

DAVIS POLK & WARDWELL
Corporate Regulatory Report

A Summary of
Current Regulatory
Developments Affecting
Publicly Listed Companies

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SEC Developments

SEC Proposes Amendments to Form 10-K and Form 10-Q Filing Deadlines and Definition of Accelerated Filer

The SEC has published proposed rules which would change the current Form 10-Q and Form 10-K deadlines and the definition of accelerated filer. The proposed rules are subject to a comment period which ends October 31, 2005. Under the proposed rules, a new class of accelerated filers will be created called “large accelerated filers.” An issuer will be a large accelerated filer if it has, as of the last business day of the issuer’s most recently completed second fiscal quarter, aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of \$700 million or more; has been subject to Exchange Act reporting requirements for at least one year; has filed at least one annual report and is not eligible to use Form 10-KSB or 10-QSB for its annual and quarterly reports.

Large accelerated filers will be required to file their annual reports on Form 10-K within 60 days after year-end for all fiscal years ending on or after December 15, 2005 consistent with current rules which provide for a reduction in the filing deadline from 75 days to 60 days after year-end for all fiscal years ending on or after December 15, 2005. All other accelerated filers will be required to file their Form 10-K within 75 days of year-end instead of having to file within 60 days after fiscal year end for years ending on or after December 15, 2005 as is provided by the current rules. Issuers that are not accelerated filers or large accelerated filers will continue to be required to file their annual report on Form 10-K within 90 days after year-end. These filing deadlines will be permanent, with no further transition to shorter periods.

Under the proposed rules, the filing deadlines for all accelerated filers (including large accelerated filers) quarterly reports on Form 10-Q will be maintained at 40 days after the quarter-end instead of being reduced to 35 days after the quarter-end for Form 10-Qs relating to fiscal years ending on or after December 15, 2006, as is currently required. Issuers that are not accelerated filers or large accelerated filers will continue to be required to file their quarterly report on Form 10-Q within 45 days after the quarter-end. These deadlines will be permanent, with no further transition to shorter periods.

SEC Developments (cont.)

For a copy of the Davis Polk memorandum on the proposed rules to change the Form 10-Q and Form 10-K deadlines and the definition of accelerated filer click [here](#). The SEC's proposed rules are available at <http://www.sec.gov/rules/proposed/33-8617.pdf>.

SEC Issues Questions and Answers Addressing Transition Issues With Respect to the Securities Offering Reform

On September 13, 2005, the SEC published a series of Q&As addressing certain transition issues with respect to the Securities Offering Reform. The Q&As represent the views of the staff of the SEC Division of Corporation Finance regarding questions that they have received regarding issuers' transition to compliance with the securities offering reform rules and forms issued by the SEC on July 19, 2005. The securities offering reforms become effective in their entirety on December 1, 2005. For a copy of the Davis Polk memorandum on the Q&As click [here](#). The Q&As are available at <http://www.sec.gov/divisions/corpfin/transitionfaq.htm>.

SEC Issues Reports on the Valuation of Stock Options

As part of its continuing effort to monitor the implementation of FASB Statement of Financial Accounting Standards No. 123R regarding accounting for employee stock options, the SEC has issued two informal progress reports on its evaluation of proposals to value employee stock options for financial reporting purposes. The staff progress reports, which were announced by SEC Chairman Christopher Cox on September 9, 2005, are in the form of a statement by the Office of the Chief Accountant, Donald Nicolaisen, and a memorandum from the Office of Economic Analysis staff.

SEC Chairman Cox's statement announcing the progress reports is available at <http://www.sec.gov/news/press/2005-129.htm>. The statement by the SEC Office of the Chief Accountant, Donald Nicolaisen, is available at <http://www.sec.gov/news/speech/spch090905dtm.htm>. The OEA memorandum is available at <http://www.sec.gov/news/extra/memo083105.htm>.

SEC Chairman Announces Regulatory Relief to Facilitate Payments to Victims of Hurricanes Katrina and Rita

On October 4, 2005, SEC Chairman Christopher Cox announced new regulatory relief designed to help ensure that insurers have the capital and liquidity to pay Hurricane Katrina and Rita victims. According to the SEC press release announcing the relief, in order to eliminate delays in the process of insurers and reinsurers tapping the capital markets, the SEC Division of Corporation Finance has taken the following actions to enable insurers for victims of Katrina and Rita to take advantage of short-form registration statements on Form S-3, and to speed the processing of new registration statements:

- » For insurance and reinsurance companies with existing shelf registrations pursuant to Rule 415(a)(1)(x), the staff will permit the extended use of the SEC's brief "notice" registration of additional securities under Rule 462(b). Under this extension, the staff will permit use of those

SEC Developments (cont.)

procedures - including notice by fax and immediate effectiveness - to register additional securities in an amount up to 20% of the dollar amount of securities originally registered on that shelf registration statement (rather than the amount remaining on that registration statement).

