

## ABOUT DAVIDOFF MALITO &amp; HUTCHER LLP

A Leading Full Service Corporate Law and Government Relations Firm with active practices in:

- Corporate & Securities
- Government Relations & Lobbying
- Mergers & Acquisitions
- Banking, Finance & Venture Capital
- Litigation
- Real Estate
- Land Use & Zoning
- Bankruptcy/Creditor's Rights
- Trusts & Estates
- Administrative Law
- Construction Law
- Computer & Internet Law
- Healthcare Law
- Labor & Employment Law

*Upcoming Events:*

- On **May 12, 2006**, Neil M. Kaufman will participate in a panel discussion regarding **Mergers & Acquisitions** presented by the **Long Island Capital Alliance**, at 8 A.M. at the **Fox Hollow** in Woodbury, New York.
- On **July 26, 2006**, Neil M. Kaufman will participate in a full-day panel discussion regarding the **Sarbanes-Oxley Act of 2002**.
- On **November 9, 2006**, The New York State chapter of the **American Lung Association** will honor Neil M. Kaufman as its **Businessman of the Year** at its annual dinner.

*Recent Events:*

- **Keith D. Sernick** was recently appointed to the **Tax Enforcement Advisory Committee** of the New York State Office of Real Property Services.
- On **December 12, 2005**, an article by **Peter M. Ripin** entitled "**Hotels Must Protect their Brands Online**" was published in **Travel Weekly**.

For more information regarding any of these events, please contact Neil M. Kaufman at (516) 248-6400 or nmk@dmlegal.com.

The information contained herein is not to be construed as legal advice.

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## CORPORATE CHRONICLE

## SEC REVISES ACCELERATED FILING DEADLINES

In 2002, the Securities and Exchange Commission adopted rules requiring registrants with \$75 million or more in public float to comply with new accelerated filing deadlines for their annual reports on Form 10-K and quarterly reports on Form 10-Q, to be implemented over a three-year period. In 2004, the Commission delayed implementing the final stage of the accelerated deadlines and, in December 2005, adopted new amendments regarding accelerated filing deadlines as follows:

- **"Accelerated Filers" v. "Large Accelerated Filers" Defined.** The new amendments redefine the term "Accelerated Filer" as registrants that have at least \$75 million, but not more than \$700 million, in public float. Additionally, a new category of "Large Accelerated Filers" has been added to include registrants with \$700 million or more in public float.
- **Large Accelerated Filers.** For these filers, filing deadlines for annual reports on Form 10-K, effective as of the fiscal years ending on or after December 15, 2006, will be subject to a 60-day deadline. Prior to the effective date, annual reports on Form 10-K for these filers remain subject to a 75-day deadline. "Large Accelerated Filers" will remain subject to a 40-day filing deadline for quarterly reports on Form 10-Q.
- **Accelerated Filers.** For these filers, the new amendments will not affect the 75-day filing deadline for Form 10-K or the 40-day filing for Form 10-Q.
- **Exit Requirements.** A "Large Accelerated Filer" is permitted to exit from "Large Accelerated Filer" status if its public float falls below \$500

million for the same fiscal year that the determination of public float has been made. "Accelerated Filers" may exit from "Accelerated Filer" status and file annual reports and quarterly reports on a non-accelerated basis if their public float falls below \$50 million, measured as of the last business day of the issuer's most recently completed second fiscal quarter.

- **Non-Accelerated Filers.** Filing deadlines for companies with less than \$75 million in public float, measured as of the last business day of the issuer's most recently completed second fiscal quarter, remain at 90 days for Form 10-K and 45 days for Form 10-Q.

## SECURITIES ACT REFORM

On December 1, 2005, the SEC's Securities Act reform became effective. In addition to expanding certain permissive communications during and around the time of a public offering (See Volume 4, Issue 4), the new rules also modify certain registration procedures.

