

Frederic W. Cook & Co., Inc.

New York • Chicago • Los Angeles

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**SEC PROPOSALS ACCELERATE PERIODIC REPORT FILING DATES AND  
HIGHLIGHT CERTAIN MANAGEMENT TRANSACTIONS**

***Summary***

On April 11, 2002, the Securities and Exchange Commission approved for public comment two significant proposals as part of a series of steps to modernize and improve the corporate disclosure system. The first proposal requires certain companies to file quarterly and annual reports in a shorter time frame than previously required. The second proposal requires companies to provide investors with quicker access to management transactions in company equity and derivative securities, management loan agreements and 10b5-1 plans.

***Background***

Historically, SEC rules have required companies to provide information on a quarterly and annual basis with select filings on a more current basis. Recent situations such as Enron have sparked investor fervor and a demand for faster, more detailed disclosure. In response, the SEC is proposing rules that would provide investors and the market with access to relevant information that is clear, concise and timely.

**Proposal #1**

*Acceleration of Periodic Report Filing Dates*

The first proposal will accelerate the filing of quarterly reports and annual reports for select companies. In general, the SEC has excluded smaller and less mature companies from this proposal, arguably, because the accelerated time frame would be unduly burdensome. Thus, only companies that meet the following criteria will be deemed “accelerated filers” and be held to the new accelerated filing requirements:

- Domestic reporting companies that have a public float<sup>1</sup> equal to or exceeding \$75 million,<sup>2</sup>

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<sup>1</sup> As defined by the SEC, a public float is the aggregate market value of a company’s outstanding voting and non-voting common equity minus the value of common equity held by affiliates of the company.

<sup>2</sup> Public float will be determined as of a date within no more than 60 and no less than 30 days before the end of the company’s last fiscal year.

- Have been subject to reporting requirements for at least 12 calendar months preceding the filing of the report, and
- Have previously filed at least one annual report.

The current filing requirements, which have been in place for over thirty years, are 45 days from period end for quarterly reports on Form 10-Q and 90 days from fiscal year end for annual reports on Form 10-K. Under the new proposal, these time periods for affected companies will be shortened to 30 and 60 days respectively.

#### *Website Access to Information*

Readily attainable access to this information is another key for investors. The advent of the Internet age has provided companies with another platform to reach interested parties. Today, it is commonplace for companies to have websites that introduce customers to their company, display their products and services and sell them. Along these same lines, the Internet allows investors and the financial markets to access information quickly and in a cost-effective manner. Under this premise, the SEC has placed an even greater influence on investor access to company filings via the web.

Specifically, the Commission is proposing that companies subject to the acceleration rules discussed above will also be required to disclose in their annual reports on Form 10-K where investors can access company filings. In particular, companies must address whether they provide Internet access via a company website to their reports on Forms 10-K, 10-Q and 8-K, free of charge, and available at least at the same time as the reports are filed with the Commission. If companies are not able to provide this service, they must disclose why not and where else the information can be obtained. In addition, companies must furnish their website address, if they have one.

Directionally, we support the shorter filing deadlines and the placement of information on the web. We believe this new proposal is good for investors and the marketplace.

#### *Compliance Date*

Companies meeting the public float and reporting history requirements must be in compliance as of the end of the companies' first fiscal year ending after October 31, 2002. Website access requirements are effective three months after the adoption of the rule.

Copies of the SEC proposal can be found at [www.sec.gov](http://www.sec.gov). The SEC welcomes interested persons to submit comments concerning the proposed amendment on or before May 23, 2002.

## **Proposal #2**

### *Form 8-K Disclosure of Certain Management Transactions*

The second proposal will require public companies (companies with a class of securities registered under Section 12) to report significant management transactions within an accelerated time period. The three general types of transactions covered are:

- Director and executive officer<sup>3</sup> transactions in company equity securities (including derivatives),
- Director and executive officer arrangements for the purchase or sale of company equity securities (commonly known as Rule 10b5-1 plans<sup>4</sup>), and
- Loans of money to directors and executive officers made or guaranteed by the company or an affiliate of the company.

The location of the information would be in Form 8-K<sup>5</sup>. Time periods for filing would vary depending on the nature and value of the transaction or loan. For example,

- Any transaction or loan with an aggregate value of \$100,000 or more, other than a grant or award under an employee benefit plan, would need to be disclosed within two business days,
- Employee benefit plan grants and awards, 10b5-1 plans and any transactions or loans with an aggregate value less than \$100,000 but equal or greater than \$10,000 would need to be disclosed by the end of the second business day of the following week, and
- All transactions and loans with an aggregate value less than \$10,000 would be deferrable until the total value for the same director or executive exceeded \$10,000.

