

## SEC ADOPTS NEW REQUIREMENTS FOR ARTHUR ANDERSEN LLP AUDITING CLIENTS

On March 18, 2002, the Securities and Exchange Commission (the "SEC") issued a release and a companion order (the "Exchange Act Order") announcing that it has adopted certain new rules to ensure the continued flow of accurate and timely information to investors and the U.S. capital markets in the wake of the indictment of Arthur Andersen LLP (together with its foreign affiliates, "Andersen"). This memorandum provides an overview of selected portions of the new rules relating to securities offerings under the Securities Act of 1933, as amended (the "Securities Act"), and certain filings under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Please note that this memorandum does not summarize all of the rules adopted by the SEC, but is intended to provide a summary of those rules that may have the most significant and immediate impact on your securities offerings and Exchange Act filings.

### I. New Rules For Registration Statements Filed Under The Securities Act

#### A. Registrants That Continue To Engage Andersen

To ensure the reliability and accuracy of financial statements, the SEC has adopted Temporary Note 3T to Article 3 of Regulation S-X,\* that requires any issuer providing audited financial statements with an accountants' report issued by Andersen after March 14, 2002 to include, as an exhibit to the filing, a letter addressed to the SEC stating that it has received from Andersen certain representations regarding audit quality controls, including representations that there was a continuity of Andersen personnel working on the audit, the availability of national office consultation and the availability of personnel at foreign affiliates of Andersen to conduct relevant portions of the audit.

#### B. Registrants That Do Not Continue To Engage Andersen

##### Financial Statements Required In Registration Statements

The SEC has adopted Temporary Note 1T to Article 3 of Regulation S-K,\* which allows an eligible issuer to file unaudited financial statements in a Securities Act registration statement so long as audited financial statements are subsequently provided by amendment. Specifically, this temporary note allows registration statements which contain financial statements of an entity that

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\* The temporary note is effective until December 31, 2002. The SEC has also adopted temporary rules for small business issuers (see Item 310 of Regulation S-B) and foreign private issuers (see temporary instructions to Form 20-F) which, in substance, are substantially similar to the rules set forth above.

has a fiscal year ending between and including November 30, 2001<sup>1</sup> and April 15, 2002 to include unaudited financial statements in the filing if (i) Andersen had been engaged as the registrant's independent public accountant, (ii) Andersen remained engaged as the registrant's independent public accountant on or after March 14, 2002 and (iii) the registrant is unable to obtain or elects not to have Andersen issue an accountants' report.<sup>2</sup> As a condition to including the unaudited financial statements in a registration statement, the registrant must:

- file a registration statement that responds to all items of the applicable registration form, but with unaudited financial statements for those financial statements for which Andersen had been engaged as the independent public accountant;
- include in the registration statement the disclosure required by Temporary Note 2T to Article 3 of Regulation S-X, which is summarized below; and
- file an amendment to the registration statement containing, among other things, financial statements audited by an independent public accountant other than Andersen and a discussion of any material changes from the unaudited financial statements filed originally; the time frame in which such an amendment must be filed generally depends on whether the registration statement in question is effective.<sup>3</sup>

Information In Prospectuses More Than Nine Months After Effective  
Date Of Registration Statement

Section 10(a)(3) of the Securities Act requires that information in a prospectus used more than nine months after the effective date of the registration statement of which that prospectus is a part (a "Related Prospectus") be as of a date not more than 16 months prior to such use. The SEC has adopted Rule 427T pursuant to which this 16 month period is extended to 18 months. This Rule applies to registrants filing a registration statement that contains financial statements of an entity that has a fiscal year ending between and including November 30, 2001 and April 15, 2002 if (i) Andersen had been engaged as the independent public accountant to audit those financial statements, (ii) Andersen remained engaged as the independent public accountant on or after March 14, 2002 and (iii) the registrant is unable to obtain or elects not to have Andersen issue an accountants' report.<sup>4</sup> This relief is conditioned on the following:

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<sup>1</sup> The relevant date is August 31, 2001 for foreign private issuers and December 29, 2001 for registrants that do not meet the requirements of Rule 3-01(c) of Regulation S-X.

<sup>2</sup> A registrant wishing to file unaudited financial statements must also, at the time of the filing, be subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act and cannot be a "blank check company" as defined in Rule 419(a)(2) of the Securities Act.

<sup>3</sup> The amendment does not need to be made if the offering is completed prior to the date such amendment is due.

