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HIGHLIGHTS AND PITFALLS

The Commission's Useful Integration (Rule 152, etc.) Guidance in August's Reg D Proposing Release

As our readers know, the SEC has been busy adopting rules targeted at facilitating capital raising by smaller issuers (implementing, more or less, some of the recommendations of the 2006 Advisory Committee on Smaller Public Companies). One proposal that hasn't yet reached the finish line (but, is expected to be adopted shortly) is for a number of long-needed changes to Reg D, including (i) a new [illegible]exemption" in revised Rule 507 for an offering only to a new "large accredited investor" category, tha[illegible]ermit limited general solicitation via tombstone-like advertising, (ii) clarifications to the "accred[illegible]definition, and (iii) shortening of Reg D's integration safe harbor time period from six mo[illegible]ell as extension of "bad-boy" disqualifications from just Rule 504 to all offerings und[illegible]828, August 3, 2007.) (Under the proposal, the contents of current Rule 507, [illegible] Rules 504, 505 and 506, will move into Rule 502(e).) Changes to Fo[illegible]December 11, 2007.

The SEC has not specifically addresse[illegible]the adoption of Rule 155 in 2001, relating to public to private, etc. ([illegible]01 issue). While the Commission didn't propose the Advisory Com[illegible]rame for the integration safe harbor, the Commission did embrace, [illegible]n II.C.1), the Committee's suggestion to provide interpretive advice (amplify[illegible]ns—see below) concerning one-sentence Rule 152's safe harbor from loss of the [illegible] otherwise private offering that, but for the safe harbor, might be integrated with an e[illegible]ffering. (See our May-June 1994 issue at pg 3.)

This enhanced interpretive guida[illegible]currently applicable, and thus there is no need to wait around for the adoption of the Reg D change[illegible]to apply the guidance. Moreover, unlike in some situations where the SEC has provided substantial interpretive guidance (such as for determining what is a perquisite in the 2006 executive compensation proposing release, Rel. No. 33-8655), the SEC did not seek any comments on this guidance, so the proposing release text appears to be the Commission's definitive statement on these issues.

Verticom Affirmed

The Advisory Committee had expressed concern about the availability of Rule 152's integration safe harbor in the situation where an issuer effects a private placement when it is planning a subsequent registered offering (*e.g.,* an IPO), given the language in Rule 152 referring to when an issuer "decides" to make the public offering and/or file a registration statement. The Staff dealt with this issue long ago in *Verticom, Inc.* (February 12, 1986), where it indicated that a private placement under §4(2) or Rule 506 would not be integrated with a public offering planned at the time of the placement, even where the registration statement is filed immediately after completion of the private offering. (See our March-April 1986 issue at page 5.) Nonetheless, the Advisory Committee requested clarification (and also suggested extending the Rule 152 safe harbor to an offering under Rules 504 or 505 of Reg D, *i.e.,* immediately prior to a public offering).

The SEC obliged the Committee's first request (but, not the second), clarifying Rule 152's "subsequently decides," essentially affirming *Verticom*, noting that the Commission is of the view that "a company's contemplation of filing a Securities Act registration statement for a public offering at the same time that it is conducting a Section 4(2) exempt private placement would not cause the Section 4(2) exemption to be unavailable for that private placement." (The one caveat that the SEC threw in (which was not expressed in *Verticom*) is that any pre-filing communications relating to the proposed public offering might render the §4(2) exemption/Rule 506 safe harbor unavailable for the private placement, presumably on the theory that communications which might be otherwise permissible in the pre-registration context from a gun-jumping perspective might still, not always, be viewed as general solicitation or general advertising for the private placement.)

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From Staff Interpretation to Commission Interpretation.

Black Box/Squadron, Ellenoff Expanded

However, the more useful aspect of the SEC's new integration guidance (which arguably breaks some needed new ground) derives from what was essentially an afterthought in the Committee's report. In note 207 in the report, the Advisory Committee cited a comment from Mike Halloran (now at the SEC as Deputy Chief of Staff and Counselor to Chairman Cox) that issuers sometimes face private capital-raising difficulties during the IPO process when they can't attract QIBs or large institutional buyers and thus cannot rely on the Staff's additional integration interpretive gloss in the *Black Box* (June 26, 1990) and *Squadron, Ellenoff* (February 28, 1992) letters (see our November–December 1994 issue at pg 3), which clarify that the private offering need not actually be closed by the registration statement filing date (*Black Box*) and, as a policy matter, go beyond Rule 152, allowing (concurrent with the pending registration) a private offering involving only QIBs and "no more than two or three large institutional investors" as offerees (*Squadron, Ellenoff*).