Current regulations require much of this information to be disclosed in the company's 10-K and proxy statement and on Forms 3, 4 and 5 filed by executive officers<sup>6</sup>. Often times, however, there can be a significant delay between the event and the actual time of the disclosure. For example, Form 4 filings are due within 10 days after the close of the month in which the reportable transaction occurs, creating a delay of 10 to 40 days. Reports on Form 5 are due within 45 days after the company's fiscal year end, creating a maximum delay of 410 days

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<sup>3</sup> Executive officer would be defined by Exchange Act Rule 3b-7. This definition differs slightly from Section 16 "officers," which specifically include principal financial officers, principal accounting officers and officers of the company's parent(s) or subsidiaries if they perform significant policy-making functions for the issuer.

<sup>4</sup> See our previously released letter dated October 18, 2000, which outlines the key provisions for compliance under this insider trading affirmative defense.

<sup>5</sup> This is the "current report" that is used to report the occurrence of any material events or corporate changes which are of importance to investors or security holders and previously have not been reported by the registrant. It provides more current information on certain specified events than would Forms 10-Q or 10-K.

<sup>6</sup> Disclosure of insider sales is covered by Section 16(a) of the Securities Exchange Act of 1934.

between the event and the filing. With the adoption of this proposal, information will be in the hands of investors much earlier than presently available.

### *Transactions*

Reportable transactions would include transactions in any class of company equity securities (including derivative securities such as stock options, whether or not issued by the company) and any transactions, either with a third-party or the company, in which the director or executive has a pecuniary interest, such as hedges, swaps and securities futures. In addition, reportable transactions under Section 16(a) such as gifts would be reportable on Form 8-K. Included in reportable transactions are option grants (including option price, vesting and term), exercises, surrender and the issuance of replacement grants including repricings. We also believe grants and vesting of other equity instruments, such as restricted stock, performance shares, SARs, and phantom stock, are meant to be covered by the new reporting requirements.

However, several transactions are not reportable under the new rules, including trust transactions that would not be reportable under Section 16(a), receipt of stock dividends, dividend reinvestment plans, transfers by will, acquisitions or dispositions pursuant to domestic relations orders and other transactions that generally do not appear to reflect management's views of the company's prospects.

### *10b5-1 Plans*

Companies would be required to report when a director or executive has entered into, modified or terminated a contract, instruction or written plan for the purchase or sale of company equity securities intended to satisfy the 10b5-1 affirmative defenses. For reporting purposes, the plan's description should include its duration, aggregate number of securities to be purchased or sold, and the name of the counterparty or agent. There is no requirement to disclose specific prices and intervals at which transactions will occur or the number of securities to be purchased or sold per interval. However, if a modification occurs, the company must disclose, in general terms, such things as whether there has been a decrease in the number of shares to be sold or an increase in the applicable limit order price.

### *Loans*

Any loan of money or other lending arrangement between an executive officer or director and the company, or an affiliate of the company, including a loan guarantee, would need to be disclosed including the dollar amount, interest rate, terms of repayment, equity as collateral, provisions for forgiveness, and other material terms of the loan and whether it is made with or without recourse. In addition, the company would need to report any loan forgiveness by the company or payment on its guarantee or foreclosure.

### *Examples*

Attached to this letter are examples provided by the SEC describing how these transactions would be reported on Form 8-K.

In summary, we are supportive of the SEC's Form 8-K proposal. We believe it supports several important objectives, including:

- Providing more timely information that may signal management's view of company performance or prospects,
- Protecting investors, and
- Promoting fair dealing in equity securities since companies will be required to report additional information related to these subjects on a more current basis.

The amendments to Form 8-K will not remove any of the requirements for disclosure under any existing regulations. Instead, it will complement those filings and provide investors with prompt disclosure with which to make informed investment and voting decisions.

### *Compliance Date*

Companies would be expected to be in compliance within 60 days following publication of the final rule. However, for the first 60 days after the effective date, derivative securities transactions would be reportable no later than the close of business on the second business day following the week of the transaction even if the value is greater than \$100,000.

Copies of the SEC proposal can be found at [www.sec.gov](http://www.sec.gov). The SEC welcomes interested persons to submit comments concerning the proposed amendments on or before June 24, 2002.

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General questions about this letter can be addressed to Louis C. Taormina in our New York office at 212-986-6330 or by e-mail at [lctaormina@fwcook.com](mailto:lctaormina@fwcook.com). Specific questions about the applicability of the new rules to a particular company's situation should be addressed to corporate counsel. Copies of this letter and published materials are available on our website at [www.fwcook.com](http://www.fwcook.com).

## SAMPLE DISCLOSURES

The SEC has provided several examples of how these transactions would be reported on Form 8-K. We have included them verbatim on this attachment.

