

**SEC ACCELERATES THE FILING  
DATES OF PERIODIC REPORTS BY CERTAIN U.S. COMPANIES**

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On September 5, 2002, the Securities and Exchange Commission adopted final rules and amendments to Form 10-K and Form 10-Q that will accelerate the filing dates of Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q filed under the Securities and Exchange Act of 1934 by most seasoned U.S. companies with publicly traded common equity. The new rules and amendments are contained in SEC Release Nos. 33-8128 and 34-46464 (the "SEC Release").

The new rules and amendments to Form 10-K and Form 10-Q will become effective on November 15, 2002, but the accelerated filing deadlines will generally be subject to phase-in periods intended to alleviate transition difficulties. For companies subject to the new rules that have calendar fiscal years, the first report whose filing date will be accelerated will be their Form 10-K report for their fiscal year ending on or after December 15, 2003. An accelerated filer with a December 31 fiscal year-end will need to file its 2003 Form 10-K within 75 days after year-end, or by March 15, 2004, rather than 90 days after year-end. Each of its Form 10-Q reports for the three quarters in the 2004 fiscal year will have a 40-day deadline. In subsequent years, Form 10-K reports must be filed within 60 days after year-end and Form 10-Q reports, within 35 days after period-end.

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**EXECUTIVE SUMMARY**

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The new rules and amendments to Form 10-K and Form 10-Q:

- Apply only to reporting companies that file annual reports on Form 10-K and quarterly reports on Form 10-Q; the new rules do not apply to U.S. companies that do not have publicly traded common equity, foreign governments, foreign private issuers, registered investment companies and small business issuers.
- Change the filing deadlines for Form 10-K and Form 10-Q reports for companies ("accelerated filers"):

- whose aggregate market value of voting and non-voting common stock held by non-affiliates (“public float”) is at least \$75 million;
  - have been a reporting company for at least 12 months; and
  - have previously filed at least one annual report.
- For companies that meet the above criteria as of the end of their first fiscal year ending on or after December 15, 2002, the new filing deadlines will be phased, in over a three-year period:
    - The annual report deadline will remain 90 days for year one and change from 90 days to 75 days for year two and from 75 days to 60 days for year three and thereafter.
    - The quarterly report deadline will remain 45 days for year one and change from 45 days to 40 days for year two and from 40 days to 35 days for year three and thereafter.
    - The phase-in period will begin with fiscal years ending on or after December 15, 2002. As a result, the first affected report for these accelerated filers which report on a calendar year basis will be their Form 10-K report for the year ending December 31, 2003.
  - Require companies that meet the accelerated filer criteria for the first time as of the end of a fiscal year on or after December 15, 2003 to comply with the filing deadlines that would have been applicable to them if they had become accelerated filers as of the end of their first fiscal year on or after December 15, 2002. These companies will not have the benefit of the one-year grace period during their first year of accelerated filer status.
  - Require accelerated filers to disclose in their Form 10-K reports filed for their fiscal years ending on or after December 15, 2002 whether they provide access to their Form 10-K, 10-Q and 8-K reports on their websites.

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**ACCELERATION OF FILING OF  
PERIODIC REPORTS**

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**Phase-In of Filing Dates**

The new rules and amendments to Form 10-K and Form-10-Q provide for the new accelerated deadlines for the filing of periodic reports to be phased-in over a three year period.

For companies meeting the definition of accelerated filer as of the end of their first fiscal year ending on or after December 15, 2002, the Form 10-K report deadline will remain 90 days for year one and will then be reduced 15 days per year over the next two years to reach a final deadline requirement of 60 days. The Form 10-Q report deadline for accelerated filers will remain 45 days for year one and will then be reduced five days per year over two years to reach a final deadline requirement of 35 days.

These changes are summarized in the following table:

<b>For Fiscal Years Ending On or After</b>	<b>Form 10-K Deadline After Fiscal Year End</b>	<b>Form 10-Q Deadline After Fiscal Quarter End</b>
December 15, 2002	90 days	45 days
December 15, 2003	75 days	45 days
December 15, 2004	60 days	40 days
December 15, 2005 and thereafter	60 days	35 days

If a company does not qualify as an accelerated filer as of the end of its first fiscal year ending on or after December 15, 2002, but subsequently does so qualify, the deadlines for filing its Form 10-K and Form 10-Q reports will be shortened immediately in accordance with the schedule above. Accordingly, a company that meets the accelerated filer definition for the fiscal year ending on or after December 15, 2003 will become subject to the phased-in, accelerated deadlines without the benefit of the one-year grace period to which companies meeting the accelerated filer definition at the end of their first fiscal year ending after December 15, 2002 are entitled. As a result, we recommend that companies that anticipate that they may become accelerated filers as of the end of a fiscal year ending on or after December 15, 2003 should begin to make appropriate plans in terms of systems and personnel for complying with the accelerated deadlines.

