

CORPORATE CHRONICLE

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New Disclosures for Smaller Reporting Companies

On December 19, 2007, the SEC announced amendments aimed at simplifying the disclosure obligations of smaller reporting companies, by eliminating Regulation S-B and creating an expanded class of smaller reporting companies. Following a one year transition period, the SEC will integrate Regulation S-B with Regulation S-K, with regulation S-K containing scaled disclosure requirements for smaller reporting companies.

In the transition fiscal year, smaller reporting companies will have the option of using the SB forms or the new scaled disclosure options in Regulation S-K. After this transition period, smaller reporting companies will be required to use Forms 10-K, 10-Q, S-1 and S-3, with the new scaled financial and non-financial disclosure on an item by item basis. The scope of issuers who will qualify as smaller reporting companies will be expanded to include: (i) those issuers with a public float of up to \$75 million; or (ii) issuers unable to calculate the public float and having less than \$50 million in revenue in the last fiscal year.

“WORM/WULFF” PROHIBITION ELIMINATED

On February 15, 2008, amendments to Rule 144 adopted by the SEC became effective. The SEC has shortened the holding periods for restricted securities, and also codified certain SEC staff interpretations. (See Corporate Chronicle Vol. 6, Issue 3).

The SEC also determined that the limitations created by a series of No Action Letters in 1999 and 2000 between the NASD and the Division of Corporate Finance (popularly referred to as the “Worm/Wulff letters”) are no longer applicable to companies that satisfy certain conditions.

The “Worm/Wulff” letters state that any affiliate or promoter of a blank check company could not resell the securities under the Rule 144 safe harbor or the Section 4(1) exemption.

The new Rule 144, as amended, remains unavailable to shell companies. However, the recent amendments provide a safe harbor for the sale of securities issued by a former shell company, provided the issuer:

- has ceased to be a shell company;
- is subject to Exchange Act reporting obligations;
- has filed all required Exchange Act reports during the preceding twelve months; and
- had filed at least 90 days earlier “Form 10” information reflecting the fact that it has ceased to be a shell company.

“Form 10” information is the typical public information required in order to register securities under the Exchange Act.

New York Law to Allow LCC Derivative Suits

On February 14, 2008, a divided NY Court of Appeals decided that members of a limited liability company (a “LLC”) may bring a derivative suit on the Company’s behalf (*Tzolis v. Wolff*, NY Slip Op. No. 01260). The decision reverses a long-held precedent that members of a LLC did not have the legal capacity to bring a derivative suit on behalf of the LLC. Previous decisions by appellate courts in New York had relied on the statutory silence with regard to derivative suits in the New York Limited Liability Company Law. The Court reasoned that public policy requires all possible remedies for LLC members when corporate fiduciaries use corporate assets to enrich themselves. The Court did not clarify what limitations, if any, will apply to the right of LLC members to sue derivatively and only offered a statement that its decision should not be interpreted as an indication that no such limitations exist. Furthermore, the Court did not elaborate on the potential double liability that could result from the decision.

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Supreme Court Limits Third Party Scheme Liability

On January 15, 2008 the U.S. Supreme Court decided that plaintiffs do not have the right to impose liability under Sections 10(b) and 10b-5 on third parties who engage in certain transactions with a company which mischaracterizes the value of such company to investors. In *Ston-eridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the defendants entered into agreements with Charter Communications, Inc (“Charter”), for which Charter later improperly recognized revenues. The plaintiffs were seeking damages, under a theory of scheme liability, from third parties which had assisted Charter’s use of the agreements to inflate the value of Charter to investors. The defendants argued that third parties cannot be held liable since the plaintiffs did not rely on any statements, conduct, or omissions of the third parties. The Court affirmed the 8th Circuit’s decision that Sections 10(b) and 10b-5 do not impose liability on third parties for merely “aiding and abetting” securities fraud, reasoning that a secondary actor can only be found liable if it employs a manipulative device upon which an investor relies. In this analysis, the Court cited the lack of statutory authority and congressional silence with regard to private liability against third parties.

Commissioned Salesman Contracts Required

In July 2007, the New York State Legislature amended Section 191(c) of the New York Labor Law, pursuant to which all employers must maintain written agreements with any commissioned salesperson containing the agreed upon terms of their employment. The agreement must:

- describe how wages are calculated and payable;
- specify compensation in case of termination;
- be executed by both parties.

The agreement must be kept on file for no less than three years. The recently amended statute places an even greater burden for employers who do not maintain these records. Failure to produce the written agreement in any dispute will result in a presumption in favor of the employee’s version of the terms of the agreement and the amount owed. The statute became effective on October 16, 2007.

NEW ELECTRONIC FORM D

On February 6, 2008, the SEC released its final amendments for Regulation D and revisions to Form D in order to allow for electronic filing. Effective September 15, 2008, all companies engaged in a private offering exempted by Regulation D will be required to file the Form D and all amendments electronically with the SEC. The data on the Form D will be made available on the SEC website. The information on the Form D will

be searchable and freely available to anyone with internet access. As a result of the electronic filing, the SEC also adopted an amendment to provide that the information available online through the posting of the Form D will not constitute a general solicitation. The SEC is coordinating with NASAA to eventually develop a one-stop filing system, where issuers will be able to file on both a state and federal level simultaneously.

FROM THE EDITOR

As you can see, we have substantially revamped our Corporate Chronicle newsletter, which will serve as one component of our firm’s anticipated monthly communication with you on a variety of topics which we believe are of interest to our clients and friends.

We hope that you like our new shorter and more concise format. We would be happy to receive any input that you may wish to provide.



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