Well-known seasoned issuers are permitted to use a new automatic shelf registration process relating to unspecified amounts of securities of varying types. The registration statement becomes immediately effective upon filing with the SEC without the necessity of prior SEC screening or review. To determine its eligibility for this automatic shelf registration process, the issuer must determine whether it is a well-known issuer at the time of initial filing and must make a similar determination in connection with each amendment to its registration statement.

(continued on page 2)

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**SECURITIES ACT REFORM***(continued from page 1)*

Well-known seasoned issuers are also permitted to:

- Omit various information from their base prospectuses, including the identities of selling securityholders. Any information omitted from the base prospectus may be supplied through a post-effective amendment or through incorporation by reference to the issuer's reports filed pursuant to the Securities Exchange Act of 1934.
- Delay the payment of filing fees until the time of takedown of specific securities from the shelf.

A new automatic shelf registration statement must be filed every three years, and a well-known seasoned issuer would be prohibited from selling under an automatic shelf registration statement that is more than three years old. This requirement has been implemented in order to make the information in the automatic shelf registration statement clearer than it might otherwise be in connection with numerous post-effective amendments.

The SEC also adopted an "access equals delivery" model with respect to fulfilling final prospectus delivery requirements, whereby the delivery requirement is satisfied through the filing of a final prospectus with the SEC.

The SEC also now requires issuers to include risk factors in their annual reports and to update those risk factors with respect to any material changes in their quarterly reports.

In addition, the SEC requires accelerated filers and well-known seasoned issuers to include a description of material unresolved

written comments from the SEC staff relating to Exchange Act reports in their annual reports if any such comments were issued more than 180 days prior to the end of the fiscal year with respect to which the annual report is filed. In addition, eligible issuers filing registration statements on Form S-1 are now permitted to incorporate information by reference into their registration statements if they:

- have filed at least one annual report;
- are current in the filing of their Exchange Act reports; and
- make their incorporated Exchange Act reports readily accessible on web sites maintained by or for them.

The following issuers, however, would not be permitted to incorporate by reference:

- reporting issuers that are not current in the filing of their Exchange Act reports; or
- issuers that are or were (or whose predecessors were) during the past three years:
  - \* blank check issuers;
  - \* shell companies (other than business combination-related shell companies); or
  - \* issuers of penny stock offerings.

In light of the changes implemented under its Securities Act reform, the SEC has also eliminated Forms S-2 and F-2.

On November 30, 2005, the SEC's Division of Corporation Finance published guidance regarding frequently asked '33 Act Reform questions. The Q&A is available at [http://www.sec.gov/divisions/corpfin/faqs/securities\\_offering\\_reform\\_qa.pdf](http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf).

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**DELAWARE COURT OF  
CHANCERY INVALIDATES  
NEGOTIATED REMEDIES CAP  
IN CONNECTION WITH  
ALLEGED FRAUD**

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On February 14, 2006, the Delaware Court of Chancery decided *ABRY Partners V, L.P. v. F&W Acquisition LLC* (2006 WL 358236 (Del. Supr.)). The case involved alleged material misrepresentations in connection with a buyer's purchase of a private company for \$500 million.

The purchase agreement included fairly common provisions:

- limiting damages for misrepresentation to \$20 million as the exclusive remedy; and
- in which the buyer disclaimed reliance on any facts or representations not expressly stated therein.

After closing, the buyer claimed to have discovered several material misrepresentations in the purchase agreement, including with respect to the financial statements of the private company, and alleged that the seller had knowingly concealed such inaccuracies.

The Delaware Court of Chancery concluded that the buyer was entitled to seek rescission based on the facts alleged. In this regard, the court held that a seller is precluded from shielding itself from the buyer's remedy of rescission if the buyer is able to show that the seller:

- knew that contractual representations and warranties were false; or
- lied to the buyer about a contractual representation or warranty.