No General Solicitation for the Private Placement. Now, the SEC indicates that the analysis needn't focus exclusively on the status of the investors (*i.e.,* QIBs or large institutional investors), but rather should focus on whether the registration statement served as a general solicitation for the particular private placement investors to whom the securities were offered and sold. Thus, the SEC's new interpretive view not only raises *Black Box* and *Squadron, Ellenoff* to Commission interpretation status, but is more expansive (no doubt, thanks in part to Halloran's current status).

Staff Review of IPOs, Etc.

The interpretive guidance from the Commission in Rel. No. 33-8828 is generally consistent with the practical approach that the Staff has taken in the real world when reviewing IPO registration statements (as opposed to no-action letters, etc., where the Staff generally tends to be more reticent given the precedent implications). Usually, the Staff reviewing registration statements consults with the Chief Counsel's Office on integration issues; in fact, the OCC Staff generally sees as their top priority assisting the Staff with issues arising during the review of registration statements.

Private to Public (or Public to Private). The release indicates that nothing in the Commissions's interpretive positions should imply that an issuer can start an offering privately and finish it publicly, or vice versa, other than as permitted under Rule 155 for an abandoned public or private offering.

Musing About the Mangan/Gryphon Effect Here

We're going to try not to do this every time, but we got to wondering what effect this new Commission guidance might have on a court faced with the question of integrating (or not) a private offering with an

IPO. [Posit litigation by private investors seeking integration of their private offering in order to support a claim for rescission under 1933 Act Section 12(a)(1). (In a case brought by the SEC involving this guidance, it wouldn't be likely that the defendant would be seeking to disregard this new, more liberal guidance that arguably goes beyond Rule 152 and the five-factor test.)]

The court would look at (i) Rules 152 and, possibly, 502(a), and might also look at (ii) the Staff's "gloss" in, *e.g., Verticom, Black Box* and *Squadron, Ellenoff*, and now (iii) the Commission's affirmation of that Staff guidance and its expansion as discussed above. There may be a difference here from *Mangan/Gryphon* (see our November-December 2007 issue at pg 6) in that there are applicable 1933 Act interpretive rules, adopted by the Commission pursuant to its general regulatory authority in Section 19(a). But, *Verticom* to "Halloran," which go significantly beyond Rule 152's "subsequently…the issuer decides to make a public offering," might have no effect on the court beyond the "power to persuade."

Mangan/Gryphon didn't have an interpretive or safe harbor rule to consider. But, there *was* a "rule," *i.e.,* Section 5, that the Staff/Commission had interpreted/glossed many times; the courts simply ignored all that gloss. Stay tuned.

Yet Another Statutory Basis for a Reg D Offering: Section 28

While some think of Reg D as a safe harbor for the private placement exemption, only Rule 506 is for a private offering under Section 4(2). Rules 504 and 505, by contrast, are for exempt offerings up to $1,000,000/$5,000,000 (which can, in fact, be public offerings), and were adopted under the Commission's authority to exempt transactions under Section 3(b) based on the lack of investor protection issues given "the small amount and limited character of the public offering." If the abovementioned proposed Rule 507 is adopted as expected, then Reg D would have a new exempt offering under Section 28. [Technically speaking, Rule 507 is an exemption, and not a safe harbor in the sense that Rule 506 is a §4(2) safe harbor; Rules 504 and 505 are §3(b) exemptions, not safe harbors.]

The SEC's General Exemptive Authority

As our readers may recall, NSMIA in 1996 included the grant to the Commission of general exemptive authority under the 1933 Act (via new Section 28) and 1934 Act (Section 36). (See our November-December 1996 issue at pg 6.) Many of us had thought this authority would enable the Commission to re-define/re-interpret the parameters of, *e.g.,* the §4(2) private offering exemption. The SEC's General Counsel apparently doesn't seem to think so; instead, the Commission decided to, in effect, create a new Section 5 exemption.

It is apparent from the proposing release that the Commission was uncomfortable with proposing Rule 507 under Section 4(2) because of the [illegible] "general" solicitation that could be seen as turning an otherwise private offering into a public one (even though the advertising as proposed is very limited, basically a written tombstone that only generally refers to the identity of the issuer and the terms of the offering). The SEC's choice of Section 28 as the basis for Rule 507 implies that it finds even this type of limited communication to be inconsistent with a private offering under Section 4(2), so the Commission seems to be drawing a line for the types of communication permissible in connection with a Section 4(2)/Rule 506 offering.

