

**REMINDER: SECTION 16 REPORTS MUST BE FILED
ELECTRONICALLY BEGINNING JUNE 30, 2003**

SIMPSON THACHER & BARTLETT LLP

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As discussed in several of our previous memoranda regarding the many requirements of the Sarbanes-Oxley Act of 2002, the Act mandates that all reports by directors, officers and principal stockholders of public companies on their holdings of, and transactions in, the company's equity securities pursuant to Section 16(a) of the Securities Exchange Act of 1934¹ be filed with the Securities and Exchange Commission electronically.² The SEC has set June 30, 2003 as the deadline for the implementation of required electronic filings and has established a new electronic filing system dedicated to Section 16 filings that is separate from the EDGARLink filing system.

This memorandum discusses a number of problems encountered by our clients in using the new system and offers suggestions that will facilitate complete and accurate reporting within the limitations of the new system. We wish to note that prospective electronic filers have encountered significant delays in obtaining the EDGAR access codes necessary to file reports electronically. Therefore, in order to ensure compliance with the two business day reporting requirement for Forms 4, we strongly recommend that you obtain such codes for any person subject to Section 16 well in advance of his or her next transaction.

The Sarbanes-Oxley Act also requires that public companies that maintain a corporate website must post all Section 16 reports on that website not later than the business day following their filing. This requirement also goes into effect on June 30, 2003. As explained in this memorandum, that requirement can easily be met by a hyperlink directly to insider ownership reports on the SEC's website.

New Electronic Filing System

The new Section 16 electronic filing system became operational on May 5, 2003 for reports on Forms 3, 4 and 5. The new system is intended to ease access by Section 16 filers and,

¹ The new requirements also apply to reports filed with the SEC pursuant to Section 17(a) of the Public Utility Holding Company Act of 1935 and Section 30(h) of the Investment Company Act of 1940. In each case, the relevant reports are made on Forms 3, 4 and 5.

² Our previous memoranda discussing the requirements of the Sarbanes-Oxley Act are available upon request or at our website at www.simpsonthacher.com. If you would like to be added to our mailing list, please e-mail sbussy@stblaw.com.

as discussed below, will permit Section 16 reports to be filed subject to a later deadline than that applicable to the EDGARLink system used for all other filings made with the SEC.

The new system can be accessed either by using third-party commercial service providers or commercial software or by logging on to the system directly through the SEC's website. The specific, secure webpage can be found at <https://www.onlineforms.edgarfiling.sec.gov>.

The new system also permits Section 16 filers, either on the SEC's website or through third-party service providers, to customize reports and file them as "reduced content filings."

There are a large number of programming glitches in the new system, many of which the SEC intends to correct in a revised version of the new system expected by July 30, 2003. These glitches, and suggested ways to overcome them, include the following:

- **The system will automatically shut down without warning one hour after one's last activity on the system, and all data previously entered will be lost.** We recommend that filers prepare a draft of their filing prior to logging on to the new system and try to complete their preparation of the form without interruption. Incomplete forms cannot be saved.
- **The number of lines available in each transaction table is limited, and may be too few if a large number of shares is being purchased or sold requiring separate transactions executed at different prices on the same day.** We recommend that the last available line be used to report a transaction for the remaining shares in the aggregate at a weighted average price, with the details of how many shares were purchased or sold at each price set forth in a footnote to that line.
- **Holdings can only be reported in the tables if there is a transaction to report, which means, for example, that if the filer is reporting a transaction only in one form of indirect holdings (such as shares held by a spouse), he or she will be unable to report his or her direct holdings or other types of indirect holdings on separate lines as the instructions to the forms require.** The SEC staff suggests that the securities held through other forms of beneficial ownership be reported in a footnote to the holdings reported in the table.
- **Holdings must be entered on every transaction line.** The SEC staff notes that running tallies must be entered where separate transactions in the same security and form of ownership are being reported.

