

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
E.O. 12065, Section 6-102
By JMV NARS, Date 5/2/2012

Circ. 8/15 for 8/27

Sherry Stephen
Supervisory Program Information Specialist

August 15, 2002

Recommendation
Approved by
Commission

AUG 27 2002

*5-0
PGGOAC
TO:*

ACTION MEMORANDUM

The Commission



FROM:

Division of Corporation Finance

SUBJECT:

Final Rules on Acceleration of Periodic Report Disclosure and Website Access to Periodic Reports

RECOMMENDATION:

That the Commission issue a release, substantially in the form attached, adopting rule and form changes to (1) shorten the due dates for Form 10-K and 10-Q reports filed by large issuers; and (2) require new Form 10-K disclosure applicable only to these large issuers requiring them to disclose where investors can obtain access to company filings, including whether the company provides website access to its reports.

ACTION REQUESTED:

August 27, 2002

**SUNSHINE ACT
STATUS:**

Open Meeting

**NOVEL, IMPORTANT
OR COMPLEX ISSUES:**

The Commission received over 300 comment letters on the proposals.

The Commission would be expressing a policy encouraging companies to provide website access to their Form 10-K, 10-Q and 8-K reports.

**PRIOR COMMISSION
ACTION:**

Release No. 33-8089 (Apr. 12, 2002), in which the Commission proposed shortening the due dates for annual and quarterly reports and requiring disclosure regarding report access.

Release No. 33-7606A (Nov. 13, 1998), in which the Commission requested comment on shortening the due dates for annual and quarterly reports.

**OTHER DIVISIONS
OR OFFICES
CONSULTED:**

Office of General Counsel – consulted (David Fredrickson)
Office of Economic Analysis – consulted (Charles Dale, Jonathan

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Sokobin, Lori Walsh)
Division of Market Regulation – copy given to (Larry Bergmann)
Division of Investment Management – copy given to (Susan Nash,
Barry Miller)
Office of Enforcement – copy given to (Laurie Stegman, Charles
Niemeier)
Office of the Chief Accountant – copy given to (Jackson Day)
Office of Information Technology – copy given to (Michael
Bartell)
Office of Filing and Information Services – copy given to
(Kenneth Fogash)

**REGULATORY
FLEXIBILITY ACT
STATUS:**

The Draft Adopting Release includes a Final Regulatory Flexibility
Analysis

**COST-BENEFIT
ANALYSIS:**

The Draft Adopting Release includes a consideration of costs and
benefits

**PAPERWORK
REDUCTION ACT
STATUS:**

The Draft Adopting Release includes a Paperwork Reduction Act
(PRA) analysis. The PRA analysis in the proposing release was
previously submitted and approved by the OMB.

**MAJOR RULE
ANALYSIS:**

The proposing release for the amendments, dated April 12, 2002,
solicited comment on whether the proposed rule amendments were
“major rules” for purposes of Congressional review. We did not
receive any comments that specifically addressed this issue. We
did, however, receive estimates from several companies regarding
the costs associated with implementation of the proposed
amendments. Based on this data, we have concluded that this is a
major rule.

**PERSONS TO
CONTACT:**

Jeffrey Minton, Special Counsel, Office of Rulemaking – x2844
Elizabeth Murphy, Chief, Office of Rulemaking – x2848

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I. SUMMARY

The Division recommends that the Commission adopt rule and form amendments under the Securities Act of 1933 and the Securities Exchange Act of 1934 to accelerate the filing of quarterly and annual reports by certain reporting companies and to require additional disclosure regarding access to Commission reports.

The amendments accelerate the filing of reports by domestic companies that have a public float of at least \$75 million, that have been reporting for at least 12 months and that previously have filed at least one annual report. The changes will be phased-in over three years, with no change for the initial year, as follows:

For Fiscal Periods		
<u>Ending After</u>	<u>Form 10-K Deadline</u>	<u>Form 10-Q Deadline</u>
December 15, 2002	90 days after fiscal year end	45 days after fiscal quarter end
December 15, 2003	75 days after fiscal year end	40 days after fiscal quarter end
December 15, 2004	60 days after fiscal year end	35 days after fiscal quarter end

We also recommend conforming amendments to the timeliness requirements for the inclusion of financial information in Securities Act and Exchange Act registration statements, proxy statements and information statements under the Exchange Act and transition reports that sometimes must be filed when a company changes its fiscal year.

The amendments also require accelerated filers to disclose in their annual reports on Form 10-K where investors can obtain access to their filings, including whether the company provides access to its reports on Forms 10-K, 10-Q and 8-K on its website, free of charge, as soon as reasonably practicable after those reports are electronically filed with or furnished to the Commission. If the company does not provide website access in this manner, it will be required to disclose why it does not do so. The company also will be required to disclose its website address, if it has one.