<u>A Distinction With a Difference—Private Investment Companies.</u> Adopting Rule 507 under Section 28 rather than §4(2) would have collateral consequences for "pooled investment vehicles" (*e.g.,* hedge funds), which are required by the 1940 Act Section 3(c)(1) or (7) investment company exemptions to sell their own securities in a private offering, typically under Section 4(2)/Rule 506. Because the proposed Rule 507 exemption would not be adopted under Section 4(2), pooled investment vehicles might not (absent rulemaking, or perhaps even a 1940 Act amendment) be able to use 507 for the offer and sale of their securities.

PROXY STATEMENT ITEMS

This Year, Preliminary Proxy Filing Can Lead to Real-Time Review of 402/404 Disclosures

Our readers may recall our advice last proxy season that issuers need not consider putting off proxy proposals that would require a preliminary proxy filing (*e.g.,* a charter amendment) for fear of having their executive compensation disclosures be among the first to be reviewed by the Staff (in a situation where timing might be critical). (See our November-December 2006 issue at pg 11.) The Staff had made it clear that they had no interest in reviewing 402/404 proxy disclosures real-time, but would rely instead on the special, *post facto* review (that turned out to be of 350 pre-picked issuers—see our November-December 2007 issue at pg 10). [This is not to say, however, that there haven't been actual, real-time Staff reviews, *e.g.,* in the 1933 Act context (per Form S-1, Item 11 or Form S-4, Item 18).]

Now, with the special review program completed, those bets are off. Thus, a preliminary filing today conceivably might (even though it probably wouldn't) trigger a "full" review that would go beyond the proposal(s) that requires the preliminary filing.

Omitting 402/404 from the Preliminary Proxy?

Moreover, CDI Interpretation 1.04 specifically disallows this omission technique, except the first time an issuer is complying with the new 402, *i.e.,* to ease the transition to new rules. (Essentially, that limited the technique to 2007, because even issuers coming into the proxy system after 2007 usually would have been subject to 402 in their IPO/S-1.) And, if an issuer files a deficient preliminary proxy (*i.e.,* omits 402/404), counsel can't just hold their breath for ten days and then run with it; CDI 1.04 makes it clear that the ten days doesn't even begin to run in that situation.

S-K Item 404(a) Follow-Up—More on Which In-Laws are Related Persons

In our July-August 2007 issue (at pg 8) we discussed whether the spouse of a stepchild of a "primary" related person (*i.e.,* a director, executive officer or greater than 5% owner) is a son- or daughter-in-law (*i.e.,* an immediate family member) of the primary related person, making the spouse a "related person" whose transactions with the issuer are subject to disclosure under S-K Item 404(a). In noting the Staff's position that

Our reader noted that clause (2) seems to be saying that an in-law is a related person only if he or she is a blood or step relation of the primary related person or of the primary related person's spouse. Reading the interpretation that way would mean that the husband of a director's step daughter-in-law is not a son-in-law (because the husband is not related by blood or step-relationship to the director or the director's spouse). We would never have gotten to that result based on the plain language of Item 404(a), but it does seem to be the implication of the Staff's CDI. We plan to take this one up with the Staff.

Audit Committee Involvement in Drafting the CD&A—Why Pile On?

When the 2006 executive compensation disclosure rule changes were first proposed, many commenters (including us—see our January-February 2006 issue at pg 1) argued that the CD&A should appear over the signatures of the compensation committee members rather than as part of the rest of the issuer's disclosures. As our readers know, while the Commission didn't go that route, the final rule does require a "signed" compensation committee report that has the effect of making the compensation committee (also) responsible for getting the CD&A right.

input from the audit committee that can't readily be obtained as part of the full board's review process. Adding an audit committee layer to the CD&A has the potential to add further delay to the compensation committee's already tight timetable, and at the same time add yet another burden to the audit committee's increasingly crowded agenda (which, as our readers know, already includes the MD&A). While audit committee involvement may be a good idea in special situations involving accounting-related matters, we don't see the wisdom of institutionalizing the practice as a checklist item. We'd be interested in hearing what our readers are seeing (or doing).

CD&A—An Executive Summary?

