

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

APRIL 2002

SEC PROPOSES NEW DISCLOSURE RULES

The SEC has proposed rule changes that would:

- accelerate filing deadlines for quarterly and annual reports under the Securities Exchange Act of 1934 (the “Exchange Act”) by certain U.S. public companies that qualify as “accelerated filers”;
- require such companies to either post their Exchange Act reports on their web sites at the same time they are filed with the SEC or explain in their annual reports why they do not provide such access; and
- require all U.S. public companies to report on Form 8-K certain transactions by their directors and executive officers.

These proposals were among a series of disclosure initiatives announced in a statement released by the SEC in February. The first two items initially were proposed as part of the Aircraft Carrier initiatives and reflect a general recognition that in the Internet age the market expects reporting of material events to occur more quickly than is currently mandated.

The third proposal responds to recent criticism that corporate insiders have in certain instances profited from sales of equity securities just prior to sharp declines in the market price of those securities and that Section 16 reporting requirements permitted insiders to delay reporting these sales. The SEC believes that its proposed rule change will significantly enhance investors’ access to information concerning transactions that may reflect management’s views of the company’s prospects, provide de facto additional compensation or cause a shift in the alignment between shareholders’ and management’s economic interests.

While the accelerated filing deadlines may require accelerated filers to dedicate additional resources to ensure that filings are timely made, the third proposal will require that all public companies overhaul their “insider trading policies” to require real time reporting to them of transactions covered by the proposed reporting requirements. This is the only way

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

2, rue du Faubourg Saint-Honoré
75008 Paris, France
(33-1) 53.43.14.14

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100, Japan
(81-3) 3597-8120

2918 China World Tower II
No. 1, Jianguomenwai Dajie
Beijing 100004, People’s Republic of China
(86-10) 6505-6822

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

that such companies will be in a position to meet their reporting obligations under the proposed new rules.

Proposed Acceleration of Periodic Report Filing Dates

The SEC proposes to accelerate the filing of:

- quarterly reports on Form 10-Q from 45 to 30 calendar days after quarter end; and
- annual reports on Form 10-K from 90 to 60 calendar days after fiscal year end.

The proposals would accelerate these due dates only for domestic reporting companies that have a public float of at least \$75 million, have been subject to the Exchange Act reporting requirements for at least 12 calendar months and previously have filed at least one annual report. The accelerated filing deadlines would not apply to any foreign reporting companies or to domestic reporting companies that do not meet these thresholds.

The SEC is strongly considering, but has not yet proposed, conforming changes for the inclusion of financial statements in filings under the Securities Act of 1933 (the “Securities Act”) for those companies subject to the accelerated reporting requirements. The SEC has also not proposed to make a conforming change to the 120-day period that a domestic reporting company has to file a proxy statement in connection with its annual meeting within which it may incorporate by reference into its Form 10-K information concerning directors and executive officers, relationships and related transactions, executive compensation, and beneficial ownership. The SEC has requested comments as to whether the deadline for filing financial statements in connection with an acquisition reportable on Form 8-K should be reduced from 60 days to 40 days (or less) after the initial report has been filed.

If adopted, the accelerated reporting deadlines would apply to U.S. public companies that meet the public float and reporting history requirements as of the end of their first fiscal year ending after October 31, 2002.

Disclosure Concerning Website Access to Reports

The SEC proposes to require companies subject to the accelerated reporting deadlines to explain in their annual reports on Form 10-K how investors can access company filings, including:

- that the public may read and copy the company’s filings at the SEC Public Reference Room and can access electronically filed information at the SEC Website;
- disclosure of the company’s Website address, if it has one;
- whether the company makes available free of charge on its Website, if it has one, its annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K and all amendments to those reports no later than the same day such material is electronically filed with or furnished to the SEC;
- if the company does not make its filing available in this manner, the reasons why;

- if the company does not make its filings available in this matter, one or more locations, if any, where the public can access these filings electronically immediately upon filing, and whether there is a fee for such access; and
- whether the company voluntarily will provide electronic or paper copies of its filings free of charge upon request.

The proposed rule is subject to a 30-day comment period and would become effective three months after the date of adoption.

