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SEC PROPOSES OFFICER CERTIFICATIONS IN 10-K AND 10-Q FILINGS

By John Girault

On June 17, 2002, the SEC proposed new rules that would require certain officer certifications in connection with the filing of Forms 10-Q and 10-K. In addition, the SEC's proposal would require companies to maintain, and annually evaluate, procedures to ensure compliance with the disclosure requirements of Forms 10-K, 10-Q and 8-K. (Click here to link to the full text of the SEC's proposal.)

Certification of 10-K and 10-Q Disclosures

The SEC's proposal would require a company's principal executive officer and principal financial officer to certify, in connection with the filing of the company's 10-K and 10-Qs, that:

- the officer has read the report;
- to the officer's knowledge, the information in the report is true in all material respects as of the end of the reporting period; and
- the report contains all information about the company that the officer is aware of and that the officer believes is important to a reasonable investor as of the end of the reporting period.

As proposed, the certification would explain that information is "important to a reasonable investor" if

- there is a substantial likelihood that an investor would view the information as "significantly altering the total mix of information" in the report; and
- the report would be misleading if the information were omitted.

Internal Procedures for Exchange Act Filings

The SEC's proposal would also require companies to have procedures in place to ensure the timely disclosure of the financial and non-financial information required by Forms 10-K, 10-Q and 8-K. While the SEC's proposal would not require particular procedures, the proposal does recommend that

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companies designate a committee with responsibility for evaluating the materiality of information and determining on a timely basis the existence of disclosure obligations.

In addition, prior to the filing of a Form 10-K, companies would be required to:

- evaluate, with management supervision, the effectiveness and design of the company's Exchange Act reporting procedures; and
- ensure that the results of the evaluation are communicated to the company's board, principal executive officer and principal financial officer.

Certification Regarding Evaluation Results

In addition to the certifications described above, the SEC's proposal would also require a company's principal executive officer and principal financial officer to certify, in connection with the filing of the company's 10-K, that they have reviewed the results of the evaluation of the company's Exchange Act reporting procedures.

While the proposal would not require board review of the evaluation results, the SEC believes that board participation in the officers' review would be "beneficial."

Comments on this proposal should be delivered to the SEC no later than August 19, 2002.

SEC PROPOSES ADDITIONAL 8-K DISCLOSURES AND ACCELERATED FILING DEADLINE

By Amos J. Oelking III

On June 17, 2002, the SEC proposed additional Form 8-K disclosure requirements as well as an accelerated Form 8-K filing deadline. Significant provisions of the SEC's proposal are as follows:

Proposed New Reportable Events

Currently, companies are required to file a Form 8-K to report the occurrence of any of six specified events, including a change of control or bankruptcy of the company. The SEC's proposal would add 11 specific events to the list of events requiring an 8-K filing, including:

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- the execution, significant amendment to, or termination of a material agreement not made in the ordinary course of the company's business;
- the loss of, or a material reduction in the relationship with, a significant customer;
- the creation of a material direct or contingent obligation of the company, whether or not the company is a party to the underlying agreement or transaction;
- a material write-off or restructuring charge relating to the termination of a business segment;
- a material accounting charge relating to an impairment of the company's assets;
- an event that would have the effect of materially limiting or prohibiting participants in the company's employee benefit or other stock ownership plan from acquiring, disposing, or converting their holdings; and
- a material amendment to the company's charter or bylaws if such amendment is not otherwise disclosed in the company's proxy statement delivered to shareholders.

Expanded Director and Officer Disclosures

The SEC's proposal would also expand the Form 8-K disclosures required with respect to directors and officers, including disclosure of:

- the resignation, refusal to stand for reelection, or removal of a director;
- the resignation, termination, or reassignment of a principal officer;
- the election of new directors (other than by the company's shareholders); and
- the appointment of new principal officers.

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Other Exchange Act Reporting Requirements

Companies are currently required to report the following events, among others, in their Forms 10-Q and/or 10-K:

- a material change in the rights of holders of the company's securities;
- an event triggering a material direct or contingent obligation of the company; and
- an unregistered sale (*i.e.*, private placement) by the company of the company's equity securities.

In lieu of Form 10-Q or 10-K disclosure, the SEC's proposal would require the disclosure of these events in an 8-K filing.

Accelerated Filing Deadline

Currently, a Form 8-K is required to be filed either 5 business days or 15 calendar days after the reportable event, depending on the event. The SEC's proposal would require the filing of a Form 8-K within two business days of the triggering event.

Delinquent 8-K Filings

Under the SEC's proposal, a company would not be liable under the Exchange Act for its failure to timely file a required Form 8-K if:

- on the due date, the company had procedures in place to ensure compliance with the requirements of Form 8-K;
- no officer or employee knew that an 8-K was required to be filed; and
- within two business days of an executive officer of the company becoming aware of the failure to file, the company filed the required 8-K with the SEC.

Currently, if a company fails to timely file a Form 8-K, it is not eligible to use short form registration statements such as Form S-3. Under the SEC's proposal, however, if a Form 12b-25 filing is made within one business day after the Form 8-K due date, and the 8-K is filed within two business days of the original due date, then the company would remain eligible to use short form

registration statements. Moreover, consistent with current law, shareholders of the company would be unable to sell securities under Rule 144 until such time as the company became current with its 8-K and other Exchange Act filings.

The SEC expects the proposals to be made effective 60 days after adoption on a prospective basis. (Click here to link to the full text of the SEC's proposal.) Comments on the proposal should be delivered to the SEC no later than August 26, 2002.

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

L. Richards McMillan, II
 Jones Walker
 201 St. Charles Ave., 51st Fl.
 New Orleans, LA 70170-5100
 ph. 504.582.8188
 email rmcmillan@joneswalker.com

Corporate and Securities Practice Group

BRAD J. AXELROD
 ALLISON C. BELL
 LISA MANGET BUCHANAN
 SCOTT DAVID CHENEVERT
 DOUGLAS N. CURRAULT, II
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