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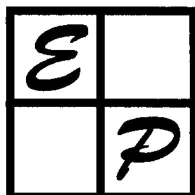

THE CORPORATE COUNSEL

Vol. XXXII, No. 5 SEPTEMBER–OCTOBER 2007

HIGHLIGHTS AND PITFALLS

Ten Compensation Disclosure Fixes

We now have the benefit of a completed proxy season under the new executive compensation rules, as well as the SEC Staff's initial observations from the comment letters sent last month. (See the September-October 2007 issue of *The Corporate Executive* for analysis and guidance of the Staff's initial round of comments.) In light of this information, the following are ten key compensation disclosure fixes that issuers need to consider now for their upcoming 2008 proxy statements.

Focus on Analysis

[illegible]

Issuers should not wait until the first draft of the proxy statement to focus on its analysis for the CD&A. The compensation committee needs to understand the necessity of articulating a rationale for compensation policies and individual compensation decisions—before decisions are made—and issuers must ensure that disclosure controls and procedures are in place to capture the rationale behind the decisions in order to facilitate the analysis in the CD&A. Compensation committees should have tally sheets, including a wealth accumulation analysis, in hand when making decisions, and—consistent with the Staff's recent comments—issuers should describe the committee's use of this important tool and the extent to which the committee increased or decreased compensation based on the tally sheets.

Highlight the CD&A Analysis under its Own Caption

[illegible]

Concentrate on the Individual

Through its review process the Staff has expressed concern with disclosure that glosses over the individual differences—and internal relationships—of compensation for the CEO and each of the NEOs. Aggregating the discussion and analysis of individual NEO compensation can obscure how the compensation committee evaluates the internal pay relationship among its executives and others in setting compensation, including the extent to which the committee analyzes the multiple by which a CEO's compensation is greater than that of other specified employees. As we noted in our September-October 2005 issue (at pg 4), internal pay equity is a critical consideration for compensation committees when considering and setting executive pay, and is essential to providing perspective whenever benchmarking against other companies is considered or presented.

[illegible]

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[illegible]

Disclose Performance Target Levels Whenever Possible

Issuers should disclose incentive plan performance target levels (preferably using a comparative table), rather than seeking to rely on the competitive harm exception. The use of Instruction 4 to S-K Item 402(b) needs to be limited to those situations where the target levels or other factors are, in fact, competitively sensitive. For example, performance target levels tied to short-term business plans or tied to a potential merger may satisfy the competitive harm test and warrant withholding the information. By contrast, it is difficult to justify competitive harm when a target level is based simply on earnings per share or total shareholder return.

[illegible]

Make Benchmarking Disclosure Meaningful

A complete description of the issuer's benchmarking process (including details of the selected comparator groups) is necessary for an understanding of this element of compensation decision-making. The relative importance of the benchmark data and the targeted percentiles (including targeted percentiles pegged to individual elements of compensation) in the overall compensation-setting process needs to be fully discussed.

[illegible]

Address the "Real" Tax and Accounting Implications

In many cases this past proxy season, issuers included in their CD&A only the same general references to Code Section 162(m) compliance that were a staple of the old Compensation Committee Reports. A description and analysis of the actual tax and accounting consequences and implications driving executive compensation policies, practices and decisions is often difficult to find.

[illegible]

More discussion of accounting implications is also warranted, including how accounting concerns (*i.e.,* expensing of equity awards) may influence the allocation of individual elements of compensation.

Provide the Whole Termination and Change-in-Control Picture

While S-K Item 402(j) provides some flexibility for presenting the termination and change-in-control disclosure, a tabular presentation appears to be preferred by the Staff and seems to work best for providing the disclosure in an understandable manner.

[illegible]

An important component of the compensation committee's analysis—which needs to be reflected in the disclosure—is the extent to which other elements of pay are factored into determining the contemplated termination or change-in-control compensation. Such consideration of *wealth accumulation* should be

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critical to the overall determination of elements and levels of compensation and thus needs to be fully described in the CD&A.

