



Holme Roberts
& Owen LLP

Attorneys at Law

Harold S. Bloomenthal
Of Counsel
bloomeh@hro.com
303-866-0353

Ola L. Clinton
Special Counsel
clintoo@hro.com
415-268-1966

Michael F. Cyran
Associate
cyranm@hro.com
303-866-0495

Jennifer A. D'Alessandro
Senior Counsel
dalessj@hro.com
303-866-0635

Kevin M. Galligan
Partner
galligk@hro.com
303-417-8510

J. Gregory Holloway
Partner
hollowg@hro.com
719-381-8462

Garth B. Jensen
Partner
jenseng@hro.com
303-866-0368

Dominic A. Lloyd
Partner
lloyddo@hro.com
303-866-0474

Mashenka Lundberg
Partner
lundbem@hro.com
303-866-0616

Charles D. Maguire, Jr.
Partner
maguirc@hro.com
303-866-0550

Gino Maurelli
Associate
maurelg@hro.com
303-866-0649

Nick Nimmo
Partner
nimmon@hro.com
303-866-0216

Thomas A. Richardson
Partner
richart@hro.com
303-866-0413

W. Dean Salter
Partner
salterw@hro.com
303-866-0245

HRO Alert

The Sarbanes-Oxley Act of 2002

Final Rules:

EDGAR FILING AND WEB SITE POSTING OF SECTION 16 REPORTS

On May 7, 2003, the SEC released final rules that require:

- Electronic filing on EDGAR of all Forms 3, 4 and 5; and
- Web site posting by public companies of Forms 3, 4 and 5 filed by their Section 16 reporting persons.

These rules, issued under the Sarbanes-Oxley Act of 2002 (the "SO Act"), finalize and, in some cases, revise the SEC's proposed rules relating to EDGAR filing and web site posting, which were released on December 20, 2002. The final rules apply to U.S. public companies, including small business issuers. Foreign private issuers are not subject to the requirements of Section 16, and the final rules do not affect this exemption.

This HRO Alert summarizes the main provisions of the final rules. Section 16 reporting persons must comply with the electronic filing requirements for all Forms 3, 4 and 5 filed on or after **June 30, 2003**. Public companies must comply with the web site posting requirements for all Section 16 reports filed by their reporting persons on or after **June 30, 2003**.

WHAT SHOULD YOUR COMPANY DO TO PREPARE FOR THE NEW RULES?

1. **Determine whether Section 16 filing obligations will be assumed by the company.** Many companies have chosen to assume Section 16 filing obligations for their officers and directors and, in some cases, "insider" 10% shareholders. If your company intends to assist its insiders with their filings, it should put in place a system for insiders to furnish the company, by email or otherwise, the information needed to complete filings in a timely manner (preferably on the transaction date). If your company does not plan to take on this role, it should take steps to ensure that its officers, directors and 10% shareholders understand their obligations with respect to Section 16.

2. **Obtain EDGAR filing codes for all Section 16 filers.** To make EDGAR filings, each director, officer and 10% shareholder must have his, her or its own EDGAR filing codes. If they have not already done so, reporting persons must file a Form ID with the SEC to obtain filing codes before EDGAR filing of Section 16 reports becomes mandatory. Although the final rules allow for a filing date adjustment in limited circumstances, the SEC indicated that a failure to obtain filing codes in a timely manner would not justify such an adjustment. The final rules eliminate temporary hardship exemptions for Section 16 reports.

If one or more of your reporting persons is also a reporting person for another public company, make sure he or she does not already have EDGAR codes before filing a Form ID. Also, ask him or her to request that the other company not file a separate Form ID for the insider, which would cancel the EDGAR codes obtained under the Form ID filed by your company.

3. **Obtain EDGAR filing software or arrange for a filing service.** The SEC has established a new online filing system, available at <https://www.onlineforms.edgarfiling.sec.gov>, which is intended to provide an easy method for reporting persons to fill in and file Section 16 reports online themselves. The new system went live on May 5, 2003, and the SEC's other online filing system, EDGARLink, is no longer available for Forms 3, 4 and 5. Although the new system is user-friendly, it does have technological limitations such as the inability to

save draft filings for later completion and the inability to make test filings. Several third-party vendors also offer EDGAR software and filing services, and filings using either of these methods will continue to be permitted under the final rules, provided that they have the capacity to make filings using the required Reduced Content XML Filing Specifications.