- » The Division of Corporation Finance will process Securities Act filings by reporting insurance and reinsurance companies within not more than five business days of their receipt.

The Division of Corporation Finance has been instructed to continue these administrative steps through Dec. 1, 2005. The SEC's press release announcing this relief is available at <http://www.sec.gov/news/press/2005-142.htm>.

SEC Chief Accountant to Step Down

On September 7, 2005, SEC Chief Accountant Donald T. Nicolaisen announced that he will leave the Commission in October 2005 to return to the private sector. The press release announcing Mr. Nicolaisen's resignation is available at <http://www.sec.gov/news/press/2005-127.htm>.

SEC Issues Fee Rate Advisory

The SEC has issued a fee rate advisory #3 for its fiscal year 2006, which began on October 1, 2005, to announce that it is operating under a continuing resolution that will extend through November 18, 2005. During this period, fees paid under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g) and 31 of the Securities Exchange Act of 1934 will remain at their current rates of \$117.70 per million.

Five days after the date of enactment of the SEC's regular fiscal year 2006 appropriation (which last year happened in December but in prior years has happened anytime from February to April), the Section 6(b) fee rate applicable to the registration of securities, the Section 13(e) fee rate applicable to the repurchase of securities and the Section 14(g) fee rate applicable to proxy solicitations and statements in corporate control transactions will decrease from the current rate of \$117.70 per million to \$107.00 per million, as previously announced. The SEC's press release regarding the filing fee is available at <http://www.sec.gov/news/press/2005-140.htm>.

SEC Extends Deadline for Compliance with Section 404 of the Sarbanes-Oxley Act for Non-accelerated Filers

The SEC has issued final rules extending the compliance date for non-accelerated filers (including foreign private issuers that qualify as non-accelerated filers) with respect to Section 404 of the Sarbanes-Oxley Act from fiscal years ending on or after July 15, 2006 to fiscal years ending on or after July 15, 2007. In order to qualify as an accelerated filer, an issuer must meet the following criteria as of the end of an issuer's fiscal year:

- » the aggregate market value of the voting and non-voting common equity held by non-affiliates

SEC Developments (cont.)

of the issuer on the last business day of the issuer's second fiscal quarter must be \$75 million or more;

- » the issuer must have been subject to the reporting requirements of the Exchange Act for at least one year;
- » the issuer must have filed at least one annual report pursuant to the Exchange Act and
- » the issuer must not be eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports.

For a copy of the Davis Polk memorandum on the final rules extending the Section 404 compliance date for non-accelerated filers click [here](#). The SEC's final rules are available at <http://www.sec.gov/rules/final/33-8618.pdf>.

SEC Provides Exemptive Relief to Companies in Areas Affected by Hurricane Katrina

On September 15, 2005 the SEC issued an order providing relief from Exchange Act filing and other regulatory requirements to investors, companies and securities firms affected by Hurricane Katrina. In order to rely on the exemption from Exchange Act filing requirements, the address of the registrant's principal executive offices listed on the cover page of the registrant's most recent periodic report on Form 10-Q or Form 10-K must be within one of the counties or parishes designated as a Presidentially Declared Disaster Area where individual assistance has been authorized by FEMA as a result of Hurricane Katrina. The SEC press release announcing the exemptive relief is available at <http://www.sec.gov/news/press/2005-132.htm>. The exemptive order is available at <http://www.sec.gov/rules/exorders/34-52444.pdf>.