At the recent ABA confab in DC, the Staff seemed to be encouraging a summary to precede the body of the CD&A. Dave Lynn's thought: Unlike its ancestor, the MD&A, the CD&A itself is supposed to be an overview (see both the adopting and the proposing release), so why an overview of the overview? Just do a good overview/CD&A!

NEW DEVELOPMENTS

"Proxy Access"

Last year this time, we were ruminating about majority voting becoming *fait accompli*; this year, we feel a need to weigh in on proxy access. We have trouble with where the Commission has ended up, for 2008 at least. But first, some context.

Unfortunately, the single term "proxy access" is being used to cover (i) a possible one-size-fits-all proposed 14a-8 amendment providing parameters for allowing into the proxy statement a shareholder proposed bylaw amendment that would establish shareholder right of access to management's proxy statement (and proxy card) in order to propose director nominees (and thereby run an election contest inside the issuer's proxy statement, with attendant contest-type disclosure requirements) (Rule 14a-8 is a federally created right of shareholder access to the proxy statement, but not in the director election context.) In 2007, the SEC made its second recent (see also 1942 and 1977) aborted attempt at promulgating such a rule; (ii) shareholder access to management's proxy statement under existing Rule 14a-8 in order to propose a precatory resolution or a binding bylaw setting forth the conditions under which shareholders can propose director nominees in management's proxy statement; and (iii) a bylaw or policy adopted by the issuer's board (whether or not in response to a type-(ii) proposal) that provides the conditions for inclusion of shareholder nominees in management's proxy statement.

We understand why the Commission has been unsuccessful in endeavor (i). But, for 2008, issuers are free to deny shareholders access for a type-(ii) proposal, leaving little or no incentive for boards to consider route (iii).

A Little History

From 1990 until the Second Circuit's 2006 decision in *AFCSME v. AIG* (462 F.3d 121), the Staff routinely allowed issuers to exclude type-(ii) proposals on the somewhat circuitous notion that these proposals related to an election contest and, thus, were excludable per 14a-8(i)(8) (even though the Staff considers majority voting proposals not to relate to an election contest—see below). From the adoption of (i)(8) in 1976 until 1990, the Staff went the other way, *i.e.,* not allowing issuers to exclude type-(ii) proposals, but the matter wasn't really in contention back then.

The Staff's post-1990 (circuitous) position is that, if a type-(ii) proposal were adopted and then resulted in inclusion of shareholder nominees in management's proxy statement, the separate solicitation requirements of Rule 14a-12 and the contest disclosure requirements of Schedule 14A, Items 4(b), 5(b) and 7, could be circumvented (i.e., that the proposing shareholders would be allowed to argue for their nominees within management's proxy statement rather than in a separate proxy solicitation governed by Rule 14a-12). Majority voting proposals, on the other hand, don't result in an election contest in the sense of there being more nominees than seats (interestingly, mandated shareholder access would result in less majority voting in that, as we have discussed, most majority voting provisions switch to plurality where there are additional nominees.)

The same concern, i.e., contest within the proxy statement, would seem to apply to a type-(iii), board-adopted bylaw. Instead of allowing exclusion of type-(ii) proposals, why couldn't the Staff/Commission see fit to re-jigger its disclosure rules to apply also to in-proxy contested elections?

AIG came along and held that the Commission/Staff couldn't allow issuers to exclude type-(ii) shareholder proposals, because the Commission hadn't adequately articulated its 1990 change in policy. For 2007, the Commission took a no-position position, essentially allowing issuers to exclude (absent litigation). Then, in

July 2007, Chairman Cox came up with a supposed solomonic proposal, that included a type-(i) rule or, alternatively, tweaking (i)(8) to codify the Staff's 1990-2006 exclusion position. On November 28, recognizing that type (i) isn't currently viable, the Commission amended (i)(8); Cox says he expects this to be only a 2008 position.

Cutting across the legal landscape here, the Supreme Court's holding in *Long Island Care at Home, Ltd. v.*

What Will Happen When Shareholders Submit Type-(ii) Proposals For 2008?

The Staff's no-position position in 2007 essentially left it up to the issuer and the proponent, or the courts if the issuer insisted on exclusion (with the outcome unknown, except inclusion in the Second Circuit), to decide whether a type-(ii) proposal went into the proxy statement; apparently following "dialogue," only three such proposals were submitted in 2007. At the best known (Hewlett-Packard), the vote was 43% in favor. A non-binding proposal at UnitedHealth received 45% support, while the third proposal (Reliant Energy) was withdrawn.