Our recommendations provide the following accommodations to address commenters' concerns and ease compliance:

- A gradual phase-in of the new deadlines over three years, with no change in the deadlines for the first year.
- A less extensive ultimate acceleration of quarterly reports than proposed (35 days rather than 30 days as proposed).
- A definition of accelerated filer that excludes over half of all publicly-traded companies as well as all small business issuers, foreign private issuers and issuers that do not have a common equity public float.

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- Revisions to the proposed determination date for the public float requirement in the definition of “accelerated filer” to give companies more advance notice and time to prepare for accelerated deadlines.
- Conforming amendments that allow certain financial statements of subsidiaries to be filed by later amendment if the subsidiary is not an accelerated filer.

II. DISCUSSION

A. Background and Proposing Release

In its February 13, 2002 Press Release, the Commission announced its intention to propose changes to its corporate disclosure rules as the first in a series of steps designed to modernize and improve the federal reporting and disclosure system. Among other changes, the Commission stated that it intended to propose rules that would (1) accelerate the due dates of companies’ quarterly and annual reports; and (2) add a requirement that companies post their Exchange Act reports on their websites at the same time that they are filed.¹

On April 12, 2002, the Commission published proposals to accelerate the deadline for annual reports from 90 days to 60 days after the end of the company’s fiscal year and to accelerate the deadline for quarterly reports from 45 days to 30 days after the end of the company’s first three fiscal quarters. We did not propose a gradual phase-in of these deadlines under the proposals. We would have required accelerated filers to promptly transition to the 60 and 30 day deadlines. These proposals would have applied to companies that met the proposed definition of an “accelerated filer” as of the end of their first fiscal year ending after October 31, 2002. The proposed definition of accelerated filer included companies with a public float of at least \$75 million, that had been reporting for at least 12 months and that previously had filed at least one annual report. The Commission restricted the proposals only to larger issuers because larger issuers likely are better prepared than small issuers to comply with shortened deadlines. They also generally are able to take advantage of short-form registration under the Securities Act and therefore benefit from incorporation by reference and shelf registration.

The Commission also proposed to require a company subject to accelerated deadlines to disclose in its annual report on Form 10-K where investors can obtain timely access to company filings, including whether the company provides access to its reports on Forms 10-K, 10-Q and 8-K on its website, free of charge, as soon as reasonably practicable after, and in any event on the same day as, these reports are electronically filed with, or furnished to, the Commission. If the company did not provide website access in this manner, it would be required to disclose why it did not do so and where else investors could access these filings electronically immediately upon filing. The company also would be required to disclose its website address, if it has one.

¹ The Commission also stated that it intended to propose rules to: provide accelerated reporting by companies of transactions by company insiders in company securities; expand the list of significant events requiring current disclosure on Form 8-K; and require disclosure of critical accounting policies in MD&A. All of the initiatives in the February 13, 2002 press release have been subsequently proposed by the Commission.

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The periodic report deadlines were last changed 32 years ago.² Since then, technological advances have both increased the market's demand for timely disclosure and the ability of companies to capture, process and disseminate this information. Periodic reports contain information that is valuable to investors. In establishing deadlines, however, the market's need for information must be balanced with the time companies need to prepare that information.

Widespread access to timely corporate information, including access to information posed on company websites, promotes the efficient functioning of the financial markets. Further, ready access to Exchange Act information is critical to the proper functioning of short-form registration under the Securities Act, which relies on incorporation of this information by reference. The Internet has revolutionized information availability. Modernizing the disclosure system involves recognizing the importance of the Internet in fostering prompt and widespread dissemination of information. The Commission has stated that it is important for information to be available in a variety of locations and that companies should make investors aware of the different sources that provide timely access to that information.

B. Comments Received

We received responses from 305 commenters.³ 302 of these commented on the acceleration of periodic report deadlines. Generally, these commenters fell into two categories. The first group (20 commenters) represented primarily investors, institutional investors and other users of company reports who supported the proposals and our objective to provide investors with more timely access to company filings. In addition to this group, many other companies, accounting firms and professional associations agreed in concept that shorter deadlines would improve the flow of information, but believed that the due dates finally chosen should reflect concerns about maintenance of the quality of information to be filed.

The second, and, by number of commenters, much more numerous, group (282 commenters) represented primarily companies, business associations, law firms and accounting firms who opposed the extent of acceleration and length of the transition period proposed because, in their view, preparing reports in the proposed timeframes would be too burdensome and could result in less accurate filings. Most of these commenters believed that any incremental benefit from the proposed acceleration is insufficient to warrant the added burdens on registrants and the risk of diminished disclosure quality, although these commenters generally did not analyze the benefits from the perspectives of users of the reports. The most frequent concerns were:

- The proposed deadlines would negatively affect the quality and accuracy of reports.

