

DAVIS POLK & WARDWELL
Corporate Regulatory Report

A Summary of
Current Regulatory
Developments Affecting
Publicly Listed Companies

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SEC Developments

SEC Issues Final Rules on Securities Offering Reform Proposal

On July 19, 2005, the SEC issued final rules on the securities offering reforms originally proposed in November 2004. For a copy of the adopting release, see <http://www.sec.gov/rules/final/33-8591.pdf>. The rules are effective as of December 1, 2005.

The adopted rules are designed to improve communications related to registered securities offerings; ensure timely delivery of information to investors without mandating unnecessary delays or “speed bumps” in the offering process and improve the registration and other procedures in the offering and capital formation process. A summary of some of the more significant reforms is as follows:

Classification of Issuers. The rules classify issuers into four types and grant varying degrees of flexibility to issuers based on this classification. The most significant revisions to the communications rules and registration processes apply to a new category of issuers referred to as “well-known seasoned issuers” or “WKSIs.” In order to be a WKSI, an issuer must be current and timely in filing its Exchange Act reports for at least one year and have either \$700 million of worldwide public common equity float or have issued \$1 billion of non-convertible securities, other than common equity, in registered offerings for cash, in the preceding three years.

Shelf Registration Reforms. The reforms establish a significantly more flexible version of the shelf registration called the “automatic shelf registration” for offerings by WKSIs. Automatic shelf registration permits automatic effectiveness without SEC review, pay-as-you-go registration fees and the ability to exclude certain information from the base prospectus. Some, but not all, of the flexibility provided to WKSI shelf registration is also available to seasoned issuers (generally defined as an issuer eligible to use Form S-3 or Form F-3 to register primary offerings of securities) including the ability to conduct offerings immediately after effectiveness, the ability to conduct “at the market offerings” and the elimination of the existing limitation on the amount of securities registered.

Additional Disclosure in Exchange Act Reports. The rules require disclosure of risk factors in annual reports on Form 10-K and, for

SEC Developments (cont.)

“accelerated filers” and WKSIs, disclosure in annual reports on Form 10-K or Form 20-F of any material unresolved SEC comments issued more than 180 days before the relevant fiscal year end.

Communications Reforms. The rules include reforms to the “gun jumping” provisions of the Securities Act which update and liberalize permitted offering activity and communications. These communications reforms include:

- establishing safe harbors, subject to conditions, for written communications of regularly released factual information and, for certain types of issuers, forward-looking information;
- providing a safe harbor for communications made more than 30 days before filing a registration statement that do not reference the securities offering that is the subject of the registration statement; and
- permitting the use of other written communications, known as “free writing prospectuses,” in addition to preliminary prospectus, base prospectus or prospectus supplement, subject to certain conditions (including, in some cases, filing with the SEC).

Electronic Roadshows. The rules address the treatment under the Securities Act of electronic communications, including electronic road shows, and exclude electronic roadshows that are carried live and in real-time to a live audience from the definition of “written communication.” In the case of electronic road shows for initial public offerings of common equity or convertible equity securities by non-reporting issuers, a “bona fide” version of the electronic road must be made readily available to an unrestricted audience to avoid filing the electronic road show with the SEC. No other electronic road shows will be subject to filing, although if the road show is not live it will be a free writing prospectus. The conditions set forth in existing no-action letters regarding electronic roadshows in connection with registered public offerings will no longer be applicable.

Liability Issues. Under the rules as adopted, disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act attaches at the time of sale and any information conveyed to the investor after the time of sale (for example, in a final prospectus distributed after the time of sale) is not taken into account. In addition, the rules establish that prospectus supplements filed after the initial effective date of a registration statement will be included in the registration statement for Section 11 liability purposes and a new effective date for Section 11 purposes will occur for issuers and underwriters only (not experts, officers or directors) with respect to each takedown off a shelf registration statement.

Elimination of Final Prospectus Delivery Requirement. The rules also eliminate the requirement that a final prospectus be delivered to an investor so long as the final prospectus is filed with the SEC.

A DPW memo discussing the final rules and the impact on capital markets transactions will be distributed shortly. In the interim, please call your Davis Polk contact if you have any questions.

SEC Developments (cont.)

Corp. Fin. Issues Additional Guidance on Shareholder Proposals

The SEC Division of Corporation Finance has issued Staff Legal Bulletin No. 14C, which includes guidance on shareholder proposals. Among other things, SLB No. 14C contains information on the application of Rule 14a-8(i)(6) to proposals calling for director independence, the application of Rule 14a-8(i)(7) to proposals referencing environmental or public health issues and procedural matters with respect to the submission of proposals by shareholders and the request for no-action relief from Corp. Fin. See <http://www.sec.gov/interps/legal/cfs1b14c.htm>.