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**DISNEY SHAREHOLDERS  
APPEAL OVITZ DECISION**

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Disney's shareholders have appealed the decision by the Delaware Court of Chancery in *In re Walt Disney Co. Derivative Litigation*, No. 15452 (Del. Ch. Aug. 8, 2005), which held that the directors of Disney acted in the best interest of the company and exercised proper business judgment in connection with their decision to grant Michael Ovitz a \$130 million severance package (See Volume 4, Issue 3).

**CURRENT NEWS AND NOTES**


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**SEC Issues Executive Compensation  
Proposing Release**

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On January 27, 2006, the SEC published a release (Release No. 33-8655; 34-53185) proposing amendments to the disclosure requirements for executive and director compensation. The proposal also includes proposed amendments regarding related-party transactions, director independence and other corporate governance matters and security ownership of officers and directors. As proposed, such amendments would apply to disclosure in proxy and information statements and other filings, such as periodic reports and registration statements. The SEC has indicated that the amendments are intended to make related disclosure easier to read and to provide investors with a more complete picture of executive compensation. The proposing release is available at <http://www.sec.gov/rules/proposed/33-8655.pdf>.

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**SEC Proposes Amendments to the Tender  
Offer Best-Price Rule**

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On December 26, 2005, the SEC published proposed amendments pertaining to the best-price rule. The amendments are intended to clarify the application of the rule and provide an exemption and safe harbor in the third-party tender offer context in relation to severance, compensatory or other employee benefit arrangements. The proposing release is available at <http://www.sec.gov/rules/proposed/34-52968.pdf>.

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**SEC Personnel Changes**

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On February 8, 2006, the SEC announced that John W. White, a corporate and securities attorney with Cravath Swaine & Moore for 25 years, will succeed Alan L. Beller as Director of the Division of Corporation Finance of the SEC. Mr. Beller oversaw numerous rulemaking initiatives, including certifications by chief executive officers and chief financial officers regarding the accuracy and completeness of annual and periodic reports required by the Sarbanes-Oxley Act of 2002.

On January 23, 2006, Brian Cartwright, a corporate securities attorney formerly with Latham & Watkins and a former astrophysicist, became the new general counsel of the SEC.

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**SEC Revokes Securities Registrations  
of Twenty-Five Late Filers**

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On February 15, 2006, the SEC revoked the securities registrations of twenty-five public companies that failed to file required periodic filings. According to the SEC, many of the filers had not filed periodic filings since 2003. The issuers consented to the revocations without admitting or denying the SEC's findings that the issuers failed to comply with Section 13(a) of the Securities Exchange Act of 1934. The February 15th SEC orders relating to these revocations are available at the following hyperlink: <http://www.sec.gov/litigation/admin.shtml>.

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**DM&H COMPANY SPOTLIGHT:  
ICY SPLASH FOOD & BEVERAGE, INC.**

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Our client, Icy Splash Food & Beverage, Inc. (OTCBB:IFBV), produces and distributes a line of carbonated beverages, including Icy Splash™, a clear, naturally fruit-flavored, carbonated soda soft drink. The Company also distributes a wide variety of specialty food products, health and beauty aids and other products, primarily to dollar store retailers.

We look forward to continuing to assist Icy Splash with respect to its business, financing, legal and strategic challenges.

**FROM THE EDITOR**

Dear clients and friends:

We greatly appreciate all of the positive feedback we have received regarding the securities market chart we included in our last issue of the DM&H Corporate Chronicle. We encourage all of our readers to keep the feedback coming. Special thanks to DM&H partner Mark Spund for his contribution to this issue.

In the first quarter of 2006, we have welcomed Cara Baugh to the corporate department in our Long Island office. We also welcome Jeffrey Hill, Robert Shapiro and Dimitra Tzortzakos to the litigation department in our New York City office. We are thrilled to continue adding this kind of talent to our firm.



Neil M. Kaufman,  
Chairman,  
Corporate & Securities  
Department