DAVIS POLK & WARDWELL

Corporate Regulatory Report

A Summary of Current Regulatory Developments Affecting Publicly Listed Companies

Contents

SEC Developments

SEC Adopts Final Rules Revising Periodic Report Filing Deadlines and Amending Definition of Accelerated Filer

On December 21, 2005, the SEC issued final rules modifying the current filing deadlines for quarterly reports on Form 10-Q and annual reports on Form 10-K. The new rules do not affect the filing deadlines for Forms 20-F and 40-F. As a result of these final rules, all accelerated filers will be able to continue to file their annual reports on Form 10-K for years ended prior to December 15, 2006 within 75 days after year-end, and their quarterly reports on Form 10-Q within 40 days after year-end, as was the case during 2005.

Under the new rules, the SEC has also created a new class of issuers called "large accelerated filers", who will be subject to a 60-day filing requirement for years ended on or after December 15, 2006. An issuer will be a large accelerated filer if it is an accelerated filer and it has, at the end of the most recent second fiscal quarter, voting and non-voting common equity held by non-affiliates of at least $700 million. All other accelerated filers will remain permanently subject to the 75 day requirement. In addition, the quarterly report deadline for all accelerated filers, including large accelerated filers, will remain permanently at 40 days.

Finally, the SEC has eased some of the current restrictions on the exit of companies from accelerated filer status.

Prior to adoption of these new rules, the filing deadline for "accelerated filers" (companies that have been reporting companies for one year and have voting and non-voting common equity held by non-affiliates of at least $75 million at the end of the most recent second fiscal quarter) for fiscal years ended after December 15, 2005 was to be accelerated to 60 days after year-end, and thereafter these issuers would have been required to file quarterly reports within 35 days after each quarter-end.

For a copy of the Davis Polk memorandum on the final rules modifying the Form 10-Q and Form 10-K filing deadlines and the definition of accelerated filer, please click **here.** The SEC's final rules are available at: **http://www.sec.gov/rules/final/33-8644.pdf.**

SEC Developments (cont.)

SEC Issues E-Proxy Proposal

The SEC has proposed amendments to the proxy rules that would permit issuers and other soliciting persons to furnish proxy materials to shareholders by posting them on the internet and providing shareholders with a notice of the availability of the proxy materials at least 30 days prior to the relevant shareholder meeting. This proposal will benefit issuers by, among other things, cutting printing and mailing costs associated with voluminous proxy materials. Since the proposal will apply to shareholders and persons other than the issuer, it could also make third party proxy solicitations less costly and, thus, easier to make. The NYSE has a related rule change proposal pending with the SEC that would eliminate the NYSE's annual report delivery requirement, and allow companies to satisfy the annual financial statement delivery requirement by making the company's annual report available on or by a link through its corporate website. Comments on the proposed amendments should be submitted to the SEC by February 21, 2006. For a Davis Polk Client Newsflash on this topic, please click **here.** The full text of the proposal is available at: **http://www.sec.gov/rules/proposed/34-52926.pdf.**

SEC Proposes Amendments to Rules Allowing Deregistration of Foreign Companies

On December 23, 2005, the SEC released a proposal to significantly liberalize the conditions under which a foreign private issuer with securities registered in the U.S. may terminate the registration of a class of equity securities and cease its reporting obligations regarding a class of equity or debt securities. The proposed rule has been actively sought by many European and other foreign companies and their trade associations.

The proposed rule would permit foreign private issuers to terminate registration and reporting obligations in the U.S. regarding a class of equity securities if:

» With respect to well-known seasoned issuers, or WKSI's (which are generally companies that, at a minimum, have at least a $700 million market capitalization held by non-affiliates), (i) U.S. residents hold 10% or less of the public float and the U.S. average daily trading volume of the securities has been 5% or less of average daily trading volume in the issuer's primary trading market during a recent 12-month period or (ii) regardless of U.S. trading volume, U.S. residents hold no more than 5% of the issuer's worldwide public float;

» With respect to an issuer that is not a well-known seasoned issuer, U.S. residents hold no more than 5% of the issuer's worldwide public float; or

» With respect to all issuers, the class of equity securities is held of record by less than 300 persons on a worldwide basis or less than 300 persons resident in the U.S.