² The Commission previously requested comment as to whether it should shorten the due dates for quarterly and annual reports for all issuers. See Release No. 33-7606A (Nov. 13, 1998) [63 FR 67174].

³ We previously distributed a summary of the public comments. Copies are available from the staff.

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Many who opposed the proposals thought they were contrary to other initiatives that the Commission has undertaken to increase the quantity and quality of company disclosure.

- The proposed deadlines would impair the ability of management, external auditors, boards of directors and especially audit committees to scrutinize and review filings properly and give appropriate consideration to the form, substance and priority of disclosures, especially MD&A disclosures and financial statement footnotes. Disclosures could be reduced or become more boilerplate if companies have less time to prepare them.
- Advances in technology over the past 30 years have been largely offset by increases in accounting and disclosure requirements and business complexity. Also, technological advances that allow companies to generate earnings data quickly for an earnings release do not replace the more analysis needed to prepare SEC reports.
- Companies would face an increased burden in preparing reports, particularly with respect to increased costs and audit fees.

Slightly less than half of those objecting (129 commenters) did not think any acceleration was warranted. However, slightly more than half (153 commenters) objected because they believed the Commission was too aggressive in its proposal. Many of these commenters, including most business organizations, generally supported the Commission's objective to provide investors with more timely information and offered alternatives to reduce potential costs and burdens and any impact on disclosure quality. These alternatives fell roughly into three categories:

- A more gradual phase-in or transition period than proposed (e.g., reducing deadlines by a set number of days per year or delaying the effective date of accelerated filing deadlines).
- Accelerating deadlines less extensively (e.g., 75 days for annual reports and 35 days for quarterly reports) or accelerating only the annual report deadline. In this regard, while commenters were mixed, more believed it would be more difficult to accelerate the quarterly report than the annual report.
- Linking the deadline for filing reports to a company's earnings release (e.g., the earlier of the existing deadlines or some period of time after a company's issuance of an earnings release).

Many commenters outlined their process of preparing reports. Several provided detailed timelines. The particular steps and timing varied, and not all companies appear to be at the same level of technological sophistication and staffing for preparing reports.

Commenters were mixed on the proposed definition of accelerated filer. Several believed all companies should adhere to the same filing deadline, regardless of size or experience. Others

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agreed with the proposed exclusion of smaller companies that may not have the necessary resources and infrastructure to report on an accelerated basis. Commenters also were somewhat mixed on the proposed use of public float as a method to differentiate between companies. Several also thought the \$75 million public float threshold was too low.

Most of the 141 commenters that referred to the proposals concerning website access were supportive, although some offered various recommendations to refine them.

B. Overview of Amendments

1. Phase-In of Accelerated Deadlines

As stated in the proposing release, in establishing the appropriate deadlines for periodic reports, the market's need for information must be balanced with the time companies need to prepare that information. Most of the commenters who objected to the proposals believed the Commission was too aggressive in the extent of acceleration and transition period proposed. Accordingly, in response to comments, we recommend phasing-in accelerated deadlines over three years with a less extensive ultimate acceleration of the quarterly report deadline.

For companies that meet our revised definition of accelerated filer as of the end of their first fiscal year ending on or after December 15, 2002, we recommend that the annual report deadline remain at 90 days for year one and then be reduced 15 days per year over two years to 60 days. We recommend that the quarterly report deadline for these filers remain at 45 days for year one and then be reduced five days per year over two years to 35 days. Our recommendations would not shorten deadlines for the first year in light of (1) concerns regarding absorption of former Andersen clients by other auditing firms, and (2) more significantly, the additional burden on registrants resulting from the Sarbanes-Oxley Act of 2002. A company would be aware this year, however, whether it is an accelerated filer, thus giving it more time to prepare for shortened deadlines. We also recommend conforming amendments to transition reports filed by accelerated filers.

2. Definition of Accelerated Filer

With a phase-in period and a less extensive acceleration of the quarterly report deadline, the need to increase the threshold for an accelerated filer becomes less critical in our view. We recommend adopting the definition of accelerated filer substantially as proposed. This means that accelerated deadlines would apply to companies after they first meet the following conditions as of the end of their fiscal year:

- Their common equity public float is \$75 million or more as of the last business day of their most recently completed second fiscal quarter;
- The company has been reporting under the Exchange Act for at least 12 calendar months;

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- The company has previously filed at least one annual report; and
- The company is not eligible to use Forms 10-KSB and 10-QSB.

