

## ABOUT DAVIDOFF MALITO &amp; HUTCHER LLP

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

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

## Upcoming Events:

- On **June 9, 2006**, we will be a **Gold Sponsor** of the **2006 Long Island/NY Metro Capital Forum**, presented by the **Long Island Capital Alliance**, at the Long Island Hilton Hotel, Melville, New York.
- On **July 26, 2006**, **Neil M. Kaufman** will participate in a panel discussion of **Current Developments in the Sarbanes-Oxley Act** at the **Hilton Garden Inn** at 1575 Privado Road, Westbury, New York.
- On **November 8, 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 at the **Crest Hollow Country Club** in Woodbury, New York.
- On **November 22, 2006**, we will be a sponsor of a **Vistage International Leadership Forum** Breakfast Series Event at the **Fox Hollow** in Woodbury, New York, at which **Chuck Reaves** will speak on "Value-Added Selling."

## Recent Events:

- On **May 12, 2006**, **Neil M. Kaufman** participated in a panel discussion regarding **Mergers & Acquisitions** presented by the **Long Island Capital Alliance**.
- In **June 2006**, **Neil M. Kaufman** was elected **President** of the Long Island chapter of **Financial Executives International (FEI)**.

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

## New Notice Publication Requirements for New York Limited Liability Entities

On February 3, 2006, New York State amended the publication requirements applicable to domestic and foreign limited liability companies, limited partnerships and limited liability partnerships. The new law, which is effective as of June 1, 2006, alters current publication requirements by:

- **Requiring additional disclosure.** In addition to current notice publication requirements, limited liability entities will also be required to disclose the (1) specific address where the office of the entity is to be located and (2) the names of up to ten persons with the most valuable membership or partnership interests in the entity who are actively engaged in the business and affairs of the entity. Selected individuals and entities may qualify for an exemption.
- **Reducing the publication period.** Limited liability entities have 120 days after the articles of organization are filed with the NY Department of State to publish such articles of organization in one weekly and one daily newspaper in the county where the business is intended to be located for four weeks (reduced from the current six week publication requirement).
- **Requiring proof of publication.** After publication is complete, the entity must file with the Department of State (1) affidavits of publication in each of the newspapers and (2) a certificate of publication completion by the entity.
- **Implementing new penalties.** Failure to comply with the publication requirements will result in an automatic suspension of the entity's right to carry on, conduct or transact any business in the State of New York.

## New Pinksheets.com Listing Tiers

On March 16, 2006, Pink Sheets, LLC, the owner of pinksheets.com, one of the principal providers of pricing and financial information for over-the-counter (OTC) securities, announced a new two-tiered listing service entitled OTCQX<sup>SM</sup>. The "Pink Sheets" is an unregulated stock quotation service designed for smaller publicly-traded companies that has minimal listing and disclosure requirements. As a result of soaring compliance costs associated with Sarbanes-Oxley, many small public companies have decided to forego listing their securities on traditional exchanges and alternatively have chosen to allow their securities to trade or be quoted in less costly marketplaces, such as pinksheets.com.

The OTCQX is a premium quotation, trading and disclosure service designed to attract small public companies to pinksheets.com by differentiating strong public companies from other currently traded OTC securities, primarily by requiring audited financial statements and providing ongoing disclosure.

All OTCQX listed companies must meet certain requirements, including:

- conducting annual audits;
- continuous quarterly and annual financial reports posted on OTCQX.com;
- providing disclosure of interim material events which might affect the share price;
- having at least 100 round lot holders;
- having continuous operations (no blank check, shell or special purpose acquisition companies);
- being included in Standard & Poor's or Mergent (f/k/a Moody's) Manuals;

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**New Pink Sheets Listing Tiers**  
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- disclosure of the identities of management; and
- providing an annual management affirmation letter.