Provide the "Walk-Away" Number

Item 402(j) may not literally require that the amounts payable under termination and change-in-control arrangements be totaled. But under the SEC's "principles-based" disclosure framework, if an issuer does not provide an aggregate figure, it is providing only part of the story. Focusing the disclosure on an expected total walk-away number that the NEO is entitled to upon a termination or change-in-control event is the best means for avoiding any unwanted "surprises" down the road if any of these provisions are ultimately triggered. This disclosure approach should parallel the considerations of the compensation committee, which needs to be equipped with "walk-away" numbers—including all vested amounts—when making any decisions about whether to establish, modify or keep any termination or change-in-control arrangements.

Maximize the Utility of the Compensation Tables

Making permissible modifications to the tables and providing additional narrative disclosure can facilitate a better understanding of the information. Based on our observations from the last proxy season and suggestions from our readers, some of these changes should include:

- Text leading up to the table providing a "tutorial" on how to interpret the data presented in the table (for instance, accounting concepts that are relevant to understanding the amounts reported for equity awards and their impact on the numbers are best presented in the lead-up to the Summary Compensation Table). (See Citigroup's 2007 proxy statement.)
- In presenting information about equity awards in the SCT, visual aids (such as different fonts or offsetting colors) can be used to help investors understand the differences between the amounts that are actually earned and received in the last completed fiscal year and the amounts that the executive officer has an opportunity to earn in the future. (See Schering-Plough's 2007 proxy statement.)
- In the Outstanding Equity Awards Table, additional disclosure showing the unrealized value of outstanding stock options (calculated by determining the difference at fiscal year-end between the market price of the underlying securities and the exercise price). While the SEC eliminated this requirement under the new rules, the information presented in the table is much more useful if the unrealized value is separately presented, rather than requiring the reader to compute the number.
- A "grant date" column in the Outstanding Equity Awards Table, in order to facilitate the presentation of the vesting date information following the table. The same concept may also be applied to identify the performance period for each performance share award as a way of relating these awards back to the CD&A.
- An "accrued benefit" column or other supplemental disclosure in the Pension Benefits Table in order to explain the amount of benefits that NEOs could receive upon retirement or upon termination. This disclosure can then facilitate the discussion of pension benefits in the termination and change-in-control section.

Fully Describe NEO and Consultant Involvement

Disclosure about the role of the CEO (or other executive officers, as applicable) in the compensation process needs to include a discussion of the ability of the CEO to call or attend compensation committee meetings, whether the CEO met with the compensation consultant used by the compensation committee, whether the CEO had access to any other compensation consultant who influenced executive compensation and the degree of input the CEO had in developing compensation packages.

Individualized disclosure about the engagement of each compensation consultant is necessary for any consultants involved in setting executive and director pay (not just the consultant engaged by the compensation committee). While not specifically contemplated by the rules, disclosure should also be included about actual or potential conflicts of interest or any other independence concerns about the compensation consultant, as this is an area that some investors have focused on.

The Need for Action Now

Expectations will be even higher this coming proxy season—therefore, issuers need to be preparing today for these potentially significant changes to their disclosure. Even if an issuer has not yet received a comment letter, it still needs to determine what fixes must be made now, so that the compensation committee and others can be fully prepared as the proxy season approaches.

—JMB/DL

The October 9 and 11 Conferences. In view of the SEC's heightened focus on this coming year's proxy disclosures, we would urge all our readers to attend—via the Nationwide Webcast—the October 9th Conference—"Tackling Your 2008 Compensation Disclosures." And—with the SEC targeting every company's CD&A—be sure to register for the October 11th Conference: "Lessons Learned" Necessary Compensation Fixes—Impacting Your Proxy Disclosures.

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NEW DEVELOPMENTS

Staff Affirms "No-Sale" for Restricted Stock

In the lead item in our July-August 2005 issue, we wondered whether the Staff was maybe backing away from the application of its bonus stock/no-sale position to restricted stock/RSUs. Thus, we were pleased to see the Staff's apparent affirmation of no-sale in this context, in *Verint Systems Inc.* (May 24, 2007).