<sup>4</sup> This rule is not available to a "blank check company."

- the Related Prospectus must be updated to include unaudited financial information as of a date not more than 16 months prior to such use, provided the Related Prospectus must contain the disclosure required by Temporary Note 2T to Article 3 of Regulation S-X, which is summarized below; and
- the Related Prospectus must include audited financial information as of a date not more than 18 months prior to such use and such audit must be conducted by an independent public accountant other than Andersen; such audited financial statements must include, among other things, a discussion of any material changes from the unaudited financial information.

Impact of Exchange Act Order On Certain Registration Statements And  
Certain Securities Law Exemptions

An issuer's eligibility to use certain registration forms and the availability of certain other exemptions provided by the federal securities laws are contingent upon, among other things, an issuer's Exchange Act filings being complete and current. As more fully described below, the Exchange Act Order generally allows eligible issuers extensions of time to file audited financial statements or, in the case of interim financial statements, obtain the required review. In light of the Andersen indictment, the SEC has taken the position that an affected issuer's eligibility to use certain registration forms and the availability of certain other exemptions will not be affected so long as the issuer is eligible to rely on the rules set forth in the Exchange Act Order and such issuers make their Exchange Act filings in compliance with the Exchange Act Order. For example, Rule 144, Rule 701 and Regulation D under the Securities Act each contain requirements relating to financial statements as a condition to their use. The SEC has taken the view that to the extent such financial statements are prepared and delivered in compliance with the Exchange Act Order, such financial statements shall satisfy the requirements for use of these rules and regulations.<sup>5</sup>

Temporary Note 2T to Regulation S-X

This temporary note provides guidance as to the type of additional disclosure that an issuer should include in a filing that contains unaudited financial statements in reliance on the rules and the Exchange Act Order adopted by the SEC. Although the exact type of disclosure will vary depending upon the issuer, an issuer must provide disclosure on the cover page of its filings and

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<sup>5</sup> The SEC also adopted Rule 401a under the Securities Act to make clear that issuers eligible to rely on the Exchange Act Order that comply with its terms will be deemed current and timely with respect to its Exchange Act filings and, accordingly, will remain eligible to use certain registration forms that require such filings to be current and timely. In addition, registration statements that are registered under Rule 415 of the Securities Act that rely on the incorporation by reference of an issuer's Exchange Act filings as a means of updating the information contained therein (rather than by filing post-effective amendments) will continue to be effective, notwithstanding the fact that the Exchange Act filings may not contain audited financial information so long as the procedures set forth in the Exchange Act Order for including audited financial statements in such filings are followed.

immediately before the financial statements to the effect that the financial statements include unaudited financial statements in lieu of audited financial statements because the issuer was unable or elected not to obtain from Andersen an accountants' report in respect of those financial statements. The issuer must also include disclosure to the effect that no auditor has opined that the unaudited financial statements are accurate and provide information as to when and how the issuer intends to provide audited financial statements.

#### Written Consents

Section 7 of the Securities Act requires that each issuer filing a registration statement with audited financial information include in such filing the written consent of the independent public accountant who conducted the audit. The SEC has recognized that, in light of the Andersen indictment, issuers may be unable to obtain these consents. New Rule 437a allows an issuer whose financial statements have been audited by Andersen to file a registration statement without the written consent where the issuer has not already obtained the consent and has been unable to obtain the consent after reasonable efforts. Issuers not filing the consent are also required to include disclosure regarding limitations on recovery by investors due to not having obtained the consent.

## **II. SEC Order Relating To Filings Made Under The Exchange Act**

### **A. Issuers That Continue To Engage Andersen**

Any issuer including financial statements with an accountants' report issued by Andersen after March 14, 2002 in an Exchange Act filing must comply with Temporary Note 3T to Regulation S-X, which is summarized above. This generally requires the inclusion of a letter with such filing confirming that Andersen has made certain representations to the issuer with respect to audit quality control.

### **B. Issuers That Do Not Continue To Engage Andersen**

The SEC has adopted rules with respect to Exchange Act filings that are to include financial statements that Andersen had been engaged to audit. These rules only apply if (i) Andersen remained engaged to perform the audit on or after March 14, 2002 and (ii) the issuer is unable to obtain or elects not to have Andersen issue an accountants' report. The Exchange Act Order allows such issuers to file unaudited financial statements (or unreviewed financial statements in the case of interim reports), provided the issuer subsequently files audited financial statements and complies with certain other specified conditions.

