Form 10-K Deadline	Form 10-Q Deadline
December 15, 2002	90 days	45 days
December 15, 2003	75 days	45 days
December 15, 2004	60 days	40 days
December 15, 2005	60 days	35 days

³ For careful readers double-checking our date counting, please note that 2004 is a leap year.

Disclosure of Website Access to SEC Reports

The new rules also require an accelerated filer to disclose in Form 10-K its website address and whether it makes reports (including amendments) on Forms 10-K, 10-Q and 8-K available on its website, free of charge, as soon as reasonably practicable after such reports are filed with the SEC. If a company does not make such reports available on its website, the company must disclose why it does not do so, and whether it will voluntarily provide electronic or paper copies of such filings free of charge upon request. These rules apply to reports on Form 10-K filed for fiscal years ending on or after December 15, 2002. For most companies, this will be the next Form 10-K.

In its release, the SEC stated that including a company's web site address in Form 10-K to satisfy the above disclosure obligations will not incorporate the entire website by reference into the Form 10-K, unless the company "otherwise acts to incorporate the information by reference." The SEC has previously said that a company may incorporate by reference into a SEC filing the entire contents of the company's website if the website address is provided as an active hyperlink. Companies should therefore be careful not to include their website address in Form 10-K as an active hyperlink. In this regard, companies should be aware that many word processing applications convert website addresses to active hyperlinks by default.

Many company websites currently include a hyperlink to a third-party listing of the company's SEC reports. The SEC has made clear that this is an acceptable method of making SEC reports available on the company's website, provided that access is free of charge and the hyperlink is directly to a list of the company's reports (or the reports themselves) and not to a general search page.

In the release announcing these rules, the SEC stated "[o]ne of the key benefits of the Internet is that companies can make information available to many investors and the financial markets quickly and in a cost-effective manner." In its release proposing these rules, the SEC also said that it "strongly encourage[s] companies to provide investors with website access to their Exchange Act reports." We believe this will be a theme in the SEC's disclosure undertakings in the future.

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While the website disclosure rules will apply to the next Form 10-K filed by most companies, the accelerated filing deadlines will not begin for over a year. Nevertheless, we recommend that companies begin planning now for accelerated reporting. Companies should examine report preparation processes to identify roadblocks to dealing with accelerated filing deadlines, including conflicting schedule requirements following each fiscal period (such as analyst conferences) for employees responsible for preparing reports. We also recommend development of systems to coordinate accelerated filing with internal and external auditors, as well as disclosure and audit committees, which will be increasingly involved in the reporting process. The transition to accelerated filing deadlines may be challenging for some, but companies have a substantial period of time to prepare to meet the new deadlines with as few difficulties as possible.

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