For 2008, the same kind of dialogue may well result but, after the Staff grants the issuer a no-action letter,

State Law Required Access? While state laws generally allow shareholders to nominate directors at the annual meeting, North Dakota may be the only state that mandates shareholder access to the proxy statement for this purpose. (See ND Century Code Chapter 10-35-08.) [As mentioned in our November-December 2007 issue (at pg 4), North Dakota also mandates shareholder call of a shareholder meeting. We wonder how many reporting issuers are domiciled in North Dakota!]

Our Take

An SEC-mandated access rule may be a bad idea (one size doesn't fit all), but shareholder ability to propose nominees in the proxy statement is a subject that should be able to be vetted company-by-company, even though several developments arguably have significantly reduced the need for in-proxy shareholder nominees in the interim since access first became a hot topic in 2003 when the Commission proposed Rule 14a-11: Majority voting (which can provide shareholders a meaningful voice short of submitting other

Dialogue, Instead. Governance guru Amy Goodman of Gibson Dunn in DC doesn't think even a board-tailored bylaw is necessary. (We can excuse Amy's leaning to the issuer side, as that is what she does (well) for a living.) Amy says the corporate governance folks at the issuer (*e.g.*, the corporate secretary or other governance officer, and investor relations) should take the initiative and reach out to major shareholders, seeking input on (and possibly suggestions for) the nominee slate. Reg FD concerns with one-on-one meetings may be an impediment here, but should be manageable. (Some issuers still meet one-on-one with analysts.)

Note that, since 2003, Schedule 14A, Item 7(d)(2)(ii)(L) has required disclosure in the proxy statement where a 5% beneficial owner (for one year), or group, has recommended a board nominee to the issuer by the

Bebchuk Shareholder Proposal Follow-Up

In our November-December 2007 discussion of shareholder proposals (at pg 5) we mentioned Lucian Bebchuk's anticipated bylaw proposal that, if adopted, would thereafter authorize virtually any qualifying shareholder proposal couched as a bylaw.

It turns out that the first no-action request seeking to omit Bebchuk's proposal was submitted to the Staff

The Staff's 14a-8 practice, when allowing exclusion under (i), is to choose only one prong of (i). Stay tuned.

Google's TSOs—S-3 Registration Rather Than S-8—Follow-Up

We had wondered (see our September-October 2007 issue at pg 5) whether Google's counsel may have decided that today's S-3ASR is at least as convenient (or maybe more so) than the S-8 for registration of equity compensation plan transactions. At the NASPP Conference, we learned that counsel had no choice: The Staff told Google it must use S-3 for its transferable stock option grants.

It is unclear to us whether the Staff said S-8 is unavailable because (i) the options are transferable or (ii)

Obviously, Google concluded that it didn't make sense to bifurcate TSOs out of its original S-8, in order to continue to register non-TSO grants (*e.g.*, non-transferable options, restricted stock, etc.) separately on S-8, in that the main negative of S-3 registration (*i.e.*, prospectus filing) would still apply as a result of the TSO grants being registered on S-3. (Using a single S-3 probably also helped Google minimize its registration fees—see below.) Google's counsel confirmed that its combo S-3 registers (1) grant of TSOs as well as grant and exercise of non-transferable plan awards, (2) exercise of TSOs by employees who choose (for some reason) not to sell, but instead exercise, their TSOs (usually, via a same-day sale) and (3) the initial, 100% hedging sale by a TSO buyer (which Google confirmed is a primary S-3, with the TSO buyer acting as an underwriter); and that employees' TSO sales are considered exempt under Section 4(1).

Some Additional S-3 Aspects

WKSI vs. Non-WKSI.

Registration Fee Not Doubled. A TSO grant for 100 shares utilizes 100 shares of the stock plan registration, and the resulting hedging short sale of 100 shares seems to utilize an additional 100 shares for the hedging sale registration, even though it's the same 100 shares. Google apparently was able to convince the Staff that it need pay only one fee here: Note (3) to the fee table of its S-3 states: “Shares…that are eligible for the TSO program may either (1) be exercised by the optionee or (2) sold under the TSO program, but not both. Accordingly, the registrant is paying one registration fee based on the total number of shares available for issuance under the… Plan.” [Microsoft, in its 2003 Form S-3 for its similar program relating to employee sales of outstanding underwater options, paid a registration fee of $1.4 million even though, presumably, it had previously paid a registration fee for the grant of those options; we’re talking real money here!]