[illegible]

Disclosure, Etc. Concerns

The Staff seemed to have no problem with the basic, no-sale premise. Rather, the drill here involved fitting Verint's *extremis* situation into the no-sale bottle, *i.e.,* the three standard conditions: 1934 Act reporting company, stock actively traded, and relatively small number of shares (see our January-February 1980 issue at pg 6).

[illegible]

Satisfying the Three Conditions Even Though in Extremis

Verint had been delinquent in its 1934 Act filings since not filing its 2006 Form 10-K (resulting from Verint's ongoing investigation of options backdating and other accounting problems) and, when it submitted its no-action request, was about to not file its 2007 Form 10-K filing. Thus, because Verint was ineligible to use S-8, etc., "no-sale" was key (Rule 701 not being available, because Verint was still subject to reporting requirements). Verint's stock had also been de-listed by Nasdaq, so trading was limited to the pink sheets.

[illegible]

Verint's *extremis* posed questions, however, with both the 1934 Act reporting and actively-traded "no-sale" conditions: Is a materially delinquent issuer (here, two 10-Ks) still a 1934 Act reporting company in this context? Can a de-listed stock be actively traded? Verint ended up addressing these concerns, apparently to the Staff's satisfaction, by conditioning vesting not only on continuing service but also on (i) Verint becoming "current with its 1934 Act reporting obligations" (presumably, 12-month currency) and (ii) the re-listing of its common stock.

[illegible]

We don't know whether the Staff ended up requesting this resale restriction/registration requirement in the dialogue that followed Verint's initial request letter, or whether Verint proposed it upfront. Request letters are still submitted non-publicly, whether in original and seven copies per Rel. No. 33-6269 (December 5, 1980) or, these days, via e-mail to the Staff at cfletters@sec.gov; unfortunately, the public never gets to see the earlier iterations of request letters, which would provide insight as to counsel's "negotiations" with the Staff.

Could Verint Have Made Option Grants?

[illegible]

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[illegible]

Does Anyone S-8 Eligible Not Register RS/RSUs?

Verint needed to rely on "no-sale." We would like to hear from any readers who actually rely on "no-sale" for restricted stock even though eligible to register.

Accounting and Section 16(a) Impacts of Verint's Unusual Vesting Conditions

[illegible]

If Verint had included executive officers in its grants (whether as non-negotiated no-sales or per, *e.g.,* Section 4(2)), when would the grant occur for Section 16 reporting purposes? Alan Dye tells us that, where conditions are not substantially likely to occur, and beyond the control of the insider, the grant doesn't occur until the conditions are (or become likely to be) met. But where, instead of RSUs, shares of restricted stock actually are issued upfront (with dividends, voting, etc.), there are arguments both ways.

Use of S-3ASR instead of S-8 to Register Stock Plan?

[illegible]

Availability of S-3 for Options, Etc.

S-3 General Instruction I.B.4 specifically allows even non-primary S-3 issuers to use S-3 to register the exercise of *outstanding* warrants or options, provided the issuer delivers certain information to participants (*e.g.*, annual report to security holders). But, because I.B.4 applies only to outstanding securities, it doesn't seem to fit the bill for a stock plan, *e.g.*, for grants not yet made. Moreover, I.B.4's information delivery requirements could be onerous compared to S-8.

Automatic Effectiveness

[illegible]

S-3 Negatives

Filing of Prospectus. Perhaps the most significant S-3 detriment/S-8 benefit is S-8's non-filing of "prospectus" material (which, for some reason, hasn't deterred Google from using S-3 despite Google's well-known proprietary proclivities; one needs to look no further than some of the information in Google's stock plan prospectus filings to see the kind of detail that using the S-3 causes to be filed). Section 11 liability does, however, apply to the S-8 "prospectus." [A "free-writing prospectus" (for an S-3, etc.), even though filed, is not subject to §11 liability (because, per Rule 433(a), it is a Section 10(b) prospectus, not §10(a)). See Rel. No. 33-8591 (July 19, 2005) at III.D.3.b.iii.(G). In a sense, an S-8 involves a collection of FWPs which, even though not filed, are collectively deemed to be a §10(a) prospectus subject to §11 liability.]

