

# PAUL, WEISS, RIFKIND, WHARTON & GARRISON

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## SEC TO PROPOSE NEW DISCLOSURE RULES

The SEC, in a departure from its past practice of issuing comment releases without much advance public discussion, has announced that it intends to propose changes in corporate disclosure rules as the first in a series of steps designed to improve the financial reporting and disclosure system for U.S. public companies. Although some of the proposals are holdovers from the SEC's Aircraft Release 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, other proposals are clearly a direct response to some of the criticisms raised by the Enron affair.

Specifically, the SEC intends to propose rules that will:

- Accelerate reporting of transactions by a registrant's insiders in the registrant's securities, including transactions with the registrant;
- Accelerate filing deadlines for quarterly and annual reports by U.S. registrants under the Securities Exchange Act of 1934 (the "Exchange Act");
- Expand the list of significant events requiring current disclosure on Form 8-K and accelerate the deadline for filing;
- Require registrants to post their Exchange Act reports on their web sites at the same time they are filed with the SEC; and
- Require disclosure of critical accounting policies in MD&As.

The SEC has indicated that it intends to publish the proposals for comment as soon as possible. Although most of the proposals are expected to be straightforward, the full details will only become available when the SEC publishes the proposals for comment. It is unclear, for example, what impact the proposed rule changes would have on non-U.S. SEC registrants. Final rule changes will become effective only after the comment process is completed.

### **I. Proposed Amendments for Insider Reporting**

The SEC is considering a variety of ways to improve public disclosure of trading by executive officers, directors and 10% beneficial owners of a registrant in the registrant's stock.

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Under the short swing profit rules (Section 16) of the Exchange Act, trades generally must be reported by the tenth day of the month following the month in which the trades occur, which represents a potential delay of up to 40 days. The SEC supports a legislative solution that would dramatically shorten this period.

In the meantime, the SEC intends to propose that, pursuant to their reporting obligations, registrants disclose on a current basis significant transactions in their stock by their executive officers and directors. As a complement to this initiative, the SEC is seeking ways to provide for electronic filing of reports of insider transactions. Direct reporting on the SEC's EDGAR filing system by insiders would entail the distribution and monitoring of literally tens of thousands of personal identification numbers to these insiders. Accordingly, the SEC is considering an approach that would require registrants (which already are required to file electronically) to file electronically information that they receive from insiders.

The SEC is also re-examining Rule 16a-3(f), which, among other things, permits officers and directors who sell stock back to their company to delay reporting (on a Form 5) until 45 days after the end of the fiscal year in which the transaction took place, allowing a potential reporting delay of many months. To eliminate this delay, the SEC intends to propose that a registrant report on a current basis any transactions involving its securities entered into with any of its executive officers or directors.

## **II. Proposed Amendments for Ongoing Exchange Act Reporting**

The SEC's disclosure system under the Exchange Act requires registrants (other than foreign private issuers) to make disclosure at annual and quarterly intervals, with limited, specified events reported on a more current basis. The SEC believes that the time periods for these filings should be shortened (which had been suggested in the Aircraft Carrier release), while the list of events requiring more current reporting should be expanded.

### **A. Annual and Quarterly Reports**

The SEC intends to propose that U.S. registrants file their annual reports on Form 10-K within 60 days after the end of their fiscal year, rather than 90 days. The SEC also intends to propose that registrants file their quarterly reports on Form 10-Q within 30 days after the end of their first three fiscal quarters, rather than 45 days.

### **B. Current Reports**

The SEC believes that markets and investors need more timely access to a greater range of information than what is required by existing disclosure rules. Accordingly, the SEC intends, in what appears to be a move towards continuous disclosure, to propose expanding the type of information that registrants must report on Form 8-K, to also include:

- Changes in rating agency decisions and other rating agency contacts;
- Transactions in a registrant's securities, including derivative securities, with executive officers and directors;

- Defaults and other events that could trigger acceleration of direct or contingent obligations;
- Transactions that result in material direct or contingent obligations not included in a prospectus filed by a registrant with the SEC;
- Offerings of equity securities not included in a prospectus filed by a registrant with the SEC;
- Waivers of corporate ethics and conduct rules for officers, directors and other key employees;
- Material modifications to rights of securityholders;
- Departure of a registrant's president, chief executive officer, chief financial officer or chief operating officer (or persons in equivalent positions);
- Notices that reliance on a prior audit is no longer permissible, or that the auditor will not consent to use of its report in a filing for an offering under the Securities Act of 1933;
- Definitive agreements that are material to a registrant (negotiations of agreements would be excluded unless and until a definitive agreement is entered into);
- Any loss or gain of a material customer or contract;
- Any material write-offs, restructurings or impairments;
- Any material change in accounting policy or estimate;
- Movement or de-listing of a registrant's securities from one quotation system or exchange to another; and
- Any material events, including the beginning and end of lock-out periods, regarding a registrant's employee benefit, retirement and stock ownership plans.

The SEC intends to propose that registrants file reports of these events no later than the second business day following their occurrence. The SEC also is considering whether some of these events should require filing by the opening of business on the day after the occurrence of the event.

### **III. Disclosure on Company Web Sites**

The SEC believes that mandated public company disclosure should be more readily available to investors in a variety of locations. To further this goal, the SEC intends to propose amendments that would require public companies to make their Exchange Act reports available on their Internet web sites, at the same time as they are filed with the SEC. This requirement would not replace or reduce a registrant's current filing obligations.

### **IV. Disclosures about Critical Accounting Policies**

The SEC intends to propose amendments to its rules for Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") to require disclosure about critical accounting policies. As described in a Cautionary Advice Release issued by the SEC on December 12, 2001, critical accounting policies are those that are both:

- most important to the portrayal of a registrant's financial condition and results, and
- require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain.

The proposals may require registrants to include in their MD&A full explanations, in clear and understandable format and language, of their critical accounting policies, the judgments and uncertainties affecting the application of those policies, and the likelihood that materially different amounts would be reported under different conditions or using different assumptions. The objective of this disclosure would be consistent with the objective of MD&A to provide information on events or uncertainties known to management that would have a material impact on reported financial information.

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This memorandum provides only a general overview of the amendments to the current disclosure regime that the SEC expects to propose and is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. We will supplement this memorandum when the proposals are issued by the SEC for public comment.

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](http://www.paulweiss.com)).

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