

DAVIS POLK & WARDWELL
Corporate Regulatory Report

A Summary of
Current Regulatory
Developments Affecting
Publicly Listed Companies

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SEC Developments

SEC Comment and Response Letters Publically Released on EDGAR

On May 12th, the SEC began publicly releasing comment letters and response letters relating to disclosure filings made after Aug. 1, 2004 that were reviewed by its Staff. Letters will be released no earlier than 45 days after completion of the review of the filing. Letters are posted on the issuer’s EDGAR location on the SEC website. Staff comment letters are marked as UPLOAD and company response letters are marked as CORRESP.

SEC Releases Statement on Implementation of SOX 404

In response to comments received from the recent SEC Roundtable on the implementation of SOX 404, the SEC released a Staff Statement on Management’s Report on Internal Control Over Financial Reporting to provide additional guidance and clarification on certain issues. It has been separately reported that approximately 14% of companies already required to comply with SOX 404 have reported, or will report, material weaknesses. See: <http://www.sec.gov/info/accountants/stafficreporting.htm>. The PCAOB also issued similar guidance (see below). For a copy of the DPW memo on this subject, [click here](#).

Fee Rate Advisory #1 Announced

Effective on the later of Oct. 1, 2005, or five days after the date on which the SEC receives its fiscal year 2006 regular appropriation, 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 to \$107.00 per million from the current rate of \$117.70 per million. In past years the change in fee rates became effective in spring of the following year, 2006 in this case, when Congress passes the SEC’s budget. For a copy of the SEC Fee Rate Advisory, see <http://www.sec.gov/news/press/2005-69.htm>.

SEC Developments (cont.)

Division of Market Reg. Issues Updated FAQs on Reg. AC

The Division of Market Regulation has issued updated FAQs on Reg. AC, including additional responses related to foreign broker-dealers. For a copy of the FAQs, see <http://is10.dpw.com/intranet/PRAX/groups/fig/related/mergers/topics/topics/a/analysts/conflict.int.rules.rel/regnac/faq.link>.

Corp. Fin. Issues Additional New Phone Numbers; Packages to be Sent to New Address

As part of its move to new offices, the Division of Corporation Finance has issued another alert regarding changes to its telephone numbers for the Division's Office of Chief Accountant, Office of EDGAR & Information Analysis, and the senior staff. The new phone numbers were effective May 9, 2005. For a copy of the Staff Alert with the new phone numbers, see <http://www.sec.gov/divisions/corpfin/cfalerts/cfalert050505.htm>. In addition, effective May 25th, packages or hard copies of materials to the SEC should be submitted to its new address at 100 F Street, N.E., Washington, DC 20549.

Linda Chatham Thomsen Named Director of Enforcement

Linda Chatman Thomsen has been named the Director of the Division of Enforcement. She has been at the Commission since 1995 and has served as the Division's Deputy Director since 2002. Before joining the staff of the Commission, Thomsen was in private practice at Davis Polk in Washington, D.C. and New York, and also served as an Assistant United States Attorney for the District of Maryland.

SEC Enforcement Actions

SEC Settles with Tyson Foods Over Compensation Disclosure

On April 28th, the SEC announced that it had settled enforcement proceedings against Tyson Foods, Inc. and its former Chairman and CEO, Donald Tyson. The SEC charged that Tyson Foods made misleading proxy statement disclosures from 1997 to 2003 regarding \$3 million of perquisites provided to Don Tyson. The SEC also charged Tyson Foods with failing to maintain adequate internal controls over Don Tyson's personal use of company assets. Don Tyson was separately charged with causing and aiding and abetting the company's disclosure violations. Tyson Foods must pay a \$1.5 million penalty and Don Tyson a \$700,000 penalty. For a copy of the SEC press release related to this matter, see <http://www.sec.gov/news/press/2005-68.htm>.

SEC Enforcement Actions (cont.)

SEC Charges Hedge Fund Manager with Insider Trading and Unregistered Sales of Securities in Connection with “Pipe” Offering

The SEC has alleged that hedge fund manager Hilary Shane committed insider trading and registration violations by short selling securities of CompuDyne Corporation prior to the public announcement of a private investment in public equity (PIPE) offering and prior to the effective date of the resale registration statement for the PIPE shares. Shane agreed to keep information about the PIPE offering confidential but began short selling CompuDyne securities in both her personal account and the hedge fund’s account prior to the public announcement of the deal. Shane covered all of her short sales with the shares she obtained in the PIPE offering. The NASD has also barred Shane from the broker-dealer industry and suspended her from the investment advisory industry. See <http://www.sec.gov/news/press/2005-76.htm> and http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_014158.

SEC Sues Hedge Fund Advisers for Short Sale Activity Alleged to Violate Regulation M

The SEC announced that it has sued three hedge fund advisers for violation of Rule 105 of Regulation M, an anti-manipulation rule which prohibits covering a short sale with securities obtained in a follow-on offering if the short sale occurred within five business days before the pricing of that offering. In some cases, the funds created large short positions within the Rule 105 restricted period, purchased shares in a follow-on offering and then engaged in further transactions or trading practices to make it appear that the trading complied with Rule 105. See <http://www.sec.gov/news/press/2005-77.htm>.