1934 Act Delinquency Results in Ineligibility to File or Renew S-3 at the Section 10(a)(3) Deadline. [illegible]

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[illegible]

Impact of Loss of WKSI Status. The issuer may lose WKSI status from, among other things, a 1934 Act delinquency, or if its public float falls below $700 million. In the event of a loss of WKSI status, a stock plan S-3 ASR would have to be amended onto a 1933 Act form for which the issuer is then eligible.

S-3 Not Available for Registration of Plan Interests. [illegible]

ERISA. If a plan is subject to ERISA, ERISA imposes information delivery requirements (a "summary plan description") in addition to those of the 1933 Act. In the S-3 context, that ERISA information would be additional prospectus material (required to be filed).

A Few S-3 Positives

S-3ASR Registers an Unlimited Amount of Securities. [illegible]

Pay-As-You-Go. Moreover, with an S-3ASR, the issuer can pay registration fees on an as-needed basis, per Rule 456(b). With S-8, the issuer must pay a registration fee for the entire amount of securities registered at the time of filing (although unused fees can be re-used).

Electronic Prospectus Delivery. [illegible]

Bottomline, we don't expect a wave of WKSIs using S-3ASRs to replace their S-8 stock plan registration. Maybe we will know more after hearing from Google at the October 10 "Google and Transferable Options—The Next 'Big' Thing?" session at the NASPP Conference in San Francisco, October 9-12.

Rule 14a-8 Proof of "Record" Ownership—Staff Says No to Investment Advisor Affirmation

[illegible]

We think it's another matter entirely, however, for the Staff to "interpret" objective, bright-line procedural requirements of the rule in a way that ignores the clear language of the rule. We were, therefore, pleased to see the Staff take the position that a proponent may not satisfy the rule's requirement to provide proof of "record" ownership of securities by delivering a statement from the proponent's "investment advisor" "verifying" the proponent's stock ownership. (See *CIGNA Corporation*, February 21, 2006.)

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Broker Affirmation of Street Name Holding Still OK

As our readers may recall (see our November-December 2001 issue at pg 6), Rule 14a-8(b) provides that, to be eligible to submit a shareholder proposal, a proponent must have continuously held a minimum of $2,000 in market value of the issuer's securities entitled to be voted on the proposal for a minimum of one year prior to submission. If a proponent holds issuer securities in street name, the rule requires the proponent to establish compliance with the stock ownership requirement by submitting to the issuer written proof of ownership from the "record" holder of the securities.

[illegible]

Investment Advisors

While we are sympathetic to the exigencies that may have led the Staff to *Dillard* (it would be burdensome to require CEDE & Co. to trace its holdings to individual proponents), we would not want to see the "record" holder requirement completely read out of the rule (*i.e.,* by Staff interpretation). Otherwise, a proponent's statement of eligibility (many of which prove to be wrong, even when made in good faith) could not be verified, by either the issuer or the proponent.

[illegible]

Other Bright-Line 14a-8 Requirements Previously Upheld By the Staff

The *CIGNA* letter should come as no surprise, of course. The Staff generally seems to recognize the need to provide some certainty (and fairness to both sides) to the shareholder proposal process (not to mention the limitations on the Staff's authority), by enforcing the unambiguous procedural requirements of the rule even where the proponent barely misses. The Staff has, for example, allowed exclusion of proposals where (1) the proposal arrived one day after Rule 14a-8(e)'s deadline for submission (*Hewlett-Packard Co.*, November 9, 1999), (2) the proponent misdirected the proposal to the issuer's transfer agent, which forwarded it to the issuer two weeks later for arrival one day late (*Coca Cola Co.*, January 10, 2001), (3) the value of the proponent's holdings of issuer securities was slightly less than $2,000 (*Sabre Holdings Corporation*, January 28, 2004), (4) the proponent held non-voting instead of voting common stock (*McCormick & Co.*, November 14, 2005), and (5) the proponent owned the required number or value of voting securities for only 359 days prior to submitting the proposal (see *Sizeler Property Investors, Inc.*, September 16, 2005). We don't expect to see any erosion in this aspect of the Staff's administration of Rule 14a-8.

