

## NEW SEC DISCLOSURE PROPOSALS REQUIRE PUBLIC COMPANIES' ATTENTION

by  
Linda L. Griggs  
Scott D. Museles  
Ross H. Parr

In response to the recent accounting and disclosure scandals that have occurred in corporate America, the Securities and Exchange Commission (SEC) has released an unprecedented number of initiatives that seek to restore investor confidence. On June 17, 2002, the SEC continued this effort when it proposed several new rules.<sup>1</sup>

***CEO/CFO Certification of Periodic Reports.*** In SEC Release No. 34-46079, the SEC proposed rules that would require the principal executive officer and principal financial officer of each domestic public company to certify the accuracy and completeness of the information contained in their company's annual and quarterly reports. These certifications would be made in the officers' individual capacities, not their representative capacities, and would likely result in an increase in liability exposure for such officers.

It would not be at all surprising if the certification requirement were expanded in the SEC's final rules to apply to all SEC filings. Such an expansion is likely for two reasons: 1) the current climate regarding management accountability for corporate disclosure; and 2) the broader scope of a subsequently issued SEC order requiring the principal executive officers and principal financial officers of 947 of the largest public companies to submit sworn statements as to the accuracy and completeness of their recent SEC filings. In addition, the SEC may consider requiring the proposed certification to be made under oath, subject to the penalties of perjury, similar to the sworn statements.

On July 15, 2002, the U.S. Senate unanimously passed a bill entitled "Public Company Accounting Reform and Investor Protection Act of 2002" (S. 2673) that, among other things, includes a provision that requires certification of the appropriateness of financial statements and disclosures contained in periodic reports and a statement that such information "fairly present[s], in all material respects, the operations and financial condition" of the company. If this requirement becomes law in the form passed by the Senate, the SEC's proposal would be superseded and guidance as to how to comply with the previously quoted language will be needed.

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<sup>1</sup>For a more extensive discussion of these proposals, see *SEC Proposes Certification of Annual and Quarterly Reports, Requirement for Internal Procedures and New Form 8-K Requirements*, July 2002, available at [www.morganlewis.com/wp0236.pdf](http://www.morganlewis.com/wp0236.pdf).

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**Linda L. Griggs** is a partner, **Scott D. Museles** is of counsel, and **Ross H. Parr** is an associate, respectively, in the Washington, D.C. office of the law firm Morgan, Lewis & Bockius LLP. They are members of the Morgan Lewis Securities Practice.

***Internal Procedures to Ensure Timely and Accurate Disclosure.*** SEC Release No. 34-46079 also included proposed rules that would require each domestic public company to maintain adequate internal procedures for gathering, analyzing and disclosing all information that is required to be included in current and periodic reports. The rules would require: (a) the company to evaluate the effectiveness of those procedures on at least an annual basis; (b) the principal executive officer, principal financial officer and the board of directors of the company to review the results of the evaluation of procedures; and (c) the principal executive officer and principal financial officer to certify that they have reviewed the results of such an evaluation.

In the Release, the SEC stated its belief that most companies already maintain procedures to comply with their disclosure obligations, and therefore the proposed rules would not result in any additional reporting or cost burdens on the companies. Nevertheless, if these rules are adopted as proposed, many companies will likely establish and document additional and more formal procedures, including the formation of a disclosure committee (as was recommended by the SEC), to ensure compliance with the rules.

The proposed rules regarding internal procedures do not require that the officers certify that they *have* effective procedures in place for verifying the disclosure. It only requires such officers to certify that they have reviewed the results of the evaluation of such procedures. However, consistent with one of the proposals being considered by a special committee formed by the New York Stock Exchange, among the SEC's questions regarding this proposal is whether a company should also be required to certify that it has established procedures for verifying the accuracy and completeness of its public disclosures.

Senate bill S. 2673 also includes a provision that would require a report in a company's Form 10-K regarding management's responsibility for the adequacy of internal controls and procedures for financial reporting and an assessment of the effectiveness of such controls and procedures. If this provision becomes law, the SEC will likely need to modify its rule proposal regarding internal procedures.

***New Current Reporting Requirements on Form 8-K and Accelerated Filing Deadline.*** In SEC Release No. 34-46084, the SEC proposed rules that would add eleven new current disclosure requirements to the SEC's current report on Form 8-K, move two existing requirements from annual and quarterly reports to Form 8-K, and amend substantially two of the existing items required to be disclosed on Form 8-K. In addition, the proposed rules would accelerate the filing deadline for most of the reports on Form 8-K from five to fifteen days after the reportable event to two days after the reportable event.

The SEC raised numerous questions regarding each of its proposed new current disclosure requirements, many of which could signal significantly *more* disclosure requirements in the final rules than those proposed. For example, the SEC asked whether it should include an item requiring disclosure of other material events related to the company's business and operations. If such an item were mandatory, the floodgates of disclosure would be opened wide, resulting in a significant burden on domestic public companies and additional exposure to liability.

With respect to the accelerated deadline for filing Form 8-Ks, the shorter deadline for filing Form 8-Ks may affect the quality of Form 8-K disclosures. More specifically, the items that require management's analysis of the effect of a particular event on the company (like a mini-MD&A) may be difficult to fully comply with on a timely basis. Moreover, the timely filing of material agreements and other documents as exhibits to the Form 8-K, particularly when documents are still being finalized or require confidential treatment requests, may be difficult.

***Conclusion.*** Based on Congressional and White House interest in current disclosure, it is almost certain that executive officer certifications, internal procedures, and additional Form 8-Ks will be required. The public comment period ends on August 19, 2002 with respect to the proposed certification/internal procedures rules and August 24, 2002 with respect to the proposed Form 8-K rules.