While we agree that there would be benefits from accelerating deadlines for all companies, we believe it would be difficult for smaller issuers to comply with accelerated filing deadlines without undue burden. Given the mixed reaction of commenters, however, we will continue to study whether it is appropriate to extend accelerated filing to additional companies.

As for the recommended definition of accelerated filer, we believe that public float serves as a proxy for size and market interest. The public float and reporting history requirements are based primarily on the current eligibility requirements for short-form registration and shelf registration. Selecting a pre-existing threshold reduces regulatory complexity. In addition, we are recommending conforming amendments to the financial statement timeliness requirements for other Commission filings, including Securities Act registration statements. Selecting a \$75 million public float threshold ensures that investors receive consistent financial information regardless of the particular registration form a company uses.

Our recommendation changes the proposed determination date for the float requirement to the last business day of a company's second fiscal quarter to give companies more advance notice that they will become subject to accelerated reporting. We also suggest changing the proposal to specify that a company cannot become an accelerated filer in the middle of a fiscal year to provide additional planning time for companies first becoming subject to accelerated filing deadlines.

3. Conforming Amendments for Other Commission Filings

In the proposing release, the Commission requested comment on several possible conforming revisions to other rules. We recommend conforming amendments to the timeliness requirements for the inclusion of financial information in other Commission filings, such as Securities Act and Exchange Act registration statements and proxy statements and information statements. These amendments ensure that the financial information included in these documents still will be required to be at least as current as financial information filed under the Exchange Act. To address a specific concern raised by commenters, however, we recommend that separate financial statements of subsidiaries not consolidated and 50% or less owned persons required by Rule 3-09 of Regulation S-X not be accelerated for inclusion in a company's Form 10-K if the subsidiary is not an accelerated filer. We recommend that these financial statements be permitted to be filed by amendment within the existing time periods. We also recommend that we continue to allow an extra 30 days for filing of schedules required by Article 12 of Regulation S-X as an amendment to their Form 10-K.

As proposed, we do not recommend shortening the period of time companies have to file their definitive proxy or information statements to allow the incorporation by reference of the information required by Part III of Form 10-K. We also do not recommend conforming revisions

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to the financial statement filing requirements in Rule 3-05 of Regulation S-X and Item 7 of Form 8-K for financial statements of businesses acquired. Neither conforming amendment was supported by commenters, and we see no significant reason to change these deadlines.

4. Disclosure Concerning Website Access to Company Reports

The vast majority of commenters supported the proposals. Accordingly, we recommend adopting the requirements substantially as proposed with minor modifications. Since the proposing release, the Commission has announced real-time access to companies' periodic reports filed electronically on EDGAR. These reports are available through the Commission's website. Despite the immediate availability of company reports through our website, we still believe the proposed disclosure is desirable, as one of the proposal's objectives was to encourage the availability of information in a variety of locations and foster best practices for the making that information broadly accessible. In addition, elimination of the 24-hour delay in accessing EDGAR reports on our website substantially facilitates provision by companies of free, real-time website access to their reports because companies now would be able to provide investors with access to their reports simply by establishing a hyperlink to our website.

We recommend that accelerated filers be required to disclose the following in their annual reports on Form 10-K beginning with reports for fiscal years ending on or after December 15, 2002:

- 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 annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and all amendments to those reports as soon as reasonably practicable after such material is electronically filed with or furnished to the Commission;
- If the company does not make its filings available in this manner, the reasons it does not do so; 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 to investors free of charge upon request.

Compared to the proposal, the draft adopting release eliminates two of the proposed disclosure items (relating to our public reference room and where else the public can access filings immediately upon filing if the company does not provide real-time website access). As real-time access is now available through the Commission's website, we believe this proposed disclosure is no longer necessary. In response to comments concerned about technical and other obstacles that might lead to violating the proposed "same day" requirement, we have eliminated that requirement. However, the adopting release interprets the "as soon as reasonably practicable" standard to mean that the report would be available, barring unforeseen

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circumstances, on the same day as filing.

The adopting release also includes several clarifications requested by commenters. These include guidance as to whether disclosure of a company's website in response to the new requirement results in incorporation by reference of information on that website into the Commission filing referencing the website. We recommend addressing this situation in the adopting release by providing a simple interpretation that compliance with the new disclosure requirement will not cause incorporation by reference unless the company otherwise acts to incorporate the website information by reference into the filing.

III. CONCLUSION

For the reasons discussed above, the Division recommends that the Commission adopt the rule and form amendments substantially as set forth in the attached release.

Attachment

Attachment A -- Draft Adopting Release