The new rules also accelerate the due dates for transition reports on Form 10-K and Form 10-Q by accelerated filers on the same schedule.

Rule 12b-25 under the Securities Exchange Act of 1934 allows companies to file a Form 10-K report up to 15 calendar days after its regular due date and a Form 10-Q report up to five calendar days after its regular due date under certain limited circumstances. While the SEC considered lengthening the extension periods under Rule 12b-25 to help alleviate any transition difficulties due to the shortened deadlines, it concluded an extension was not necessary due to the lengthy phase-in period of the new rules.

### **Definition of “Accelerated Filer”**

A company will be an “accelerated filer” subject to the new filing deadlines if it files on Form 10-K and Form 10-Q and meets, as of the end of its fiscal year, the following conditions, which are set forth in a new definition contained in Rule 12b-2 under the Exchange Act:

- Its common equity public float was \$75 million or more as of the last business day of its most recently completed second fiscal quarter (e.g. June 30 for companies with a fiscal year ending December 31)<sup>1</sup>;
- The company has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- The company has previously filed at least one annual report<sup>2</sup> under the Exchange Act; and
- The company is not a small business issuer eligible to use Forms 10-KSB and 10-QSB.

### *Timing for Determining if a Company is an Accelerated Filer*

A company must determine if it meets the definition of accelerated filer as of the last day of its fiscal year although a company’s public float is determined as of the end of its most recently completed second fiscal quarter. Because the public float requirement is measured by looking back at the last business day of a company’s most recently completed second fiscal quarter, a company will know in advance whether it will become an accelerated filer at the end of its fiscal year by virtue of meeting the public float test and can begin making appropriate preparations. If a company does not initially qualify as an accelerated filer, it must consider at the end of each fiscal year whether it has met the conditions set forth in the definition and has become an accelerated filer. A company does not need to determine whether it is an accelerated filer at any other time during the year.

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<sup>1</sup> A company’s public float is determined by using the price at which the company’s outstanding voting and non-voting common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity. This is the same public float test generally used to determine a company’s eligibility to use a registration statement on Form S-3 for primary offerings of equity securities for cash.

<sup>2</sup> The definition uses the term “annual report” and not Annual Report on Form 10-K. Accordingly, it appears that if a company that files annual reports on Form 20-F, 40-F or 10-KSB becomes required to file on Form 10-K in any fiscal year, it would become an accelerated filer or of the end of that fiscal year, assuming it meets the other requirements of the “accelerated filer” definition.

### *Losing Accelerated Filer Status*

Once a company becomes an accelerated filer, it remains an accelerated filer unless and until it subsequently becomes a foreign private issuer eligible to file on Form 20-F or a small business issuer eligible to use Forms 10-KSB and 10-QSB<sup>3</sup>. For example, a company that does not meet the requirements of a small business issuer will remain an accelerated filer even if its public float has declined to less than \$75 million. If a company loses its status as an accelerated filer, it will not become an accelerated filer again until it again meets the accelerated filer criteria discussed above.

### **Disclosure of Public Float and Accelerated Filer Status**

Currently, companies reporting on Form 10-K are required to disclose on the cover page of such reports their public float as of a date within 60 days before the filing of the report. Under the new rules, each company required to file a Form 10-K, regardless of whether it is an accelerated filer, must instead disclose on the cover page of its Form 10-K its public float on the last business day of the company's most recently completed second fiscal quarter. For example, a company with a fiscal year that ends on December 31 would disclose its public float as of its most recent June 30<sup>th</sup>. In addition, all companies reporting on Form 10-K and Form 10-Q must check a box on the cover of their Form 10-K and Form 10-Q reports indicating whether they are an accelerated filer. These changes to the Form 10-K and Form 10-Q forms become effective on November 15, 2002.

### **Types of Entities Excluded from Eligibility to Become an Accelerated Filer**

Companies that have only debt securities that are publicly traded, foreign governments, foreign private issuers, registered investment companies and small business issuers are not subject to the new accelerated filing deadlines. The SEC Release states that the SEC will continue to consider whether the new rules, as well as other Exchange Act filing requirements, should apply to foreign private issuers.

### **Conforming Amendments to Regulation S-X**

As described below, the SEC has amended Regulation S-X to conform to the new accelerated filing rules.

