

## Mandatory Electronic Filing and Website Posting of Section 16 Reports

On April 24, 2003, the Securities and Exchange Commission adopted long-anticipated rules requiring the electronic filing of all Section 16 reports by directors, officers and 10% beneficial owners.<sup>1</sup> In addition, companies that maintain a corporate website will be required to post on their website all Section 16 filings no later than the end of the business day following the filing date. The mandatory electronic filing of Section 16 reports and website posting requirement both take effect June 30, 2003.<sup>2</sup>

### Electronic Filing

Section 403 of the Sarbanes-Oxley Act of 2002 amended Section 16(a) of the Securities Exchange Act of 1934 to require that changes in beneficial ownership be reported within two business days following the date of the transaction, unless the Securities and Exchange Commission determines that the two-day reporting requirement is not feasible. In accordance with the amended statute, the SEC in August 2002 amended its rules to require that substantially all changes in beneficial ownership be reported on a Form 4 generally within two business days, including various types of employee benefit plan transactions that previously were eligible for deferred reporting on a Form 5.<sup>3</sup>

In addition, Section 403 of the Sarbanes-Oxley Act mandated, effective no later than one year following enactment of the legislation, the electronic filing of all reports of changes of beneficial ownership. The new SEC rules require the electronic filing of all Section 16 reports, including initial statements of beneficial ownership on Form 3, in addition to reports of changes in beneficial ownership on a Form 4 or Form 5.<sup>4</sup> The new SEC rules implement the electronic filing requirement one month in advance of the statutory deadline.

To ease the burden of the new electronic filing requirement, the SEC has adopted the following measures:

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<sup>1</sup> Under Section 16(a), each director and each officer (as defined by SEC Rule 16a-1) of a company with a class of equity securities registered under Section 12 of the Exchange Act and every beneficial owner, directly or indirectly, of more than ten percent of such class of registered equity securities (collectively, "Section 16 reporting persons") are required to file reports with respect to their beneficial ownership of equity securities of the company.

<sup>2</sup> See SEC Release No. 34-47809 (May 7, 2003). <http://www.sec.gov/rules/final/33-8230.htm>.

<sup>3</sup> See SEC Release No. 34-46421 (Aug. 27, 2002) implementing the two-day reporting requirement. <http://www.sec.gov/rules/final/34-46421.htm>. A few types of transactions (such as gifts) remain eligible for deferred reporting on a Form 5, which must be filed no later than 45 days after the end of the fiscal year in which a reportable transaction occurs.

<sup>4</sup> A Form 3 must be filed within ten days after a person first becomes a Section 16 reporting person or, in the case of a company registering securities under the Exchange Act for the first time, on the effective date of the registration statement. The Form 3 discloses the Section 16 reporting person's entire beneficial ownership of equity securities of the company as of the date of the filing.

- The deadline for the electronic filing of Section 16 reports has been extended from 5:30 p.m., Eastern time, to 10:00 p.m., Eastern time. Accordingly, beginning June 30, 2003, filings made during the extended hours will be considered filed on the same business day. Currently, filings commenced after 5:30 p.m. are deemed filed on the next business day.<sup>5</sup>
- For a period of one year (ending June 30, 2004), so long as a Section 16 report is filed no more than one business day following the due date, no disclosure of the late report will be required in the company's proxy statement.<sup>6</sup>

To facilitate compliance with the mandatory electronic filing requirement, the SEC has established a new internet website for the creation and filing of Section 16 reports. This web-based filing system became fully operational May 5, 2003.<sup>7</sup> As a result, Section 16 reports no longer can be made through EDGARLink as are other company filings. Instead, effective as of May 5, 2003, all electronic Section 16 reports must be filed either on-line or through a third-party filing service.<sup>8</sup> Under the new web-based filing system, a Section 16 reporting person (or the company, if it is preparing the reports for its directors and officers) can file the report by completing the on-line template.<sup>9</sup>

### Website Posting

To implement the Sarbanes-Oxley Act requirement for website posting, the SEC has adopted new paragraph (k) to Rule 16a-3 requiring that a company that maintains a corporate website post on the website all Section 16 reports filed with respect to the equity securities of the company. All such reports must be posted no later than the end of the business day following the date the report is filed with the SEC. Each such report must remain accessible on the website for at least a 12-month period from the date of posting. The company can satisfy the posting requirement either by posting the reports

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<sup>5</sup> According to the SEC, the reprogramming needed for this change will not be completed until approximately the end of July 2003. During the interim period, although the EDGAR system will continue to assign a next business day filing date, the Section 16 forms will be deemed filed on the day of receipt.

<sup>6</sup> Under 405 of Regulation S-K, a company is required to disclose in its proxy statement known failures of a Section 16 reporting person to file a timely Form 3, 4 or 5. Currently, under Rule 201 of Regulation S-T, a filer that experiences unanticipated technical difficulties in making a filing can obtain a temporary hardship exemption by making the filing in paper under cover of a Form TH not later than one business day after the date the filing was due. In conjunction with the new electronic filing rules this exemption has been eliminated. The SEC has advised, however, that, if a late filing is due to technical difficulties, the filer may apply to the SEC staff for an adjustment of the filing date under Rule 13(b) of Regulation S-T.

<sup>7</sup> See SEC Release No. 34-47766 (Apr. 30, 2003). <http://www.sec.gov/rules/final/33-8224.htm>.

<sup>8</sup> Until June 29, 2003, Section 16 reporting persons also continue to have the option of making Section 16 filings in paper.

<sup>9</sup> The SEC is still refining some of the elements of its on-line reporting template. As a result, the SEC has advised that the entry of some of the data on the Section 16 forms, particularly relating to derivative securities, requires certain "temporary accommodations." See Section 16 Electronic Reporting -- Frequently Asked Questions." <http://www.sec.gov/divisions/corpfin/sec16faq.htm>.

themselves or by furnishing a hyperlink to the reports. The hyperlink can be either to the SEC's EDGAR database or to a third-party service.<sup>10</sup> Of these alternatives, hyperlinking to EDGAR, either directly or through a third-party service, generally would seem to be the more attractive alternative because it eliminates the risk that a form filed, particularly by a 10% beneficial owner, will not be received by the company in time to meet the posting deadline.<sup>11</sup>

*D. Michael Lefever*

If you would like to learn more about the Securities Practice Group at Covington & Burling, please call any of the following:

Washington	David Martin	202.662.5128
New York	Bruce Bennett	212.841.1060
San Francisco	Andi Vachss	415.591.7069
London	Kelly Vance	44.20.7067.2040

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<sup>10</sup> If a company chooses to hyperlink to a third-party service, the following conditions must be satisfied: (i) the reports must be available within the required timeframe, (ii) access to the reports must be free of charge, (iii) all of the information on the reports must be retrievable, (iv) the medium to access the reports is not so burdensome that the intended users cannot effectively access the information provided, (v) the access includes any exhibits and attachments to the reports, (vi) the access to the reports is through the company website that the company normally uses for disseminating information to investors and (vi) the hyperlink is directly to the Section 16 forms of the company (as opposed to the homepage of the third-party).

<sup>11</sup> SEC Rule 16a-3(e) requires a Section 16 reporting person to send or deliver a duplicate copy of its Section 16 form to the company not later than the time the form is transmitted for filing to the SEC. Therefore, unless the company has arrangements in place for the electronic transmission of such forms to the company, it may not arrive in time to meet the website posting deadline.