SEC Issues Final Rules Relating to Deregistration/Delisting; Shell Companies

On July 15, 2005, the SEC issued a release adopting amendments to Exchange Act rules and forms to streamline the procedures under which a security may be delisted from a national securities exchange and/or withdrawn from registration under Section 12(b) of the Exchange Act. For a copy of the final rule release, see <http://www.sec.gov/rules/final/34-52029.pdf>.

On the same day, the SEC also issued final rules adopting amendments to Form S-8, Form 8-K, and Form 20-F relating to shell companies. The rules define the term “shell company” and address the use of Form S-8 by shell companies and the information required to be disclosed in a report on Form 8-K or Form 20-F filed when a company becomes a shell company or ceases being a shell company. The rules will, among other things, have implications for business combination transactions involving reporting shell companies. For a copy of the final rule release, see <http://www.sec.gov/rules/final/33-8587.pdf>.

FASB Developments

FASB Issues Guidance on Accounting for Uncertain Tax Positions

The Financial Accounting Standards Board issued on July 14 proposed guidance on accounting for uncertain tax positions that may or may not be cleared on audit by taxing authorities. Generally, companies can only record tax benefits if these benefits are probable, which means that the Company has a high level or “should” level of assurance that the position will be upheld without considering audit detection risk. The draft rules, which would be effective at the end of this year for calendar-year reporting companies, are meant to make accounting practices more comparable across companies. For a copy of the guidance, see <http://www.fasb.org/draft/index.shtml>.

PCAOB Developments

PCAOB Approves Tax Services Proposal and Auditing Standard Regarding Reporting on Whether a Material Weakness Continues to Exist

On July 26, 2005, the PCAOB approved final rules that will prohibit independent auditors from providing certain tax services, such as providing any service or product to an audit client for a contingent fee or commission, providing assistance in planning or tax advice on certain potentially abusive tax transactions or providing tax services to certain senior officers of an audit client. The PCAOB also approved Auditing Standard No. 4 to establish requirements and provide direction for when an auditor is engaged to report on whether a company's previously reported material weakness in its internal control over financial reporting continues to exist. Such engagement and the related auditor assurance are not required under any PCAOB or other auditing standard, but the PCAOB is issuing the auditing standard to cover voluntary engagements of auditors by companies that feel such assurance is needed. Both sets of rules must still be approved by the SEC before they will be effective. For a copy of the final tax services rules as published by the PCAOB, see http://www.pcaobus.org/Rules/Docket_017/2005-07-26_Release_2004-014.pdf. For a copy of Auditing Standard No. 4 as published by the PCAOB, see http://www.pcaobus.org/Rules/Docket_018/2005-07-26_Release_2005-015.pdf.

NASD Developments

NASD Issues FAQ That Failure to Comply with Certain SOX 404 Requirements May Not Result in Delisting

NASDAQ has released an FAQ that addresses the consequences of a company's inclusion in its Form 10-K of an incomplete management assessment of internal control over financial reporting or of an auditor's attestation report that contains an opinion that is disclaimed because the auditor did not have time to complete its internal control work. According to the FAQ, such a Form 10-K would normally not satisfy NASDAQ's filing requirements, thus subjecting the company to possible delisting. However, NASDAQ acknowledged the difficulties of this first year's implementation of SOX 404 and has determined, after consultation with SEC Staff, that during 2005, such incomplete management assessment of internal control over financial reporting or disclaimed auditor's opinion will not result in delisting of the company, provided the company is taking all steps required by SEC Staff to address these issues. A company in this situation should promptly contact NASDAQ's Listing Qualifications Department. Also, no company will be eligible for this relief unless the Form 10-K contains an unqualified audit opinion on the company's financial statements. For the complete FAQ, see <http://www.nasdaq.com/about/FAQsContinued.stm#17>.

Other Developments and DPW Memos

IRS Circular 230 Effective

On June 21, IRS Circular 230 became effective. These rules require, among other things, that written tax advice (including tax disclosure in non-SEC registered offerings) include legends explaining that the advice cannot be relied upon to avoid tax penalties. For a copy of the DPW memo on IRS Circular 230 click [here](#).

Other DPW Memos

For a copy of the DPW memos on the NASD proposal to require disclosure and other procedures regarding the issuance of fairness opinions by member firms, click [here](#) and [here](#).

For a copy of the DPW memo on majority voting for the election of directors, click [here](#).

Contacts

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

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*This report is a summary for general information only.
It is not a full analysis of the matters presented and should not be relied upon as legal advice.*