- **The conversion or exercise price for derivative securities must be reported in dollars, but certain forms of derivative securities may not be convertible or exercisable at a dollar price (for example, phantom stock may convert on a one-for-one basis).** In such cases, the SEC staff suggests that filers enter a “0” (zero) in the column and explain the conversion or exercise method in a footnote.
- **The electronic forms require that single specific dates be entered for the date derivative securities become exercisable and their expiration date.** If a date is not yet known (for example, the applicable dates for phantom stock held acquired under a deferred compensation plan may both be the insider’s retirement date), the SEC staff suggests that the filer enter the “dummy date” of “08/08/1988” and explain the applicable terms in a footnote. If, as another example, the derivative securities vest in installments, the vesting date for the first installment should be entered and the vesting terms explained in a footnote.
- **New rules provide that when amending a form, only the holdings or transactions lines being amended or new holdings or transaction lines being added are to be reported. Certain amendments (such as an amendment to report a filer status previously omitted), however, may not involve a change in a line in the tables; but the system requires that with limited exceptions at least one line must be reported in any amendment.** The SEC staff suggests that one line previously reported be repeated, with an explanation of the purpose of the amendment, and that the reported line is not being added or changed, in a footnote.

Filing Hours

Beginning June 30, 2003, Section 16 reports filed directly through the new systems up to 10:00 p.m., Eastern time, will be deemed to have been filed on the same business day. This gives filers an additional four and one-half hours in which to file as compared to corporate filings made through the EDGARLink system.

Because of the expanded filing hours and ease of access of the new system, temporary hardship exemptions will no longer be available for Forms 3, 4 or 5. Filers, however, may still request a filing date adjustment where a filing is delayed due to technical difficulties beyond the filer’s control.

Recognizing that insiders may experience temporary difficulties in transitioning to mandated electronic filing, the SEC is granting temporary relief from the strict requirements of

Item 405 of Regulation S-K, which requires disclosure of Section 16 reporting delinquencies in a company's proxy statement and Form 10-K. Until June 30, 2004, no disclosure will be required if the report is filed not later than one business day following its regular due date.

EDGAR Access Codes

Each Section 16 reporting person must possess his or her own Central Index Key (CIK) number, CIK Confirmation Code (CCC) number and, for on-line filing, password. Separate CIK and CCC numbers must be obtained for each filer even where filing jointly on one form.

In anticipation of the mandated filing requirements, the volume of applications for the EDGAR access codes has been extremely high resulting in significant delays in the issuance of new codes. While the backlog has decreased somewhat, applicants may still experience delays of up to a week in obtaining new codes. We strongly urge clients to obtain codes for Section 16 persons as soon as possible and well in advance of any anticipated transaction reportable within two business days on Form 4.

Insiders must apply for codes by submitting a completed Form ID to the SEC by facsimile to the EDGAR Filer Support Office at (202) 504-2474.

Website Posting

The requirement that public companies that maintain a corporate website must post all Section 16 reports within one business day after they are filed also becomes effective on June 30, 2003. The new rules clarify that a "corporate website" refers to a public (internet) site.

The posting requirement can be satisfied by either providing direct access to the forms or by "hyperlinking" to reports maintained by a third-party service or by the SEC itself. If hyperlinking is used,

- the forms must be available in the required timeframes;
- access to the reports must be free of charge to the user and the medium of access must not be burdensome;
- all information in the forms and any exhibits or attachments, must be retrievable;
- access must be through the public company's normal investor information website; and

- the hyperlink must be to the Section 16 forms themselves, or a list of them; not the home page or general page of a third-party service.

Each filed report must remain accessible for at least 12 months following its posting.

If the company is posting by direct access to the reports, it should establish procedures so that it receives copies of all Section 16 reports, including those filed by principal stockholders, in time to meet its posting delegations. One suggestion is to designate an electronic transmission medium compatible with the public company's own systems as the "person" designated to receive Section 16 reports. Such designated file information should be posted on the website, together with the Section 16 filings.

The easiest method of posting, however, is by a direct link to the SEC's own EDGAR database. The link, however, must be to a list solely of Section 16 reports, using EDGAR's search capacity. For a public company with a [CIK code of 000123456](#), for example, the following link will generate a list solely of all electronic Section 16 filings:

<http://www.sec.gov/cgi-bin/browse-edgar?company=&CIK=0000123456&owner=only&action=getcompany>

The new rules also clarify that the requirement to post Section 16 reports applies to an investment company that does not maintain its own website if the company's investment adviser, sponsor, depositor, trustee, administrator, principal underwriter or any affiliated person of the investment company maintains a website that includes the name of the investment company.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

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