The OTCQX is divided into two separate tiers:

- PremierQX, the highest tier, includes issuers that meet the size and quality thresholds to be listed on a national exchange, hold annual shareholders' meetings and have a minimum bid of \$1; and
- PrimeQX includes issuers that are operating companies, have audited financial statements, and meet the other OTCQX requirements listed above but are not large enough to be listed on PremierQX.

A key requirement for every company prior to being admitted to OTCQX is the appointment of a Designated Advisor for Disclosure ("DAD"). DAD's, who are usually securities attorneys or investment bankers, will be required to participate in the preparation of the company's disclosure statements and prevent issuers with inadequate or questionable disclosure from joining OTCQX. This requirement is designed to provide a professional "gatekeeper" for secondary market disclosure to U.S. investors, similar to the approach used in some European countries.

**Audit Engagement Letters Raising Independence Issues**

Recently, many independent auditors have added certain provisions to engagement letters in an effort to shield them from potential liability. Such provisions include:

- limiting liability to the fee paid by the audit client,
- the use of alternative dispute resolution, through mediation and arbitration, to resolve any dispute under agreements,
- waiver of a jury trials,
- auditor indemnification under certain circumstances, and
- limiting the time frame in which an audit client can make a claim.

In Section 602.02.f.i of the SEC's Financial Reporting Policies, the SEC takes the position that auditor independence is jeopardized when companies enter into indemnification and limited liability agreements with their auditors. The Investment Company Institute has advised the American Institute of Certified Public Accountants to adopt the SEC's position and encouraged the SEC to require companies to completely disclose any such contractual provisions limiting auditors liability.

**Directors' Role in the Aftermath of Disney**

In the aftermath of the controversial *Disney* decision, it is apparent that if directors and officers exercise good faith efforts to inform themselves of "all material information reasonably available to them," then courts will offer "wide latitude" regarding the protections of the Business Judgment Rule. However, it is important to note that directors should take proactive steps to ensure they are guaranteed the protections afforded under the Business Judgment Rule and shield themselves from liability, by:

- ensuring that the Company's certificate of incorporation includes a provision permitted under Section 102(b)(7) of the Delaware Corporation Law (or similar statutes in other states) providing for "director exculpation";
- acting in good faith and with a level of due diligence that satisfies their fiduciary duty owed to the corporation;
- thoroughly documenting board, compensation, audit and other committee deliberations in meeting minutes, and, at such meetings, addressing and actively considering all important material information available to the board or committees; and
- retaining outside counsel for board committees when significant amounts of compensation or other material matters may be involved.

**NASDAQ Capital Market Petitions For "Covered Securities" Exemption**

The Nasdaq Stock Market recently petitioned the Securities and Exchange Commission ("SEC") to amend Rule 146(b) to include securities listed on the Nasdaq Capital Market ("NCM"), previously named the Nasdaq SmallCap Market, as "covered securities" under Section 18 of the Securities Act of 1933, as amended. Section 18 permits the SEC to designate selected securities as "covered securities," thus exempting the securities from state regulation, if the securities are listed on a national securities exchange that has listing standards, as determined by the SEC, that are substantially similar to the listing standards of the New York Stock Exchange, the American Stock Exchange ("AMEX") or the Nasdaq National Market ("NNM").

In 1998, the SEC denied securities listed on NCM the "covered securities" status because, although scheduled changes to the initial listing standards for common stock appeared to be substantially similar to those of AMEX, the changes were not in effect at the time of review. However, since that time, Nasdaq has made numerous changes to the listing requirements of NCM and now believes that the changes "leave no question" that the listing standards of NCM are substantially similar or, in some instances, exceed the listing requirements of "accepted" exchanges.

Nasdaq believes that permitting securities listed on NCM to have the benefit of the "covered securities" exemption is appropriate because but for the size of the companies listed thereon, the NCM and NNM are identically regulated, and that it is crucial because, without such exemption, NCM's ability to be competitive with other exchanges is impaired. Nasdaq stated that in certain situations, although issuers qualify to list on the NCM, they forgo listing on the NCM and pursue listing on other exchanges that offer blue sky exemptions. The NCM's petition can be found at <http://www.sec.gov/rules/petitions/petn4-513.pdf>.