ABA Subcommittee to Propose S-8 Catch-Up to Other 1933 Act Reforms

As our Google S-8 vs. S-3 dialogue suggests, the S-3ASR and the unallocated S-3 have streamlined and improved the registration process arguably to the point of surpassing the S-8 for convenience, all of which has led the astute ABA Subcommittee on Employee Benefits and Executive Compensation, currently chaired by Ron Mueller of Gibson Dunn in DC, to embark on a project to suggest S-8 fixes to the Staff. The S-8 was last streamlined in 1990. (See our May-June 1990 issue.)

The committee’s preliminary wish list includes making the S-8 universal/unallocated, allowing shares and

originally was discussed back in the Brian Lane era). The Committee would also like to “codify” that customary restricted stock/RSU grant/vesting doesn’t involve a “sale” and, thus, normally would not need to be registered, even by non-delinquent issuers (see our September-October 2007 issue at pg 4).

<u>Eliminating Multiple Auditor Consents.</u> Universal/pay-as-you-go would avoid filing numerous S-8s, with the cumbersome need to obtain an auditor’s consent each time. Today, a new S-8 might be required whenever a new plan is adopted, a plan is increased, a plan is assumed on an acquisition, or when, *e.g.,* 401(k) plans are combined.

Stoneridge!@#$%

Over the course of our careers in securities law, who among us hasn’t been asked by an issuer-client about the issuer having been requested to participate in a transaction that is designed primarily to provide an accounting benefit to a counterparty? *E.g.,* a major supplier wants the client to enter into a current purchase that will be reversed (or price-adjusted down) in a subsequent accounting period. The question, of course, is what exposure the client might have as a participant in the supplier’s accounting “planning.”

To us, the question here is not whether *Central Bank* is good law, but whether the client we posit is merely an aider/abettor. Imagine four or so persons in a conference room plotting the subject scheme, *e.g.,* the supplier, its investment banker, the aforementioned client, and maybe the supplier’s auditor. The supplier obviously is a principal in this fraud; so is the audit firm (their name is on the audit). But, isn’t the issuer-client a principal, too?

Legislative Solution?

Perhaps affirmation by the Supreme Court will now spark more outrage than *Central Bank* did, leading to a push for legislated aider/abettor civil liability (which the Court acknowledged would change the result). But, that may be easier said than done, since 10b-5 private liability is more lore than law. Thus, the legislative route might open up the whole question of (the extent of) private liability. Moreover, for the Commission to consider so providing by rule may be even more problematic.

Enforcement Staff Busy Advising Backdaters and Others When Investigation Has Closed

In the old days, an issuer being investigated by Enforcement might be left hanging for years as to whether the Staff may take action, or even whether the investigation remained open. Fortunately, that has now changed. Thus, many of those 200 or so backdaters that were being investigated have been receiving (and happily reporting receipt of) notice of the closing of an investigation, *e.g.,* Dean Foods (press release, May 10, 2007), Apollo Group (press release, July 3, 2007) and CNET Networks (8-K Item 8.01, September 4, 2007). Others are, well, waiting…and hoping.

[illegible]

[illegible] and/or make an announcement. 8-K Item 4.02 (see pg 11) also may have contributed to the upfront reporting trend. And, prompt disclosure of the existence of an investigation begets prompt reporting to the marketplace that an investigation has been closed.

How an Investigation is Closed

The Commission is not involved in the opening or closing process of an investigation. The Commission must, however, get involved if/when a matter requires a formal order of investigation, which provides, *e.g.,* subpoena power. (Prior to that Commission action, the respondent receives a "Wells" notice, affording the [illegible]

[illegible] Even where a formal order had been issued, the Commission doesn't get involved in the closing process. (Of course, the Commission's rejection of a Staff recommendation to bring an action can lead to closing a matter.) Per the GAO report (at pg 22), the Division now will send a termination letter/notice at the start of the closing process rather than waiting until the bureaucratic process ends.

The Corp Fin Side

At Corp Fin, there is now a similar "no further comments" letter process that, as we have discussed, arose from the Staff's decision in 2004 to begin posting comment correspondence 45 days (or more) after a Corp Fin review is completed. The letter usually is sent out promptly and starts the 45-day period.

