

CLIENT ALERT

A Flurry of Changes In Response To Enron

SEC Proposes To Accelerate Filing of Forms 10-K and 10-Q, and Disclosure of Insider Transactions on Form 8-K

HISTORICALLY, we have tended to react to proposals for legislative or regulatory changes in the rules governing public companies and the securities markets with a certain amount of skepticism, often waiting until a law was actually enacted or a rule changed before bringing it to our client's attention. However, the flurry of recent proposals for legislative or regulatory change in response to the Enron/Arthur Andersen/Tyco scandals are an exception. The political pressure for real change is sufficiently great, and the practical implications of some of the proposals are sufficiently large, that we think it appropriate to alert you to some of the proposals while they are still in the proposal stage.

This Client Alert will discuss two such recent proposals by the Securities and Exchange Commission to change the reporting requirements for public companies under the Securities Exchange Act of 1934 (the "Exchange Act"). If adopted, these changes will accelerate the filing deadlines for Forms 10-K and 10-Q for many companies and will require them to disclose certain insider transactions within as little as two days after they occur.

Acceleration of Filing Deadlines for Forms 10-K and 10-Q

The SEC proposes to accelerate the basic filing deadline for domestic companies reporting under the Exchange Act to require filing their Form 10-K within 60 days after the end of the fiscal year (instead of the present 90 days) and their Form 10-Q within 30 days after the end of each quarter (instead of the present 45 days). Small public companies and foreign companies will not be subject to the accelerated filing deadlines and will continue to be subject to the old 90 day and 45 days periods. The companies subject to the new

shorter deadlines would be domestic companies that: (1) have a public float of more than \$75 million; (2) have been subject to the reporting requirements of the Exchange Act for at least one year, and (3) have previously filed at least one Form 10-K. Domestic companies must determine whether they qualify as accelerated filers once a year, no less than 30 no more than 60 days before the end of the fiscal year. Once a company becomes subject to the accelerated filing schedule, it would remain in that status until it becomes eligible to file annual and quarterly reports as a small business issuer. If the SEC adopts the proposed changes, they will become effective as of the end of the first fiscal year ending after October 31, 2002.

Accelerated Filers Posting Reports On Website

The SEC has proposed that every company subject to the accelerated filing requirement described above disclose on its Form 10-K whether it posts its Exchange Act reports on its website at the same time as it files them with the SEC. If it does not, it must explain the reasons why not, and disclose the electronic location where the public can access immediately the Exchange Act reports and whether there is a fee. In addition, the accelerated filer must disclose whether it provides voluntarily copies of its Exchange Act reports free of charge upon request. The thrust of this requirement obviously is to push all companies covered by the rule to post their Exchange Act reports on their website simultaneous with filing.

Company Disclosure of Insider Transactions on Form 8-K

The SEC has also proposed to require reporting public companies to report on a new Item 10 of Form 8-K a number of types of transactions by company insiders. Specifically, they will have to report: (1) all directors' and executive officers' transactions in the company's equity

securities (regardless of whether the transaction is in a class of securities registered under the Exchange Act); (2) directors' and executive officers' arrangements for the purchase and sale of company securities pursuant to Rule 10b5-1(c) trading plans; and (3) loans of money to a director or executive officer made or guaranteed by the company or an affiliate of the company. This company Form 8-K filing requirement would be in addition to, and would not replace, the obligation of the insider to file Form 3s, 4s, and 5s. A company would be required to report an insider's transaction or a company-guaranteed loan within two business days if the aggregate value of the transaction equaled or exceeded \$100,000. Employee benefit plan grants and awards of company securities, insider transactions and loans with an aggregate value between \$10,000 and \$100,000 and arrangements pursuant to Rule 10b5-1 trading plans would be reportable not later than the close of business on the second business day of the following week. The company would not have to report an insider's transactions or loans with value less than \$10,000. However, the company would have to "keep tabs" for each director and executive officer and comply with the appropriate deadline once the aggregate value of the insider's unreported transactions and loans exceeds \$10,000.

Many of our clients know from experience how difficult it can sometimes

be to get Forms 3 and 4 filed on a timely manner. This proposal, if adopted, will present some real practical challenges. The SEC release proposing the rule specifically addresses the consequences to the company of failure to timely file the Form 8-K. A delinquency in reporting these events would not affect eligibility for use of Form S-3 or ability to sell under Rule 144. If the company has designed procedures and a system for applying procedures sufficient to provide "reasonable assurance" that these events will be timely reported, at the time of a violation it was following those procedures, and as promptly as reasonably practicable it files to correct any violation, then it will not be subject to any sanctions for failure to timely file the Form 8-K. However, repeat offenders would face sanctions.

If the SEC adopts this proposal, it would become effective 60 days after publication of the final rule.

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Many commentators have expressed objections to different aspects of the above proposals, particularly the requirement to complete audited financial statements and file the Form 10-K within 60 days, and the requirement to report some insider transactions within 2 days. While the proposal may be modified in response to these objections, it is reasonably clear that in response to the Enron scandal a portion of the proposal will be adopted fairly quickly.

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