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<sup>3</sup> A small business issuer is defined as a company that (1) has revenues of less than \$25,000,000, (2) is a U.S. or Canadian issuer, (3) is not an investment company, and (4) if a majority owned subsidiary, the parent corporation is also a small business issuer; *provided however*, an entity is not a small business issuer if it has a public float of \$25,000,000 or more.

*Filings within 90 Days of Year-End*

Currently, under Rule 3-01(c) of Regulation S-X, a reporting issuer, which is not a foreign private issuer, is not required to include audited financial statements for its most recent fiscal year in registration statements filed or declared effective or proxy statements mailed until the 90<sup>th</sup> day after the end of the fiscal year if it satisfies three conditions:

- The company has filed all required Exchange Act reports;
- The company reasonably, and in good faith, expects income, after taxes but before extraordinary items and a cumulative effect of a change in accounting principle, for its most recent fiscal year; and
- For at least one of the two immediately preceding fiscal years, the company has reported income, after taxes but before extraordinary items and cumulative effect of a change in accounting principle.

Unless all three conditions are met, registration statements filed or declared effective and proxy statements mailed after the 45<sup>th</sup> day following the fiscal year end must include audited financial statements for the most recent fiscal year end.

Rule 3-01, as amended, shortens the 90-day deadline to conform to the phase-in periods for accelerated filers to keep this requirement parallel to the requirement to file an Annual Report under the Exchange Act. Accordingly, for accelerated filers in year one the deadline will remain 90 days, in year two the deadline will be 75 days and in years three and subsequent years the deadline will be reduced to 60 days. The SEC did not change the 45-day deadline for companies that do not meet the three required conditions.

*Filings After 134 Days of Year-End*

Currently, under Rule 3-01(e) of Regulation S-X, interim financial information must be included in registration statements filed by U.S. registrants after 134 days subsequent to the end of the registrant's fiscal year. Under these circumstances, the filing must include financial statements within 135 days of the date of filing. Under the conforming amendments, for accelerated filers in year one the period will remain 134 days, in year two the period will be reduced from 134 to 129 days and in year three and subsequent years, the period will be reduced to 124 days. Thus, in year two of the phase-in period updated financial statements will now be required within 130 days of the date of filing and in year three of the phase-in period, within 125 days of the date of filing.

*Age at Effective Date of Filing*

Under existing Rule 3-12 of Regulation S-X as it applies to companies which are not foreign private issuers, where financial statements in a filing are as of a date 135 days or more before the date the filing is expected to become effective, or proposed mailing date in the case of a proxy statement, the financial statements must be updated with a balance sheet as of an interim date within 135 days and with statements of income and cash flows on a comparative basis for the interim period between the end of the most recent fiscal year and the date of the interim balance sheet provided. Two exceptions exist under the current rule. First, where the registrant meets the conditions in Rule 3-01 of Regulation S-X, described above, and the anticipated effective date or proposed mailing date in the case of a proxy statement falls after 45 days but within 90 days of the end of the fiscal year, the filing need not be updated with financial statements more current than as of the end of the third fiscal quarter of the most recently completed fiscal year provided audited financial statements for that fiscal year are not available. Second, where the registrant does not meet the prescribed conditions referred to above and the anticipated effective date or proposed mailing date falls after 45 days but within 90 days of the end of the fiscal year, the filing must include audited financial statements for the most recent fiscal year.

The conforming amendments revise the rule to parallel the requirements for filing financial information under the Exchange Act. In year one of the phase-in period, the general updating period will remain at 135 days for accelerated filers. In year two of the phase-in period, the general updating period will be reduced from 135 days to 130 days for accelerated filers. For year three and subsequent years, the period will be reduced to 125 days. For each of the exceptions, the 90 day period will remain at 90 days for year one and then be reduced to 75 days in year two and 60 days in year three and subsequent years for accelerated filers.

*Unconsolidated Subsidiaries and 50% or Less Owned Persons*

Under Rule 3-09 of Regulation S-X, in certain circumstances a company must file separate financial statements for subsidiaries that are not consolidated and 50% or less owned persons ("non-consolidated entities"). If the filing of the financial statements of non-consolidated entities was accelerated to conform to the filing deadlines of the investor registrant, a company that does not meet the definition of an accelerated filer could be required to file its financial statements before it would otherwise be required to do so solely because of the ownership stake by the investor registrant that is an accelerated filer. To avoid this result, the SEC has amended Rule 3-09. Under the amendment, separate financial statements of non-consolidated entities required by Rule 3-09 will not be accelerated for inclusion in an accelerated filer's Form 10-K if the non-consolidated entity is not an accelerated filer. In that instance, the financial statements of the non-consolidated entity can be filed by amendment within 90 days, or within six months if the non-consolidated entity is a foreign business, after the end of the registrant investor's fiscal year. In addition, the SEC made conforming amendments to provide companies with

additional time to file the required financial statements if the fiscal year of the investor registrant and the non-consolidated entity differ.