Proposed Amendments to Form 8-K Requiring Companies to Report Transactions by Directors and Executive Officers

The SEC proposes amending Form 8-K, the form for current reports for U.S. public companies under the Exchange Act, to require these companies to report information about:

- directors' and executive officers' transactions in company equity securities (including transactions in derivative securities, hedging transactions and transactions with the company);
- adoption, modification or termination of plans and other arrangements (so-called "10b5-1 plans") by directors and executive officers for the purchase or sale of company equity securities entered into in advance of trading so that the purchase or sale will not be deemed to have been made on the basis of material nonpublic information; and
- loans of money to directors and executive officers made or guaranteed by the company or an affiliate of the company.

Generally, reports of transactions and loans with an aggregate value of \$100,000 or more would be due within two business days. Most other reports would be due by the close of business on the second business day of the following week. However, reports of transactions and loans with an aggregate value less than \$10,000 would be deferrable until the aggregate cumulative value of unreported events for the same director or executive officer exceeds \$10,000.

The requirement to report directors' and executive officers' transactions in company equity securities is similar to corporate insiders' Section 16 reporting obligations and both apply to any U.S. company that has registered a class of equity securities pursuant to Section 12 of the Exchange Act. Like Section 16, the proposed rule would include transactions in any class of company equity securities, whether or not registered under Section 12. Also reportable would be transactions in derivative securities in respect of company equity securities (whether or not the derivative securities were issued by the company) and would include any acquisition or disposition of derivatives and any exercise, conversion, termination or settlement of derivative contracts. While beneficial owners of more than ten percent of a class of equity securities registered under Section 12 are subject to Section 16 reporting obligations, their transactions would not be reportable on Form 8-K by the company.

In addition, transactions by directors and executive officers in the following categories would not be reportable:

- receipt of stock dividends (including stock splits) and pro rata rights;
- acquisitions pursuant to regular reinvestment of dividends or interest through a broad-based reinvestment plan;
- acquisitions or dispositions pursuant to domestic relations orders;
- transactions as executor of an estate or similar fiduciary during the 12 months following appointment;
- transactions that change the form of beneficial ownership without changing the director's or executive officer's pecuniary interest in the equity securities;
- routine acquisitions (*e.g.*, through payroll deduction) pursuant to broad-based, tax-conditioned employee benefit plans and related excess benefit plans;
- transfers by will or the laws of descent and distribution;
- acquisitions or dispositions pursuant to holding company formations and similar corporate reclassifications and consolidations; and
- deposits or withdrawals of equity securities from voting trusts.

Under the Section 16 reporting regime, the onus is on the insider to report his or her transactions. Although companies may prepare filings or otherwise assist insiders with their Section 16 reporting, these companies have no obligation to do so. The proposed disclosure of insider securities transactions, and on an accelerated basis, will require an entirely new regime of sharing of information between public companies and their insiders. A company that fails to file a report under this proposed rule would not be sanctioned if at the time of the violation it had implemented and followed procedures sufficient to provide reasonable assurances that qualifying events are timely reported and then promptly made a filing to correct any violation. (A delinquent filing would not affect a company's eligibility to use shelf registration procedures under the Securities Act or its current reporting status under Rule 144.)

The proposed 8-K reporting requirements are subject to a 60-day comment period and would become effective 60 days following publication. The SEC would expect to delay for an additional 60 days compliance with the obligation to report transactions within two business days that have a value of \$100,000 or more. Nonetheless, given the impetus behind these disclosure requirements and the likelihood that the proposals will be adopted as proposed, public companies would be well advised to begin preparing the necessary procedures to obtain the required information from their insiders and to have policies ready for implementation when the rules become effective.

* * *

This memorandum provides only a general overview of the proposed disclosure rules. It is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

Mark S. Bergman	(44 20) 7367 1601	Paul D. Ginsberg	(1) 212-373-3131
Richard S. Borisoff	(1) 212-373-3153	John C. Kennedy	(1) 212-373-3025
Andrew J. Foley	(1) 212-373-3078	Edwin S. Maynard	(1) 212-373-3024
John A. Myer	(44 20) 7367 1605		

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

©2002 Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas, New York, NY 10019-6064