SEC Speaks

SEC Commissioner Atkins Continues to Express Concerns over SOX 404 Process

In a speech on September 19, 2005 before the Joint Meeting of SEC Government-Business Forum on Small Business Capital Formation and the SEC Advisory Committee on Smaller Public Companies, SEC Commissioner Paul Atkins sympathized with small companies' concerns over compliance with the requirements of Section 404 of the Sarbanes-Oxley Act and questioned whether the "material weakness" standard is being correctly and consistently interpreted. He also questioned whether the definition of "key internal control" was sufficiently clear and stated that corporate management and auditing firms have been much too conservative in exercising their judgment due to a fear of being second-guessed by regulators. Commissioner Atkins stated that corporate management and auditing firms need to be given more comfort by the SEC and PCAOB that they will be allowed to exercise

SEC Speaks (cont.)

their professional judgment. He also emphasized the need for the SEC to continue to monitor the activities of the PCAOB in the implementation of Section 404. In discussing the relative costs and benefits of Section 404 compliance, Atkins stated that “it is certainly not clear to me that documentation of internal controls would have been able to prevent the type of collusive fraud by management that we saw in the recent corporate failures.” The full text of Commissioner Atkin’s speech is available at: <http://www.sec.gov/news/speech/spch091905psa.htm>.

SEC Chairman Cox Sets Improved Executive Compensation Disclosure as Priority

In recent statements, SEC Chairman Christopher Cox has indicated that the SEC will soon either revise existing rules or issue new rules related to executive compensation disclosure. In an interview published in the Wall Street Journal on September 19, 2005, Chairman Cox stated that current executive compensation disclosure can be “opaque,” and “clearly needs to be addressed.” In an interview broadcast on PBS on August 10, 2005, Chairman Cox indicated that in the near future the SEC would provide improved rules on disclosure so as to provide shareholders with “one number” that represents a given executive’s total compensation. According to a September 20, 2005 article in The Times (London), Chairman Cox has assigned a specialist team of SEC investigators to investigate how executive pay and special bonuses may be disguised.

NYSE Developments

NYSE Proposes Amendment to Rule 312(g) Regarding Recommendations by Member Organizations of Securities Issued by Companies Controlled by or Under Common Control of the Member Organization

Rule 312(g) currently prohibits a member organization from soliciting transactions in its own publicly traded equity securities and from making any recommendations with respect to its publicly traded equity securities or the securities issued by any corporation controlling, controlled by or under common control with such member corporation - in other words, the securities of any parent, sister or subsidiary corporation relative to the member organization. The intent of Rule 312(g) is to mitigate conflicts of interest that may arise when recommending the public equity securities of companies in which the member organization may have an interest. The NYSE has filed an amendment to NYSE Rule 312(g) with the SEC to permit the recommendation of purchases and sales of shares of companies controlled and under common control with member organizations, subject to appropriate customer disclosure of the relationship. While the current rule applies only to publicly traded equity securities, the proposed amendments would also broaden the application of the rule to privately placed securities. No change is proposed with respect to the current prohibition against member organizations soliciting transac-

NYSE Developments (cont.)

tions in their own securities or those of their parent companies. The proposed change is subject to SEC approval and although this proposed change has been filed with the SEC, the SEC hasn't yet published it. The proposal provides for a public comment period once it is published by the SEC. A copy of the NYSE proposal is available at <http://www.nyse.com/pdfs/2005-58fil.pdf>.

NYSE Proposes Changes to Listed Company Fees

The SEC has published a proposed rule change submitted by the NYSE regarding the NYSE's listing fees and annual fees. The proposal must be approved by the SEC and is subject to a comment period ending October 14, 2005. A copy of the NYSE proposal is available at <http://www.sec.gov/rules/sro/nyse/34-52463.pdf>.

NYSE Issues Information Memorandum Regarding Cooperation with Investigations

The NYSE Division of Enforcement has issued an information memorandum to the CEO, Managing Partners, Compliance and Legal Departments of all Members, Member Organizations and Chief Operating Officers. The purpose of the memorandum is to provide guidance to the NYSE member community on its obligation to cooperate with exchange reviews, examinations and investigations, including investigations carried out by NYSE Division of Enforcement with respect to violations of federal securities laws and regulations and the policies and rules of the NYSE, and to provide disclosure to the exchange of, among other things, violations of the rules of the NYSE or the federal securities laws. The information memorandum addresses exceptional or extraordinary cooperation namely, cooperation that goes beyond that required by the rules of the NYSE and federal securities laws, that has the potential, in appropriate cases, to influence the outcome of an investigation, for instance by causing the NYSE to seek a reduced sanction, to decide to bring reduced or less serious charges, to obviate the need for an undertaking, or to decide to forgo bringing charges altogether. A copy of the NYSE's information memorandum is available at [http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525707C004C6DE0/\\$FILE/Microsoft%20Word%20-%20Document%20in%2005-65.pdf](http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525707C004C6DE0/$FILE/Microsoft%20Word%20-%20Document%20in%2005-65.pdf).