Your company also can download the SEC's OnLineForms Filer Manual from <http://www.sec.gov/info/edgar/filermanual85.htm> as Volume III of the EDGAR Filer Manual. Chapter 3 includes detailed step by step instructions and illustrations for preparing and the submitting Forms 3 online (which can be readily adapted for preparing Form 4 or Form 5) and for attaching other documents to the filing.

4. Reconfigure your company's web site to post, or hyperlink to, filed Section 16 reports. The final rules require your company to post on its web site the Forms 3, 4 and 5 filed by its reporting persons. Each report must be accessible by the end of the next business day after filing, and remain accessible for at least 12 months. Your company is not required to establish or maintain a web site if it does not already have one.

The final rules permit your company either to post Section 16 reports directly on its web site, or to provide a hyperlink to a third-party web site or the SEC EDGAR database to access the reports.

Hyperlinking satisfies the posting obligation only if the following conditions are met:

- The reports are made available within one business day after filing;
- Access to the reports is free of charge;
- The display format allows retrieval of all information in the reports;
- The access procedure is not so burdensome that users cannot effectively access the information provided;
- The display format includes any exhibits or attachments;
- The reports are accessible for at least 12 months after filing;
- Access to the reports is provided through the web site the company normally uses for disseminating information to investors; and
- The hyperlink is directly to the Section 16 reports or a list of the reports, not to the home page or general search page of the third-party service or to a list of the company's SEC filings generally.

The hyperlink must state clearly that it leads to the Section 16 reports of the company's insiders. The final rules allow your company to disclaim responsibility for the accuracy of information provided by a third-party service.

5. Make sure your company's reporting persons transmit their Section 16 reports to the company in electronic format. Because the company must post its insiders' Forms 3, 4 and 5 by the end of the business day after filing, it is crucial that the company discuss with its reporting persons the appropriate method to ensure that the company receives Section 16 reports in time to post them on its web site in a timely manner. The company should designate an electronic transmission method for receiving the issuer copy of the filings required by SEC rules, and notify its insiders of this method. In addition, the SEC suggested that companies post the designated method on their web sites along with their reporting persons' Section 16 reports. This concern about timely receipt of filings becomes less critical if the company hyperlinks to a third-party web site that would display the filing automatically within minutes after acceptance of the submission.

EXTENDED FILING DEADLINE

Due to the short filing deadline and in response to commenters' concerns, the final rules provide that Form 3, 4 and 5 filings received by 10:00 p.m. Eastern time will be deemed filed on the same business day. The SEC had suggested this approach in the proposed rules and requested comment. By contrast, most SEC filings must be made by 5:30 p.m. Eastern time to be considered filed on that day, and the SEC's position on Form 3, 4 and 5 filings **will not change** the deadline with respect to other filings. Although the EDGAR system will not be reprogrammed to allow for the later filing deadline until late July, the SEC stated that it will interpret the filing date rules in accordance with the extended deadline. Filer support will be available only until 7:00 p.m. Eastern time.

ITEM 405 DISCLOSURE RELIEF

In response to concerns raised by one commenter, the SEC provided limited relief from the requirement to disclose in the company's proxy statement delinquent Section 16 filings by its reporting persons. Therefore, the final rules provide that your company will not need to disclose a late Form 4 filing by one of its insiders if the form was filed:

- not later than one business day following the due date; and
- on or before June 30, 2004.

The SEC emphasized that "this disclosure relief does not change the fact that any Form 3, 4 or 5 filed later than the applicable due date violates Section 16(a)."

HOW HRO CAN HELP

The final rules will affect the Section 16 reporting practices of both your company and its reporting persons. If you would like to discuss these rules and how they may affect your company and its Section 16 insiders, we encourage you to contact any of the persons listed in the margin of the first page of this HRO Alert. We also are available to assist you in preparing and filing Forms ID for your company's reporting persons.

This HRO Alert is a periodic publication of Holme Roberts & Owen LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Nor is it intended to address specific disclosure or compliance issues that may arise in particular circumstances or all of the provisions included in the newly adopted rules. The contents are intended for general informational purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. For further information regarding the rules described herein, please contact any of the persons listed in the margin of the first page of this HRO Alert.

5/20/03