**CURRENT NEWS AND NOTES****Nasdaq Permitted to Register Listed Issuers Under Section 12(b)**

On April 6, 2006, the Securities and Exchange Commission ("SEC") approved a rule change to NASD Rule 4130, which allows Nasdaq to file an application with the SEC on behalf of its listed issuers to transition the registration of their class of Nasdaq-listed securities from Section 12(g) to Section 12(b) of the Securities Exchange Act of 1934 (the "Act") in light of Nasdaq's new designation as a national securities exchange. The rule allows issuers to opt out of such procedure, which may render them ineligible to be listed on Nasdaq. In the release, the SEC noted that the change is consistent with Rule 15A(b)(6) principles of investor protection, by promoting just and equitable principles of trade, by enhancing mechanisms of free and open markets and is in the general interest of the public. The new rule release is available at <http://www.sec.gov/rules/sro/nasd/2006/34-53606.pdf>.

**Section 404 Compliance Costs Declined**

Studies released by Financial Executives International (FEI) and CRA International indicate that second year compliance costs relating to Section 404 of the Sarbanes-Oxley Act decreased significantly for public companies of all sizes as compared to the previous year, primarily due to experience gained from the first year, which has allowed companies to:

- be more efficient in implementing and testing controls,
- reduce one-time documentation provided to external auditors, and
- reduce the need to use outside service providers.

Although 404 compliance costs have generally decreased, non-404 audit fees were reported to have increased because of increases in salary costs, additional audit procedures required under new non-404 standards, additional compliance and independent monitoring system costs and higher practice protection costs.

**SEC Refuses Section 404 Exemption For Smaller Public Companies**

On May 17, 2006, one week after the SEC's public roundtable regarding second-year Section 404 experiences and the proposals of its advisory committee on smaller public companies, the SEC announced that no US public company will be exempted from the 404 requirements. While this is no surprise, the SEC appears to be considering further deferrals in the time periods for which 404 compliance will be required. It also seems possible that some small public companies may see their auditor attestation requirements under 404 be deferred longer than their management assessment requirements.

**U.S. Broker-Dealers Accused of Naked Short Selling**

Electronic Trading Group LLC ("ETG") has filed suit against 11 top U.S. broker-dealer firms and other unnamed individuals, claiming that the broker-dealers engaged in the practice of naked short selling. Short selling is a technique whereby a trader borrows shares from his/her prime broker, sells the borrowed stock and later purchases the stock, hoping to replenish the loaned stock at a lower price while gaining a profit on the trade. In a short sale, the prime broker must locate and deliver the shares prior to execution of the sale. Naked short selling is where the trader executes the sale without ever possessing the shares because the shares were not borrowed or have never been available to the broker. ETG is seeking to collect over six years worth of fees from the defendants for improperly charging fees for these "phantom" transactions where no actual service, whether borrowing or delivering the stock to cover the short sale, was rendered.

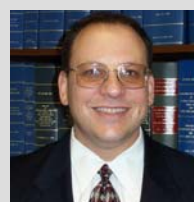
Sorry, we had no room for the Company Spotlight in this issue. We anticipate that it will return in the next issue.

**FROM THE EDITOR**

Dear clients and friends:

I am happy to announce that my long-time friend and colleague Keith Braun, formerly a partner at Snow Becker & Krauss in New York, has re-joined my practice as senior counsel in our Garden City office. Those of you who know Keith will realize the value that he brings to our firm.

I have recently been named President of the Long Island chapter of Financial Executives International (FEI). I look forward to building the chapter into a place where financial executives feel encouraged to participate in order to benefit from the knowledge obtained from our speakers and the camaraderie of fellow financial executives. If you would like to participate in this effort, please contact me directly.



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