

EDGAR system. Some also asserted that ethics codes may contain a significant amount of detailed information that would not be of particular interest to investors.

We are not entirely persuaded by the commenters that we should not require a company disclosing that it has a code of ethics that applies to its principal executive officer and senior financial officers to make those provisions of the code available. However, more flexibility seems appropriate in light of the fact that many companies already post their codes on their websites. We therefore are adopting rules that will allow companies to choose between three alternative methods of making their ethics codes publicly available. First, a company may file a copy of its code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and addresses the specified elements as an exhibit to its annual report.<sup>48</sup> Alternatively, a company may post the text of its code of ethics, or relevant portion thereof, on its Internet website, provided however, that a company choosing this option also must disclose its Internet address and intention to provide disclosure in this manner in its annual report on Form 10-K, 10-KSB, 20-F or 40-F.<sup>49</sup> As another alternative, a company may provide an undertaking in its annual report on one of these forms to provide a copy of its code of ethics to any person without charge upon request.<sup>50</sup>

If a company is complying with this disclosure item in its annual report, inclusion of the company's website address in the annual report will not, by itself, include or incorporate by reference the information on the company's website into the annual

report, unless the company otherwise acts to incorporate the information by reference.<sup>51</sup> Also, we understand that a company may have multiple websites that it uses for various purposes, such as investor relations, product information and business-to-business activities. We intend the requirement to disclose the company's website address to mean the website the company normally uses for its investor relations functions.

#### 4. Location of the Code of Ethics Disclosure

A company will have to include the new code of ethics disclosure in its annual report filed on Form 10-K, 10-KSB, 20-F or 40-F.

#### 5. Form 8-K or Internet Disclosure Regarding Changes to, or Waivers From, the Code of Ethics

Section 406(b) of the Sarbanes-Oxley Act directs us to require a company to make "immediate disclosure" on Form 8-K or via Internet dissemination of any change to, or waiver from, the company's code of ethics for its senior financial officers. Consistent with this mandate, and in keeping with our decision to also require a company to disclose whether its principal executive officer is subject to a code of ethics, we are adding an item to the list of Form 8-K triggering events to require disclosure of:

- The nature of any amendment to the company's code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions;<sup>52</sup> and
- The nature of any waiver, including an implicit waiver, from a provision of the code of ethics granted by the company to one of these specified officers, the name of the person to whom the company granted the waiver and the date of the waiver.<sup>53</sup>

<sup>48</sup> See new Item 601(b)(14) of Regulations S-K and S-B. Although Section 406 of the Sarbanes-Oxley Act does not state that our rules must require a company to file a copy of the code of ethics as an exhibit to its annual report, some investors likely will be interested in examining the actual code itself, given that codes are likely to vary significantly from one company to another.

<sup>49</sup> See new Item 406(c)(2) of Regulations S-K and S-B, Item 16B(c)(2) of Form 20-F and paragraph (9)(c)(2) of General Instruction B to Form 40-F. We note that the NYSE has filed with the Commission a proposed rule change under Section 19(b)(1) of the Exchange Act (15 U.S.C. 78s(b)(1)) that, if adopted, would require listed companies to adopt codes of ethics and post them on their internet websites. See SR-NYSE-2002-33 (pending before the Commission). Therefore, this alternative would be consistent with the proposals of the NYSE, minimizing unnecessary duplication.

<sup>50</sup> See new Item 406(c)(3) of the Regulations S-K and S-B, Item 16B(c)(3) of Form 20-F and paragraph (9)(c)(3) of General Instruction B to Form 40-F.

<sup>51</sup> In Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843], we provided interpretive guidance on the effect of including a Web site address in other situations. We are not changing that guidance for those other situations.

<sup>52</sup> The new rule includes an instruction clarifying that a company need not disclose technical, administrative or other non-substantive amendments to the code of ethics. See Instruction 1 to new Item 10 of Form 8-K, Instruction 6 to Item 16B of Form 20-F, and Note 6 to paragraph (9) of General Instruction B to Form 40-F.

<sup>53</sup> See new Form 8-K Item 10. In Release No. 33-8106 (June 17, 2002) [67 FR 42914], we proposed to reorganize and renumber the Form 8-K items as part of our Form 8-K proposals. In anticipation of such change, we had proposed to designate this item as Item 5.05. Because we are adopting it before we consider adoption of the reorganization of Form 8-K, we are designating this new item as Item 10 under the existing Form 8-K numbering system.

Only amendments or waivers relating to the specified elements of the code of ethics and the specified officers must be disclosed. This clarification is intended to allow and encourage companies to retain broad-based business codes. For example, if a company has a code of ethics that applies to its directors, as well as its principal executive officer and senior financial officers, an amendment to a provision affecting only directors would not require Form 8-K or Internet disclosure.

A company choosing to provide the required disclosure on Form 8-K must do so within five business days after it amends its ethics code or grants a waiver.<sup>54</sup> As an alternative to reporting this information on Form 8-K, a company may use its Internet Web site as a method of disseminating this disclosure, but only if it previously has disclosed in its most recently filed annual report on Form 10-K or 10-KSB:<sup>55</sup>

- Its intention to disclose these events on its Internet website, and
- Its Internet website address.<sup>56</sup>

The commenters were mixed in their reaction to our proposal to permit Internet disclosure of changes and waivers of the code of ethics in lieu of a Form 8-K filing. Some commenters did not believe that Internet disclosure would provide sufficiently broad dissemination. Others believed that such disclosure would be sufficient. The final rules retain the Internet disclosure option because the language in Section 406(b) of the Sarbanes-Oxley Act clearly indicates that Congress intended companies to have this option.

<sup>54</sup> We initially proposed a two business day filing period to be consistent with the accelerated Form 8-K filing deadlines that we proposed in Release No. 33-8106. Because we have not yet adopted those proposals, the five business day period will serve as an interim deadline for an Item 10 Form 8-K. The five business day period is the shorter of the two existing Form 8-K deadlines. When we address the Form 8-K proposals, we will consider whether to shorten the Item 10 deadline to two business days.

<sup>55</sup> See new Item 406(b) of Regulations S-K and S-B. Because investors may not expect these disclosures to be made on the company's Web site in lieu of a Form 8-K filing, we are requiring a company to provide investors with advance notice that it may choose to use this option to avoid confusion.

<sup>56</sup> If a company elects to disclose this information on its Web site, it must do so within the same five-business day period as required for a Form 8-K that includes this type of disclosure. In addition, a company electing to provide disclosure in this manner must make the disclosure available on its Web site for at least 12 months after it initially posts the disclosure. Although a company may remove information from its Web site after the 12-month posting period, the company must retain this disclosure for a period of not less than five years and make it available to the Commission or its staff upon request. New Item 10(c) of Form 8-K.