#### Annual Reports On Form 10-K Or 10-KSB And Form 20-F

Eligible issuers who are required to file annual reports on Form 10-K or Form 10-KSB who have a fiscal year ending between and including November 30, 2001 and April 15, 2002 must comply with existing filing deadlines but may file their annual reports with unaudited financial

statements with respect to those financial statements for which Andersen had been engaged as the independent public accountant. This relief is conditioned on the issuer:

- including in the filing the disclosure required by Temporary Note 2T to Regulation S-X, which is summarized above; and
- amending the filing within 60 days of the original due date for the filing;<sup>6</sup> the amended filing must include, among other things, financial statements audited by an independent public accountant other than Andersen and a discussion of any material changes from the unaudited financial statements originally filed.

Substantially similar rules apply to eligible foreign private issuers that are required to file annual reports on Form 20-F who have a fiscal year ending between and including August 31, 2001 and April 15, 2002.

#### Quarterly Reports On Form 10-Q Or 10Q-SB

Eligible issuers who are required to file quarterly reports on Form 10-Q or Form 10-QSB who have a fiscal quarter ending between and including January 26, 2002 and June 15, 2002 must comply with existing filing deadlines, but may file interim financial statements that have not been reviewed by an independent public accountant. This relief is conditioned on the following:

- the filing must include the disclosure required by Temporary Note 2T to Regulation S-X, which is summarized above; and
- the issuer must have an independent public accountant (other than Andersen) complete the required review and, if upon completion of this review, there is a change in the interim financial statements, the issuer must file an amendment that must contain, among other things, the interim financial statements reviewed by such independent public accountant and a discussion of any material changes from the unreviewed financial statements originally filed.<sup>7</sup>

#### Proxy Statements On Form 14A And Information Statements On Form 14C

The Exchange Act Order allows issuers with a fiscal year ending between and including November 30, 2001<sup>8</sup> and April 15, 2002 to file their proxy statement or information statement

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<sup>6</sup> In calculating the original due date of the filing, the rules dictate that the issuer exclude any additional period for filing granted pursuant to Rule 12b-25 under the Exchange Act.

<sup>7</sup> If upon completion of the review there is no change in the interim financial statements, the issuer does not have to make an amended filing but must include a statement in its next quarterly report that a review has been conducted but no amendment to the unreviewed financial statements was necessary.

<sup>8</sup> The relevant date is December 29, 2001 if the issuer does not meet all of the conditions in Rule 3-01(c) of Regulation S-X (or Item 310(g) of Regulation S-B if the entity is a small business issuer).

with unaudited financial statements with respect to those financial statements for which Andersen had been engaged as the independent public accountant<sup>9</sup>. This relief is conditioned on the following:

- the issuer sends its proxy statement or information statement on or before September 13, 2002;
- the issuer's proxy statement or information statement responds to all information required by the applicable Schedule, but with unaudited financial statements for those financial statements for which Andersen had been engaged as the independent public accountant;
- the proxy statement or information statement must include the disclosure required by Temporary Note 2T to Article 3 of Regulation S-X, which is summarized above; and
- the issuer must file revised material or amend documents incorporated by reference within specified time frames;<sup>10</sup> the filing or amendment must include, among other things, the financial statements audited by an independent public accountant other than Andersen and a discussion of any material changes from the unaudited financial statements originally filed.<sup>11</sup>

We would be pleased to work with you in evaluating the impact of the new rules on your securities offerings and other filings. If you wish to obtain additional information regarding the impact of these rules, please contact the corporate partner who regularly works with you, or John S. D'Alimonte (212-728-8212), Steven J. Gartner (212-728-8222) or William H. Gump (212-728-8285).

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<sup>9</sup> The SEC also recognized that issuers sending their proxy statement or information statement before obtaining their audit report will be unable to comply with certain disclosure requirements regarding audit committee reports and audit fees. Accordingly, the Exchange Act Order permits the omission of such information so long as the issuer complies with the requirements of the Exchange Act Order. The omitted information is required to be included in the issuer's amended annual report filing.

<sup>10</sup> The time frames in which such filing or amendment is due depends on whether the issuer meets the requirements of Rule 3-01(c) of Regulation S-X (Item 310(g) of Regulation S-B for small business issuers).

<sup>11</sup> No filing or amendment need be made if the solicitation, in the case of proxy statements, or corporate action, in the case of information statements, has been completed prior to the date such amended filing is due.