SEC Developments (cont.)

Other conditions that must also be satisfied include the following:

» The company has been a reporting company in the U.S. for at least two years, has filed all required reports during that period, and has filed at least two annual reports on Form 20-F.

» The company's securities have not been sold in the U.S. in either a registered or unregistered offering (including 144A and other private placements) under the Securities Act for at least one year. Offerings to employees, most exempt offerings under Section 3 and commercial paper are exempted from this dormancy period, as are sales by selling shareholders, as long as they are sold in non-underwritten offerings.

» The company's securities have been listed on the company's home market for at least two years.

Comments on the proposal should be submitted to the SEC by February 28, 2006. For a copy of the Davis Polk memorandum on the proposed amendments to the deregistration rules, please click **here**. The full text of the proposal is available at: **http://www.sec.gov/rules/proposed/34-53020.pdf.**

SEC Proposes Amendment to "Best Price" Rule for Tender Offers

On December 16, 2005, the SEC proposed long-awaited modifications to the tender offer "best price" rule. This rule (Exchange Act Rules 14d-10 and 13e-4) requires that the consideration paid to any security holder in a tender offer is the highest consideration paid to any other security holder in the offer.

The proposed amendments would:

» Clarify that Rules 14d-10 and 13e-4 apply only with respect to the consideration offered and paid for securities tendered in an issuer or third-party tender offer.

» Add a specific exemption to Rule 14d-10 (relating to third party tender offers) for employment compensation, severance or other employee benefit arrangements entered into with employees or directors of the subject company provided that payments (A) relate solely to past or future services to the company or promises not to compete with the company and (B) are not based on the number of securities owned by the employee or director in the target company.

» Provide a safe harbor to Rule 14d-10 for employment compensation, severance or other employee benefit arrangements that have been approved by a compensation committee or other independent committee of the company entering into the arrangement.

For a Davis Polk Client Newsflash on this topic, please click **here**. The text of the proposal is available at: **http://www.sec.gov/rules/proposed/34-52968.pdf.** Comments on the proposed rule should be submitted to the SEC by February 21, 2006.

SEC Developments (cont.)

SEC Issues Questions and Answers Addressing Implementation and Interpretation of Securities Offering Reform

On November 30, 2005, the SEC published a series of Q&As addressing the implementation and interpretation of 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 the new rules and forms adopted by the SEC in the Securities Offering Reform rulemaking. The Securities Offering Reform became effective in its entirety on December 1, 2005. The Q&As are available at: **http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf.**

SEC Issues Updated Current Accounting and Disclosure Issues Outline

In December 2005, the SEC published an updated outline of Current Accounting and Disclosure Issues in the Division of Corporation Finance. Certain of the topics discussed in the outline include:

» Disclosure relating to employee benefit plans that the SEC expects issuers to include in their MD&A and/or financial statement footnotes, including: a description of the means of determination of the assumed discount rate with respect to pension plans; the impact of employee benefit plans on the issuer's liquidity and future operating performance or financial condition; material assumptions and estimates underlying the accounting for benefit plans, as well as the material effect of changes to those assumptions; a comparison of actual and expected results of benefit plans; and discussion of any material funding obligations.

» The impact of changes made by issuers to reportable segments after the end of the fiscal year, including the restatement requirement of the issuer's historical annual audited financial statements that will be triggered as a result of the filing of a Form S-3 or Form S-8 after the filing of a quarterly report on Form 10-Q that reflects the new segment structure.

The outline represents the views of certain members of the staff of the SEC Division of Corporation Finance and does not necessarily reflect the views of the SEC. The outline is available at: **http://www.sec.gov/divisions/corpfin/acctdis120105.pdf.**

SEC Issues Fee Rate Advisory

On November 23, 2005, the SEC issued fee rate advisory #5 for its fiscal year 2006, which began on October 1, 2005, announcing the reduction in fees that public companies and other issuers will pay to register their securities with the SEC. Effective November 27, 2005, 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 decreased to $107.00 per million. The SEC's press release regarding the new filing fee is available at: **http://www.sec.gov/news/press/2005-163.htm.**

SEC Speaks

SEC Chairman and Chief Accountant Discuss Measures to Improve Disclosure in Financial Statements