Posting (Next Year) of Shareholder Proposal No-Action Letters, Finally

[illegible]

Former Corp Fin Deputy Director Marty Dunn, who oversaw the 14a-8(i) process, also pointed out that Staff responses (and the issuer's underlying request, as well as the proponent's letter) are published in paper at

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the SEC's Public Reference Room in DC (no longer at any regional office) immediately after the Staff issues its response (until 1988, there was a general 30-day publication delay for all no-action letters), and that the publication services (*e.g.*, Lexis and LivEdgar) immediately scan and post them electronically. Note that Rule 82 requires that materials filed with the SEC (and related written communications) regarding shareholder proposal no-action letters, and the Staff's response thereto, be made available upon request (Rule 81 governs other no-action letters). There is no longer any confidentiality request/delay process here.

[illegible]

Filing Form T-1 After S-3 Effectiveness—Don't Use Form 8-K

The Staff's new 1939 Trust Indenture Act Compliance and Disclosure Interpretations suggest that some issuers may need to change the way they file a Form T-1 in connection with a shelf takedown of debt securities.

Background—The Form T-1 Filing Requirement

[illegible]

Delayed Offerings—When/How to File the T-1

When an issuer includes debt securities in a universal or automatically effective shelf registration statement, the issuer might not have selected the indenture trustee at the time the S-3 is made effective, planning instead to retain a trustee only when and if the issuer takes debt off the shelf. In those cases, the issuer must file the Form T-1 as an exhibit to the registration statement, when the trustee is later identified (see 1939 Act Rule 5b-1). This sequence of events is contemplated by 1939 Act Section 305(b)(2), which provides that, in a "delayed offering," the indenture trustee's statement of eligibility does not have to be filed with the registration statement, but instead may be filed later "in accordance with such rules and regulations as may be prescribed by the Commission."

[illegible]

The Commission's rules do not, however, expressly contemplate the filing of Form T-1 as an 8-K exhibit. Instead, as provided in Volume II of the EDGAR Filer Manual, the T-1 should be a standalone filing, under the electronic form type "305b2" (adopted in Rel. No. 33-7122 (December 19, 1994)). Mindful that some issuers have not complied with this requirement, the Staff has driven it home in two new interpretations, along with an admonition that the T-1 should not be filed by Form 8-K. (See 1939 Act CDI Question 103.01 and Interpretation 220.01.)

Effective Date of Form T-1—Ten-Day Wait?

[illegible]

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Updating the Exhibit 5 Legality Opinion at Each Shelf Takedown

While on the subject of updating S-3 exhibits via Form 8-K, we learned recently that some counsel consider it unnecessary to update the Exhibit 5 legality opinion for each takedown under a shelf S-3. We don't agree, at least where the opinion filed with the S-3 at the time of effectiveness was based on assumptions regarding the board of director's approval (down the road at the time of each takedown) of the issuance, price or terms of the registered securities. While the Commission allows issuers to satisfy the S-K Item 601(b)(5) exhibit requirement upfront, at the time of effectiveness (or, with an S-3ASR, at the time an additional class of securities is added by post-effective amendment—see the Securities Offering Reform FAQs (November 30, 2005) at Q.20, which also requires a signed opinion covering the specific securities "no later than the time of offering the securities"), by filing a qualified opinion (*i.e.,* one that assumes, *e.g.,* board approval of takedown and offering price), the Staff requires that the issuer file an updated (*i.e.,* offering-specific) opinion in connection with each takedown. (See Rel. No. 33-6714, n.47, June 5, 1987, and the TIM, at D.11, both of which were highlighted in an ABA Special Report published in the August 2004 issue of *The Business Lawyer*, at pg 1511-12.) As these authorities make clear, however, the updated legality opinion may be filed as an 8-K exhibit.

Disclosure of Short Positions on Form 13F?