### (a)(1) Acquisitions/Dispositions of Equity Securities

Name and Title of Director/Executive Officer	Date of Transaction	Title and Number of Securities Involved in Transaction	Per Share Acquisition/Disposition Price	Aggregate Value of Transaction	Description of Nature of Transaction
John Jones/CEO	2/19/02	25,000 shares common stock	\$14.10	\$352,500	Sold shares in open market transaction
Jane Smith/Director	2/20/02	4,000 shares Series A preferred stock	\$30.00	\$120,000	Purchased shares in open market transaction

### (a)(2) Acquisitions/Dispositions of Derivative Securities

Name and Title of Director/Executive Officer	Date of Transaction	Number of Derivative Securities Involved in Transaction	Per Share Exercise/Conversion Price	Price (if any) of Derivative Security	Exercisability/Expiration Dates of Derivative Security	Title and Number of Underlying Securities	Description of Nature of Transaction
Norman Young/CAO	2/19/02	(1)	\$14.00	(1)	Exercisable commencing 2/19/02; Expiring 2/19/03	10,000 shares of common stock	Agreement to sell securities - hedging transaction (1)
Theresa White/Vice President	2/20/02	2,500	\$14.25	0	(2)	2,500 shares of common stock	Received employee stock option grant

(1) On February 19, 2002, Norman Young, the Chief Accounting Officer of the registrant, entered into a "swap" agreement with XYZ Brokerage Firm ("XYZ") pursuant to which, on February 19, 2003, XYZ will be required to pay to Mr. Young an amount equal to the current market value of 10,000 shares of registrant's common stock, or \$140,000, and Mr. Young will be required to pay XYZ an amount equal to the then-current market value of 10,000 shares of the registrant's common stock. In addition, Mr. Young has agreed to pay XYZ, as a fee, an amount equal to ¼ of one percent of the current market value of the 10,000 shares of registrant's common stock subject to the agreement and that, to the extent that the registrant declares and pays any dividend on its common stock during the term of the agreement, any such amounts will be paid to XYZ. XYZ has agreed to pay to Mr. Young an amount equal to the "prime" interest rate on \$140,000 during the term of the agreement.

(2) Employee stock option is exercisable in four equal annual installments, beginning on the first anniversary of the date of grant. The option will expire on February 19, 2012.

**(a)(3) Exercises/Conversions of Derivative Securities**

Name and Title of Director/Executive Officer	Date of Transaction	Number of Derivative Securities Involved in Transaction	Per Share Exercise/ Conversion Price	Title and Number of Underlying Securities	Description of Nature of Transaction
John Jones/CEO	2/19/02	5,000	\$4.50	5,000 shares of common stock	Exercised employee stock option

**(b)(1) Rule 10b5-1 Plans**

On February 20, 2002, Tom Johnson, the Chief Financial Officer of the registrant, entered into a plan with ABC Brokerage Firm, pursuant to which ABC will undertake to sell 25,000 shares of the common stock of the registrant currently owned by Johnson at specified intervals through the end of 2002.

On February 22, 2002, Donald Cummings, the registrant's Vice-President for sales, modified a previously reported sales plan with XYZ Brokerage Firm to decrease the number of shares of registrant common stock subject to sale on a monthly basis pursuant to the plan, and to decrease the limit order price at which the shares may be sold under the plan. These modifications will reduce to 18,000 the aggregate number of shares that may be sold by Mr. Cummings pursuant to the plan.

On February 22, 2002, Patricia Brown, the registrant's vice-president for administration, terminated her previously reported sales plan with LMN Brokerage Firm.

**(c) Loans**

On February 19, 2002, the registrant agreed to loan Sandra Green, a member of the registrant's board of directors, \$50,000 for the purpose of purchasing 10,000 shares of the registrant's common stock through the exercise of a stock option previously granted to Ms. Green on May 1, 1999. The loan, which is immediately available, will bear interest at the rate of four percent per annum and will be evidenced by a written promissory note containing the following terms. Interest will accrue during the term of the loan, which is five years. Principal and accrued interest will be due and payable at the expiration of the loan term. The loan will be non-recourse. Under the provisions of the note, the registrant's board of directors has the discretion to forgive any repayment of principal and interest if the board deems such action to be in the best interests of the registrant. The 10,000 shares of the registrant's common stock to be acquired with the loan proceeds will secure repayment of the loan. These shares will be held in escrow for the benefit of the registrant pending repayment or substitution of additional or different collateral in form and amount satisfactory to the registrant.

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Additional clarity from the SEC would be useful to executive compensation practitioners, specifically whether and how the following executive compensation transactions would be reported:

- Cashless exercises of options and immediate sale of shares,

- Exercise of options using a stock for stock exercise,
- Satisfaction of tax withholding requirements by withholding from shares exercised or vested or tender of shares owned,
- Grants of “reload” options,
- Modifications of option contracts that cause a new measurement date,
- Transfer of deferred account balances into or out of company deferred stock, and
- Payment of earned bonus or LTI awards in stock, whether currently restricted or deferred.