In a speech on December 5, 2005 before the 2005 AICPA National Conference on Current and PCAOB Developments, SEC Chairman Christopher Cox stated that the SEC and FASB were working together to increase the transparency and usefulness of financial information by simplifying accounting rules. As part of this effort, the FASB is reassessing specific standards in major areas where rules fail to provide transparent disclosure, attempting to codify all of the existing literature in order to establish a single source for all GAAP material and trying to contain the proliferation of new pronouncements from multiple sources. At the same conference, Carol Stacey, the Chief Accountant of the SEC's Division of Corporation Finance, noted that auditors need to take additional steps to ensure that financial statements are "complete, accurate, and relevant." These steps include learning to use technology better, improving educational training, reducing the complexity of financial statements, using good judgment and reducing disclosure overload. The full text of Chairman Cox and Chief Accountant Stacey's speeches is available at **http://www.sec.gov/news/press.shtml.**

SEC Chairman Encourages Adoption of Interactive Data Filing Standard

In recent statements, SEC Chairman Christopher Cox has promoted the adoption of Extensible Business Reporting Language (XBRL), a computer language that allows users to instantly search and retrieve data from SEC reports. In a speech on November 11, 2005 before the Securities Industry Association, Chairman Cox stated that interactive data holds the potential to revolutionize financial reporting and corporate disclosure. According to Chairman Cox, the adoption of XBRL will improve the quality and timeliness of financial information, increase the productivity of analysts, eliminate errors caused by manual data entry, improve the SEC's effectiveness and, potentially, solve the problem of different global accounting standards. In speeches on December 5, 2005 before the 2005 AICPA National Conference on Current SEC and PCAOB Developments and on December 12, 2005 before the Economic Club of New York, Chairman Cox noted that interactive data may help auditors test the integrity of internal controls and that it should eliminate the need for repetitive information and duplicative forms, providing time and cost savings to issuers. While XBRL filing is currently voluntary, Chairman Cox has encouraged all issuers to adopt it. The full text of Chairman Cox's speeches is available at: **http://www.sec.gov/news/press.shtml.**

NYSE Developments

NYSE Files Proposed Rule Change to Disclosure Requirements for Independent Directors

The NYSE filed on November 23, 2005 proposed revisions to the disclosure requirements with the SEC that would require companies to affirmatively disclose reasons for a board's determination that directors are in fact, independent. Currently, the NYSE requires disclosure of the identity of independent directors and the basis for the board's determination that a relationship is not material; immaterial relationships between individual directors and the company are not required to be disclosed. The proposed rule change would require companies to disclose with respect to each independent director, whether the director has either (1) no relationship with the company or (2) an immaterial relationship with the company.

If the director has an immaterial relationship, the company must specifically describe it and the basis for determining its immateriality. Alternatively, the board may establish categorical descriptions of relationships that it has determined are per se immaterial. By electing to establish categorical descriptions, the company will not have to disclose the details of a relationship within the named category or the basis for the board's independence determination for the affected director. Boards would not be allowed, however, to treat as categorically immaterial any relationship that is required to be disclosed as a related party transaction under Item 404 of Regulation S-K. In this case, the relationship must be specifically described and the board must disclose the basis for determining immateriality.

The proposed rule change is subject to SEC approval and has not yet been published by the SEC. Once published, comments will be due within 21 days of publication. A copy of the proposed rule change filed with the SEC is available at: **http://www.nyse.com/pdfs/NYSE-2005-81.pdf.**

NYSE Clarifies Shareholder Approval Policy

In connection with the much publicized three-way deal among Banco Santander of Spain, Sovereign Bank and Independence Community Savings, the NYSE in late November 2005 clarified the application of its shareholder approval policies relating to the issuance of shares by a NYSE-listed company in a manner that is likely to change the way in which future deals are structured. Among other things, the NYSE indicated that there are limitations to its long-standing policy of not counting the issuance of treasury shares and appears to have significantly narrowed the types of transactions that may proceed without a shareholder vote under the NYSE rule requiring a shareholder vote prior to any share issuance that will result in a change of control. For a Davis Polk Client Newsflash on this topic, please click **here.**

NASD Developments

NASD Issues Revised Fairness Opinion Rule

The NASD has revised its proposed rule governing the issuance of fairness opinions by NASD member firms, originally issued in June 2005. The revisions include, among other things, the following:

» The rule would apply to all fairness opinions disclosed to public shareholders, not just those "included in a proxy statement."