[illegible]

Several readers pointed out that 1934 Act Section 13(f) was also mentioned at the hearing as possibly being relevant here. We don't think §13(f) requires "short" disclosure either.

Who Must File Form 13F?

[illegible]

Report "Holdings." Form 13F must be filed within 45 days after the end of each calendar quarter, listing "holdings" of all 13(f) securities over which the institutional investment manager has "investment discretion." The term "13(f) securities" is defined in Rule 13f-1 to include any equity security of a class described in Section 13(d)(1) (generally, any class registered under Section 12) that is admitted to trading on a national securities exchange (*e.g.,* the NYSE or Nasdaq) or is quoted on the automated quotation system of a registered securities association. The SEC makes it easy, by publishing on sec.gov a comprehensive list of 13(f) securities each quarter, as mandated by Section 13(f)(3).

[illegible]

13F Holdings Not Necessarily Beneficially Owned—Investment Discretion vs. Investment Power

While on the subject of Form 13F, we are often asked whether, when an institutional investment manager discloses on Form 13F a holding of more than five percent of an issuer's stock, the issuer should identify the investment manager as a greater than five percent owner in the S-K 403 beneficial ownership table. Our answer has always been "no," unless the investment manager also files a report on Schedule 13D/G reporting "beneficial ownership" of more than five percent of the class.

[illegible]

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1934 Act Section 3(a)(35) (see also Q.6 of the Division of Investment Management's May 2005 FAQs on Form 13F) provides that a person has "investment discretion" over an account if the person (i) is authorized to determine what securities will be purchased or sold for the account or (ii) makes decisions as to what securities will be purchased or sold for the account, even if some other person has responsibility for investment decisions. In our experience, some institutional investment managers consider themselves to have investment discretion over securities of which they are not "beneficial owners" under Section 13(d) or 13(g) (*e.g.,* where the manager buys, sells and holds issuer securities pursuant to a rabbi trust that dictates voting and investment decisions). [Our readers may recall that a rabbi trust is a trust set up by an issuer to hold issuer assets (subject to creditor claims) for distribution to participants in an unfunded, non-qualified deferred compensation plan.] Accordingly, issuers are not required to, and should not, look to Forms 13F for beneficial ownership information. That's why Instruction 3 to Item 403 says that issuers may rely on Schedules 13D and 13G for beneficial ownership information, but makes no mention of Form 13F.

When Does a Reporting Delinquency Occur?—Clarification

In pointing out (in our March-April discussion at pg 3) that a missed 8-K has the same effect on S-3 (and S-8) eligibility as a missed 10-K or 10-Q, we noted that, a late 8-K usually can be filed "soon enough" (*i.e.*, before a takedown) to assuage disclosure concerns. In doing so, we may have suggested that the timeliness clock for an 8-K delinquency doesn't restart until the 8-K is filed.

California's Listed Issuers/Securities Exemptions Updated

California's blanket exemption for securities listed on an exchange certified by the Commissioner of Corporations, and its non-issuer transaction exemption for all securities of issuers with a security listed on an exchange certified by the Commission, have long been in need of some fine tuning, despite NSMIA's purported pre-emption of state law qualification for "covered securities" (see our July-August 1997 issue at pg 5).

Background

Section 25101(a) provides for a similar certification, exempting any securities of exempt listed issuers from California's peculiar Section 25130 requirement for issuers to file an annual notice in order to exempt "non-issuer" transactions in their securities occurring in the state. The history here is similar to that of Section 25100(o).

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Recent Certification of Nasdaq Global Select Market and Nasdaq Global Market

[illegible]

Note that §25100(o) applies to securities approved for listing (*e.g.,* in an upcoming IPO), whereas §25101(a) only applies after listing has occurred. And, §25101(a) is not available to non-issuer transactions registered under the 1933 Act (*e.g.,* a secondary offering).