If a non-consolidated entity is also an accelerated filer, its financial statements must be filed by the investor registrant within the newly prescribed deadlines.

***Form 10-K Schedules Required by Article 12 of Regulation S-X***

The SEC also made conforming changes to Regulation S-X to maintain a 30-day period after the due date of an Annual Report on Form 10-K for the filing of all schedules required by Article 12 of Regulation S-X.

**Time Allowed to Incorporate Form 10-K Information from Definitive Proxy or Information Statements**

Information required in Part III of Form 10-K (*e.g.*, regarding directors and executive officers, executive compensation, beneficial ownership and related party transactions) may be incorporated by reference into a Form 10-K from a subsequently filed definitive proxy statement or information statement if the statement is filed by 120 days after the end of the fiscal year covered by the Form 10-K. While the SEC considered shortening the 120 day deadline in light of the new filing deadline for Form 10-K filings, it concluded there was no significant reason to do so at this time.<sup>4</sup> This means that for accelerated filers there will be a longer time period between the required filing times of their Form 10-K filings and proxy or information statements which include the Part III information. In a telephone interpretation the SEC staff advised that during this interim period prior to the filing of the definitive proxy or information statement containing the Part III disclosure, a company cannot have new short-form registration statements under the Securities Act of 1933 declared effective.

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<sup>4</sup> The SEC's new rules adopted to implement Section 302 of the Sarbenes-Oxley Act of 2002 relating to officer certifications in periodic reports raise special issues for companies that wish to incorporate by reference into their Form 10-K reports Part III information from a subsequently filed proxy statement or information statement. In such cases, the certifications would be deemed to apply prospectively to the information to be filed in the future. In our memorandum dated September 6, 2002 entitled "*SEC Adopts New CEO/CFO Certification Rules Pursuant to Section 302 of the Sarbenes-Oxley Act of 2002*," we suggested that issuers give serious consideration to filing their reports concurrently with their proxy or information statements or including the required information in the annual report itself. These practices may be necessary or prudent because the officers required to make the certifications may be unwilling or unable to certify information they have not had the opportunity to review. The memorandum referred to above is available upon request or at our website: [www.simpsonthacher.com](http://www.simpsonthacher.com).



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WEB ACCESS INFORMATION

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The new rules require accelerated filers to provide the following additional disclosure in their Form 10-K reports:

- The company's website address, if it has one;
- Whether the company makes available free of charge on or through its website, if it has one, its Form 10-K, Form 10-Q and Form 8-K reports, and all amendments to those reports, as soon as reasonably practicable after such material is electronically filed with or furnished to the SEC;
- If the company does not make its filings available in this manner, the reasons it does not do so, including, where applicable, that it does not have an Internet website; and
- If the company does not make its filings available in this manner, whether the company voluntarily will provide electronic or paper copies of its filings free of charge upon request.

The additional disclosure must be included in all Form 10-K reports of accelerated filers filed for fiscal years ending on or after December 15, 2002. Accordingly, accelerated filers with a December 31 fiscal year-end will need to include this new disclosure in their Form 10-K reports for the year ending December 31, 2002.

The SEC Release indicates that providing access to Exchange Act reports through a hyperlink to a third-party service is an acceptable method of making reports available through a company's website so long as the reports are made available in the appropriate timeframe at no cost to the user. The SEC Release also states that a company should hyperlink directly to its reports rather than to the home page of the third-party service. Providing access to Exchange Act reports through a hyperlink to a company's reports on the SEC's EDGAR website will also allow a company to state it provides website access to its reports as soon as reasonably practicable after those reports are filed.

The SEC Release states the following with respect to the new rules:

- The requirement of a company to make reports available on or through its website "as soon as reasonably practicable" after such reports are filed with the SEC means barring unforeseen circumstances, on the same day as the filing;
- There is no requirement for how long a company's reports must be made available on or through its website. The SEC Release encourages companies to

provide ongoing website access to their reports and at a minimum provide access to previous reports for at least 12 months;

- The disclosure of a company's website address in its Form 10-K report in accordance with the new rules will not by itself include or incorporate by reference the information contained in a company's website into its SEC filings; and
- The new disclosure does not separately create or otherwise affect a company's duty to update its prior statements.

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Please contact your relationship partner or John D. Lobrano (jlobrano@stblaw.com), Vincent Pagano (vpagano@stblaw.com) or Raymond W. Wagner (rwagner@stblaw.com) at (212) 455-2000 if we can be of assistance regarding these important developments.

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