» It clarifies that certain disclosures required by the proposal are meant to be descriptive rather than quantitative (e.g., it is sufficient to disclose that a contingent compensation relationship exists and not specify the amount of compensation to be received upon successful completion of the transaction).

» Members must disclose the categories of information (e.g., projected earnings and revenues, expected cost-savings, etc.) that formed a substantial basis for the fairness opinion that were supplied by the company requesting the opinion, and with respect to each category, whether the member has independently verified the information.

The proposed rule change is subject to SEC approval and has not yet been published by the SEC. Once published, the rule will likely be adopted shortly after the public comment period runs. For a copy of the Davis Polk memorandum on the proposed fairness opinion rule originally issued in June 2005, please click **here**. The revised proposal is available at: **http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_015636.pdf.**

SEC Approves NASD Rule Change Permitting Issuance of Public Reprimand Letters When Delisting is Not an Appropriate Sanction

In December 2005, the SEC approved rule changes to permit Nasdaq to issue public reprimand letters upon a determination that a listed company has violated a Nasdaq corporate governance or notification listing standard and that delisting is not an appropriate sanction. These new rules provide Nasdaq with the authority to issue public reprimand letters and thereby impose lesser sanctions on issuers in limited circumstances when delisting, in its determination, is not appropriate. The new Nasdaq rules are substantially similar to NYSE Rule 303A.13, which was adopted by the NYSE and approved by the SEC earlier in the year. The SEC notice of filing and immediate effectiveness of the rule change is available at: **http://www.sec.gov/rules/sro/nasd/34-52899.pdf.**

NASD Developments (cont.)

NASD and NYSE Issue Joint Report on the Operation and Effectiveness of Research Analyst Conflict of Interest Rules

In December 2005, the NASD and NYSE, at the request of the SEC, issued a joint report on the operation and effectiveness of the research analyst conflict of interest rules which were implemented by the NASD and NYSE beginning in 2002. The report suggests a variety of changes to the NASD and NYSE research analyst conflict of interest rules, including:

- codification of the interpretation that communications that constitute prospectuses, including free writing prospectuses, are not research reports even if they meet the definitional elements (note that if free writing prospectuses were research reports, they would be prohibited due to the "quiet period" rules described below);
- consideration of a limited exemption from the registration requirements under the NASD/NYSE rules for non-research personnel that produce research reports;
- elimination of the permissibility of pre-publication review of research by investment banking and other non-research personnel, other than by legal and compliance;
- modification to the quiet period rules, including (i) a uniform 25-day quiet period on the publication of research by all managers, co-managers, underwriters and dealers that participate in an IPO (currently, managers and co-managers are subject to a 40-day quiet period), (ii) elimination of the quiet period following a secondary offering (currently, managers and co-managers are subject to a 10-day quiet period, except that research pursuant to SEC Rule 139 regarding a company with "actively-traded securities" is permitted), (iii) elimination (NASD) or reduction (NYSE) of the quiet period surrounding the expiration, termination or waiver of a lock-up agreement, provided members include an additional statement as part of their SEC Regulation AC certification-or alternatively, a separate certification-for research issued during such periods, and (iv) inclusion of an announcement of earnings as an exception to the quiet period rules so as to align these exceptions with events that trigger the filing of a Form 8-K under SEC rules (note that this modification has been proposed by the NYSE only);
- amendments to the disclosure requirements applicable to member research reports so that, in lieu of publication in the research report itself, member firms would be required to disclose their conflicts of interest related to research reports by including a prominent warning on the cover of a research report that such conflicts of interest exist, together with information on how the reader may obtain more detail about these conflicts on the member's Web site; and
- extension of the prohibition on investment banking from retaliating against a research analyst as a result of an unfavorable research report or public appearance to all employees, not just those involved in investment banking.