[illegible]

How the Nasdaq Capital Market (formerly, SmallCap) Fits In Here

Effective May 24, 2007, SEC Rule 146(b) was amended to add securities listed on the Nasdaq Capital Market to the list of "covered securities" pre-empted by 1934 Act Section 18 from state securities regulation (NSMIA) and state anti-fraud claims (SLUSA). (See Rel. No. 33-8791, April 18, 2007.) This essentially renders moot California's non-certification of the Nasdaq Capital Market, except for those (*e.g.,* Keith Bishop) still concerned that NSMIA's pre-emption might not extend to rights to purchase, etc. The Commission did not pick up on the recommendation of the 2006 Advisory Committee on Smaller Public Companies to also add the OTCBB to 146(b). (See our May-June 2006 discussion at pg 8.) [In the 146(b) adopting release, the SEC does appear to "confirm" Nasdaq's position that the GSM is a segment of the GM and, therefore, that both are considered successors to the NMS within the meaning of Section 18.]

Rule 144—Acting in Concert Under a 401(k) Plan

[illegible]

Rule 144 applies to market sales by the administrator of the issuer's 401(k) plan where the sales result from an affiliate's election to transfer or withdraw funds from the plan's issuer stock fund, *i.e.,* the sales are for the account of the affiliate. (See *Rohr Industries*, August 27, 1985.) Ordinarily, though, when an affiliate elects to transfer or withdraw funds from an issuer stock fund, the plan administrator avoids having to comply with Rule 144 by (i) matching (or "netting") the affiliate's sales with issuer stock fund purchases for the account of other plan participants, on a book-entry basis, and (ii) allowing any net sales into the market to be allocated to non-affiliates. (See our November-December 1993 issue at pg 1.)

[illegible]

If selling affiliates were deemed to be "acting in concert," however, their sales would be subject to aggregation (see Rule 144(e)(3)(vi)), meaning that the total number of securities sold for all affiliates could not exceed the volume limit. At its 2004 meeting with the Staff, the ABA's Joint Committee on Employee

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Benefits asked the Staff whether affiliates would be deemed to be acting in concert where the plan (i) placed a limit on the aggregate number of shares of issuer stock that could be sold in the market at one time (to maintain an orderly market for a thinly traded stock), and (ii) provided for a pro rata cutback if total proposed sales would exceed the plan limit.

[illegible]

Existence of Agreement

Although the JCEB's question posited that none of the plan participants would enter into an agreement with any other plan participant, the Staff's favorable response was not a foregone conclusion. Way back when Rule 144 was a newborn, the Staff declined to grant no-action relief where an issuer proposed to get 20 holders of restricted securities to agree not to sell more than a specified number of shares each month, "to preserve an orderly market for everyone's benefit." (*Damson Oil Corp.*, April 13, 1972). There, too, the sellers were to become subject to an agreement *with the issuer,* and not with each other, although it was clear that the purpose of the proposed agreement was to benefit all parties to the agreement (as well as all other shareholders).

Aggregation With Other Plan Participants?

[illegible]

The Upcoming Issue of *The Corporate Executive*

Because our readers will not want to wait two months between issues, and because most of our readers already subscribe to both *The Corporate Counsel* and *The Corporate Executive,* we will blur the lines and continue our proxy disclosure guidance from one issue to the next.

Any readers (or colleagues) who do not subscribe to both newsletters are encouraged to enter no-risk trials to keep abreast of the ongoing proxy disclosure developments and our guidance. (Right now, you can receive the newsletters free for the rest of the year when you try a 2008 No-Risk Trial.)

It's Renewal Time

As all subscriptions are on a calendar year basis, renewal time is upon us. Please return the enclosed renewal form (or renew at TheCorporateCounsel.net) ASAP. And, don't forget that this year, in particular, you will also need *The Corporate Executive.*

The October 9 and 11 Conferences

In view of the SEC's heightened focus on this coming year's proxy disclosures, we would urge *all* our readers to attend—at least via the Nationwide Webcast—the October 9th Conference—"Tackling Your 2008 Compensation Disclosures." Just as critical now—with the SEC targeting every company's CD&A—be sure to register for the October 11th Conference: "Lessons Learned" *Necessary Compensation Fixes—Impacting Your Proxy Disclosures* (also in San Francisco and via Nationwide Live Video Webcast).

See you there!

—JMB/MG

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