Impact on 10-K Requirement to Report Unresolved Comments. As our readers may recall, since 2005, Form 10-K, Item 1B has required reporting by AFs and LAFs of material unresolved Staff comments. (See our November-December 2005 issue at pg 6.) The resulting need for an issuer to know whether or not comments have been resolved might be another factor in Corp Fin's advising issuers (*i.e.,* when comments have been resolved).

Bulletin Board Companies Left Out of S-3 Expansion

On December 11, the Commission expanded S-3 primary eligibility to issuers with a float (measured within 60 days prior to filing of the S-3) of less than $75 million, for registration in any 12-month period of up to

here would involve further rulemaking that would weigh the "costs of further exposing the markets to the potential for abusive primary offerings disguised as secondary offerings." Perhaps the main concern was not to further facilitate the PIPE phenomenon. (See our November-December 2007 issue at pg 6.) The Commission also feels that the new, liberalized Rule 144 requirements for restricted securities (see our November-December 2007 issue at pg 1) partially address the problem here.

Cheap Stock—IPO Disclosure Overkill

Sometimes, in the course of an IPO, the company finds itself in a "cheap stock" situation, *i.e.,* the Staff takes the position that stock options granted prior to the IPO were underpriced and should have triggered an earnings charge. Even in the old APB 25 days, when cheap stock triggered a charge where otherwise there was none, pre-IPO cheap stock grants generally were considered ancient history and, presumably, would not recur, so underwriters usually didn't have a problem essentially overlooking the APB 25 charge. Now, there may be even less underwriter/investor discomfort with the merely incremental 123(R) charge.

Management Blogs—Reg FD Dissemination?

Sun Microsystems' dialogue with the Commission (dating back to September 2006) about using its website to satisfy FD's dissemination requirements is elucidating, and is posted on www.sun.com for all to see at Jonathon's Blog (the CEO's). Following the initial dialogue, the CEO blogged that Sun would begin announcing

or prior to discussing the information at a meeting or conference call with one or more analysts. The Commission's response essentially was, "Maybe at some future time." Given Chairman Cox's penchant for technology, that time may be fast approaching. However, we would characterize the Chairman's response to Sun (albeit, not a Commission Statement) as "Maybe, depending on the circumstances."

Blogs

We are also intrigued here by the proliferation of executive blogs on company websites. *E.g.,* at Sun, both the CEO and the General Counsel blog. Query, if a CEO blogs that the company's current earnings guidance should be adjusted (up or down), is there an FD problem with that statement, or is there been adequate dissemination (absent a press release), as presumably there would be if the CEO says the same at a duly scheduled and publicized analyst conference call? Don't think we're there yet.

8-K Amendment Coming to Clarify that 4.02 Reporting Cannot Be (Buried) in 10-Q/K

As our readers may recall, in its November 2004 Form 8-K FAQs, Q.1 (which have not yet become a part of the CDI), the Staff clarified that an issuer's disclosure/reporting that past financial statements should not be relied on should be per Item 4.02 of Form 8-K, and not in a 10-Q/K even in the unlikely circumstance where a 10-Q/K is filed within the four-business-day 8-K filing period. In a July 2006 study of "stealth" [illegible]

FASB Re-Examining FAS 5 Disclosure Criteria—Eventual Impact on the Audit Letter Process

As our readers may recall, the longstanding treaty/rapprochement between the legal and accounting professions on the process by which auditors seek comfort from counsel as to contingent liabilities, etc. of audit clients is largely facilitated by counsel's reference in the audit letter to FASB's Financial Accounting Standard No. 5 (issued in 1975), which essentially allows counsel to avoid commenting where counsel considers material exposure to be between 5% and 95% probable (see our March-April 2004 issue at pg 2).

To our knowledge, the SEC is not involved in this project (yet), nor is the PCAOB (which has jurisdiction over SAS 12, governing the auditor's inquiry process). Rather, as law and accounting guru Linda Griggs of Morgan, Lewis in DC reports, FASB apparently free-associated itself into re-visiting FAS 5 as a result of FASB's [illegible]

[illegible]

At its September 6, 2007 meeting, FASB decided to embark on the FAS 5 project. (FASB says that potential convergence with the IASB's pending reconsideration of International Accounting Standard 3T (*Provisions, Contingent Liabilities, and Contingent Assets*) is another reason for the FAS 5 project.) If FAS 5 is changed, then (as the treaty now stands) audit letter practice could change drastically. Fortunately, not just yet.

Fixed 1934 Act Fees?