NASDAQ Developments

Nasdaq Proposes Clarification of Director Independence Standards

The Nasdaq has filed a proposed rule change with the SEC to clarify its corporate governance rules regarding director independence. Under the proposed rule changes, the definition of independent director in Nasdaq Rule 4200(a)(15)(B) would be modified to provide that a finding of independence is precluded if a director accepts any *compensation* from the company or its affiliates in excess of \$60,000 during any consecutive twelve month period within the three years prior to the independence

NASDAQ Developments (cont.)

determination. Under the existing rule, a director's independence is evaluated based on *payments* accepted from the company or its affiliates. The proposal seems to suggest that this is a narrowing of the rule since the Nasdaq staff has been confronted with several examples of payments that do not fall within the original intent of the rule. The rule would also continue to provide specific examples of compensation that would preclude a director's independence, such as contributions to the political campaign of a director or family member.

The proposals would also modify the interpretative material to Nasdaq Rule 4200(a)(15) regarding director independence to provide that a director that serves as a compensated officer of a company on an interim basis is not precluded from being considered independent after that service. The service as an interim officer, however, must be limited to not more than one year. In addition, if while acting as an interim officer the director participated in the preparation of the company's financial statements, the director would be precluded from serving on the Audit Committee for three years under Nasdaq Rule 4350(d)(2)(A)(iii). The Board of Directors would also still have an obligation to consider this interim service in making its overall independence determination.

The proposals would also clarify that references to "the company" in Nasdaq Rule 4200(a)(15)(D) includes any parent or subsidiary of the listed company. Nasdaq Rule 4200(a)(15)(D) precludes a director from being independent if the company made certain payments to or received certain payments from an organization of which the director is or has a family member who is a partner, controlling shareholder or executive officer.

Lastly, the proposals would clarify that the Exchange Act Rule 10A-3(c)(2) exception to the audit committee requirements for certain issuers that have a listed parent is also applicable to the Nasdaq's audit committee requirements.

The proposed rule changes require SEC approval and have not yet been published by the SEC. Once published by the SEC, the proposals provide for a public comment period. A copy of the proposed rule changes is available at: http://www.nasdaq.com/about/SR-NASD-2005-105_NASDAQ_Rule_Filing.pdf.

Nasdaq Proposes Change to Listing Standards Applicable to Companies in Bankruptcy Proceedings

The SEC has published a proposed rule change submitted by the Nasdaq which would require a reorganized company to re-apply for listing on the Nasdaq and meet all initial listing criteria, including the payment of initial listing fees, upon discharge from bankruptcy proceedings. Currently, the Nasdaq's rules provide that an issuer that files for bankruptcy protection is subject to delisting but on occasion, the Nasdaq allows companies to retain their listing throughout the bankruptcy proceeding. Under the proposed rule, in the event that the Nasdaq allows the continued listing of an issuer during a bankruptcy reorganization, the issuer would nevertheless be required to satisfy all requirements for initial listing upon emergence from bankruptcy proceedings. The proposed rule change would also clarify that any securities issued by a Nasdaq-listed issuer pursuant to a court-approved plan of reor-

NASDAQ Developments (cont.)

ganization are exempt from Nasdaq's shareholder approval rules. The proposed rule change must be approved by the SEC and was subject to a comment period that ended on October 4, 2005. A copy of the proposed rule change is available at <http://www.sec.gov/rules/sro/nasd/34-52385.pdf>.

PCAOB Developments

PCAOB Chair to Step Down

On September 23, 2005, PCAOB Chair William McDonough announced that he will resign his position on November 30, 2005 or when his successor is in place, whichever is sooner. The press release announcing Mr. McDonough's resignation is available at http://www.pcaobus.org/News_and_Events/News/2005/09-23.aspx.

Other Developments

Disney Case Appealed

In mid-September, Milberg Weiss Bershad & Schulman filed a notice of appeal with the Delaware Supreme Court with respect to the August 9, 2005 opinion by Delaware Chancery Chancellor William Chandler that the Disney board did not breach its fiduciary duties in the hiring of Michael Ovitz and his subsequent termination without cause (resulting in a severance package of \$130 million). For a copy of the Davis Polk memorandum on the Chancery Court decision, click [here](#).

Contacts

If you have questions about any of the developments covered in this report, please call your regular Davis Polk contact or:

Kevin Cavanaugh
212 450 6811

kevin.cavanaugh@dpw.com

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It is not a full analysis of the matters presented and should not be relied upon as legal advice.*