SEC Speaks

Donaldson Discusses Pending Changes to Exec. Comp. Disclosure; Interim Guidance on Personal Use of Aircraft Issued by Treasury and IRS

In a speech made on May 12th, Chairman William Donaldson discussed, among other possible upcoming reforms, changes to the disclosure of executive compensation. He stated that while the Commission will not be acting to limit executive compensation, they will seek “greater disclosure of pay packages - with not only the total amount of compensation provided, but a clearer explanation of each element of the package, including benefits that may not be easily quantified but which the CEO clearly cares about.” See <http://www.sec.gov/news/speech/spch051205whd.htm>. On a related matter, on May 27th, the Treasury Department and the IRS issued interim guidance on the tax treatment of the personal use of corporate aircraft for entertainment travel. The guidance explains how to apply the American Jobs Creation Act of 2004 limitation on the costs that a business may deduct when an executive uses company aircraft for entertainment travel. The interim guidance is effective

SEC Speaks (cont.)

for expenses incurred after June 30, 2005; however, the guidance indicates that the IRS will not challenge a “reasonable method” for determining disallowed expenses (including a method consistent with the interim guidance) used prior to June 30, 2005. For a copy of the press release related to this guidance, see <http://www.ustreas.gov/press/releases/js2476.htm>. For a copy of the guidance, see <http://www.ustreas.gov/press/releases/reports/notice200545.pdf>.

PCAOB Developments

PCAOB Issues Guidance for Auditors on SOX 404

The PCAOB on May 16th published additional guidance to auditors on how to implement the PCAOB’s Auditing Standard No. 2, “An Audit of Internal Control over Financial Reporting Performed in Conjunction with an Audit of Financial Statements,” related to SOX 404. The guidance consists of a Board Policy Statement Regarding Implementation of Auditing Standard No. 2 and a series of staff questions and answers. The SEC issued similar guidance to public companies (see above). See http://www.pcaobus.org/News_and_Events/News/2005/05-16.asp.

Standing Advisory Group to Meet on Sox 404

The PCAOB Standing Advisory Group has announced that it will devote its next meeting on June 8th and 9th to a discussion of SOX 404 implementation issues. The agenda includes a discussion on the first year’s experience with SOX 404 requirements as well as any anticipated changes for 2005. In addition, audit committee oversight, evaluation of material weaknesses and reporting and communication issues are also planned to be discussed. For a copy of the briefing paper, see http://www.pcaobus.org/Standards/Standard_Advisory_Group/Meetings/2005/06-08-09/Briefing_Paper.pdf.

PCAOB Releases Q&A on Engagements Regarding XBRL

On May 25th, the PCAOB released staff questions and answers related to attest engagements regarding XBRL (eXtensible Business Reporting Language) data furnished under the SEC XBRL Voluntary Financial Reporting Program on the EDGAR System. The questions and answers provide guidance for auditors who are engaged to report on whether the XBRL data accurately reflects the corresponding information in the official EDGAR filings. The guidance addresses both performance and reporting matters relating to applying the Board’s attestation standards to these engagements. See http://www.pcaobus.org/Standards/Staff_Questions_and_Answers/index.asp.

FASB Developments

FASB Releases Exposure Draft on GAAP Hierarchy

FASB has published an exposure draft, The Hierarchy of Generally Accepted Accounting Principles, which carries forward the GAAP hierarchy from SAS 60. It ranks the relative authority of accounting principles issued from multiple standard-setters. See http://www.fasb.org/draft/ed_gaap_hierarchy.pdf.

Other Developments

Delaware Amends Law to Remove Option of Paper Certificates

The adoption of HB 150, which becomes effective August 1st, will allow all public companies incorporated in Delaware the ability to issue stock certificates in electronic form only. The amendment to Section 158 of the Delaware General Corporation Law eliminates the requirement that a Delaware corporation with uncertificated shares issue a certificate for such shares upon the request of the holder of such shares. For a copy of HB 150, see [http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/HB+150/\\$file/legis.html?open](http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/HB+150/$file/legis.html?open).

SIA Encourages SEC to Address Issuer Retaliation Against Research Analysts

In a letter to the SEC on May 11th, the Securities Industry Association urged the Staff, together with the NYSE and NASD, to consider adopting rules that would prohibit or deter issuer retaliation against analysts and their firms for negative research coverage. According to the letter, the forms of retaliation, while not engaged in by most issuers, could be subtle, such as denying access to senior management, to more blunt, such as threatening to withdraw business. See http://www.sia.com/2005_comment_letters/6374.pdf

Other DPW Memos of Interest

Please see the memo on May 10th on the SEC Chief Accountant Outlines “Roadmap” for Convergence of Financial Reporting Standards, [here](#).

Contacts

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

Ning Chiu
 212 450 4908
ning.chiu@dpw.com

Frances Mi
 212 450 4048
frances.mi@dpw.com

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