We have discussed the changing/diminished role of outside counsel in at least some aspects of securities law practice, particularly review of 1934 Act reports. (See our January-February 2002 issue at pg 5.) Not surprisingly, we are hearing of annual fixed fee arrangements based, *e.g.,* on actual fees for the past few years. Sounds intriguing, but we suspect that the main reason it may make sense is that in many instances outside counsel are doing little more than reading a penultimate draft of the 10-K, etc., and congratulating in-house counsel on a job well done.

Even the Proxy Statement

[illegible]

Other Fixed Fees

There are other endeavors that issuers/general counsel may find are conducive to fixed fees. A good example is international equity compensation, where a few law firms have particular expertise that can't be replicated in-house. There, a law firm with many such clients may well be amenable to fixed fees that may end up returning more than standard hourly rates while still providing clients attractive cost savings.

Annual Salary Survey

We thank Altman Weil, Inc. for once again allowing us to provide our readers the appended median salary comparison chart for corporate law departments, based on its annual Law Department Compensation Benchmarking Survey.

New Staff 144 Positions on Gifts and Pledges by Affiliates—and Blockbuster Position On Hedging

As we go to press, we want to alert our readers that the Staff will explain its new positions on the application of Rule 144 to gifts and pledges at the "Rule 144 Conference" on January 30th—and we expect the Staff to make clear that all hedging transactions that result in sales into the market by affiliates must comply with Rule 144 at the time of the sale, in accordance with *Goldman I* and *II.*

The New Rule 144 Amendments—Our Upcoming Video Conference

In response to many requests from readers who are coming to recognize that the SEC's major changes to Rule 144 will create many new compliance and preventive obligations and problems—particularly for issuers and brokers—we are hosting a major Video Conference. The Conference will take place on January 30th, in time for issuers and brokers to then use our Course Materials, consisting of model forms and procedures to prepare all the necessary new procedures, memos, forms, representation letters, legends etc. that will be called for.

Important Officer and Director Memorandum. Every issuer will now need to send a memo to every officer and director addressing the rule changes. [Note, our Model Memorandum to Officers and Directors—highlighting key pitfalls and sleepers, and providing important 10b5-1 and pre-clearance preventive reminders—is reason alone to register now.] The Video Conference will be "a must" for every public company and every brokerage firm (and all law firms that advise issuers and brokers). See the enclosed for more information—or go to TheCorporateCounsel.net to register today. (Note the significantly reduced costs for 2008 subscribers.)

Critical January Webconference: "*The Latest Developments:* Your Upcoming Proxy Disclosures—What You Need to Do Now!"

On CompensationStandards.com, do not miss the two-part webconference—featuring David Lynn, Mark Borges, Ron Mueller and Alan Dye (and SEC Staffer Mike Reedich) that will provide you with all the latest guidance on your upcoming disclosures in response to the SEC's *very latest positions and expectations*—including what you should be doing now in some of the most sensitive areas.

On January 23rd and 31st, these webcasts will provide an important follow-up from our blockbuster October Conference as we get into the proxy season, updating us all. Renew your CompensationStandards.com membership (or enter a no-risk trial) to ensure your disclosures meet the Staff's latest expectations.

Here are some important upcoming webcasts:

– TheCorporateCounsel.net's "Forecast for 2008 Proxy Season: Wild and Woolly" (1/22)

– TheCorporateCounsel.net's "Smaller Companies: How Your 10-K Changes This Proxy Season" (1/24)

– CompensationStandards.com's "Part I: *The Latest Developments:* Your Upcoming Proxy Disclosures—What You Need to Do Now!" (1/23)

– *The Corporate Counsel*'s & TheCorporateCounsel.net's "New Rule 144 – What to Do Now" (1/30)

– CompensationStandards.com's "Part II: *The Latest Developments:* Your Upcoming Proxy Disclosures—What You Need to Do Now!" (1/31)

– Section16.net's and Naspp.com's "Alan Dye: Keeping Yourself Out of the Section 16 'Hot Water'" (1/29)

– TheCorporateCounsel.net's "The Former SEC Staff Speaks" (2/6)

– DealLawyers.com's "MAC Clauses: All the Rage" (2/21)

And Much More: As all of our print subscriptions and website memberships are on a calendar year basis, it is time for you to renew (either use the enclosed renewal form or go to TheCorporateCounsel.net's "Renewal Center" or take advantage of a no-risk trial on the "No-Risk Trial Center" on that site).

—JMB/MG

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