The views provided in the report are those of the NASD and NYSE staffs regarding the research analyst conflict of interest rules and have not been endorsed by the Board of Governors of the NASD or the Board of Directors of the NYSE. A copy of the report is available at: **http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_015803.pdf.**

Other Developments

ISS Adopts 2006 Policy on Majority Vote Shareholder Proposals

Institutional Shareholder Services (ISS) adopted a new policy position in the debate over director nominations for U.S. companies regarding majority voting shareholder proposals. Under its policy, ISS will "generally recommend FOR" reasonably crafted shareholder proposals (whether binding or non-binding) calling for directors to be elected with an affirmative majority of votes cast and/or the elimination of the plurality standard for electing directors, provided the proposal includes a carve-out for a plurality voting standard when there are more director nominees than board seats (e.g., contested elections). However, ISS will consider recommending AGAINST a shareholder proposal if the company has adopted formal corporate governance policies or principles that present a meaningful alternative or effective equivalent to the majority voting standard and provide an adequate response to both new nominees as well as incumbent nominees who fail to receive a majority of votes cast.

A copy of the ISS 2006 Voting Policy is available at: **http://www.issproxy.com/pdf/2006USPolicyUpdate111705.pdf** and a related Q&A is available at **http://www.issproxy.com/pdf/FAQMVPolicy2006.pdf.**

Delaware Court Decision Questions Special Committees and Fairness Opinions

In a recent Delaware Chancery Court opinion, In re Tele-Communications, Inc. Shareholders Litigation, No. 16470 (Dec. 21, 2005) on defendants' motion for summary judgment, Chancellor Chandler made a number of rulings and observations that may be relevant to transactions involving a special committee. The full text of the court's opinion is available at: **http://www.dpw.com/1485409/dpw/tci.opinion.pdf.**

Second Circuit Rules that Section 12(a)(2) Does Not Afford a Cause of Action to Persons Who Purchase Securities in a Private Offering

In December 2005, the U.S. Court of Appeals for the Second Circuit held that Section 12(a)(2) of the Securities Act does not afford a cause of action to persons who purchase securities in a private primary offering and therefore not "by means of a prospectus", even when given a copy of an old prospectus. In 1995, the U.S. Supreme Court held that plaintiffs who purchased securities in a private secondary sale could not sue under Section 12(a)(2) because their private sale contract did not qualify as a "prospectus". Until now, the Second Circuit had not reached the issue of whether the rationale for the 1995 Supreme Court decision, which involved a private secondary sale, precludes a Section 12(a)(2) claim with respect to any private securities transaction, including a primary offering. The U.S. Courts of Appeals for the First, Fifth and Tenth Circuits have previously also concluded that a Section 12(a)(2) claim cannot be brought in connection with a private offering. The Second Circuit's opinion is available at: **http://www.ca2.uscourts.gov:81/isysnative/RDpcT3BpbnNcT1BOXDA0LTMxMzktY3Zfb3BuLnBkZg==/04-3139-cv_opn.pdf#xml=http://10.213.23.111:81/isysquery/irlb227/2/hilite.**

Other Developments (cont.)

Delaware Court Rules Suit Over News Corp. Board Policy Can Go Forward

On December 20, 2005, the Delaware Chancery court denied News Corp.'s motion to dismiss a shareholder claim that the company breached a contract when it maintained a poison pill plan in violation of a previously announced board policy. Given the procedural posture of the case, the significance of this ruling remains unclear. The full text of the court's opinion is available at: **http://www.delawarelitigation.com/unisuper.**

SEC Names Scott Taub as Acting Chief Accountant

On November 14, 2005, SEC Chairman Cox designated Scott Taub to serve as Acting Chief Accountant for the SEC. The full text of the press release announcing his appointment is available at: **http://www.sec.gov/news/press/2005-160.htm.**

SEC Names Bill Gradison Acting Chairman of PCAOB

On December 2, 2005, Public Accounting Oversight Board Member Bill Gradison was named Acting Chairman of the Board, filling the vacancy left by the resignation of Chairman William J. McDonough. The press release announcing Mr. Gradison's appointment is available at: **http://www.pcaob.org/News_and_Events/News/2005/12-02.aspx.**

DPW Memos

For a copy of the Davis Polk Memorandum regarding the United Nations Convention Against Corruption, please click **here.**

For a copy of the Davis Polk Memorandum regarding the FTC policy address on premerger gun-jumping activity, please 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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