

## ABOUT DAVIDOFF MALITO &amp; HUTCHER LLP

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

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

- Upcoming Events:*
- On **September 12, 2006**, **Howard Weiss** will participate in a seminar titled “**Real Estate Development From Beginning to End**,” sponsored by **Lorman Education Services**, at the **Park Central Hotel** in New York, New York.
  - On **September 18-21, 2006**, **Peter M. Ripin** will be a speaker at the “**12th Annual Lodging Conference**” in Phoenix, Arizona, involving hotel franchising and technology issues.
  - On **October 11, 2006**, **Neil M. Kaufman** will participate in a seminar titled “**Current Developments in the Sarbanes-Oxley Act**,” sponsored by **Lorman Education Services** at the **Crowne Plaza at the United Nations Hotel**, New York, New York.
  - On **November 22, 2006**, we will sponsor a **Vistage International Leadership Forum Breakfast Event** at the **Fox Hollow** in Woodbury, New York, at which **Chuck Reaves** will speak on “**Value-Added Selling**”.

- Recent Events:*
- On **August 11, 2006**, **Michael G. Zapson** participated in a seminar on “**Real Estate Development from Beginning to End in New York**” at the **Wingate Inn**, Garden City, New York.
  - On **July 25, 2006**, **Neil M. Kaufman** participated in a seminar titled “**Current Developments in the Sarbanes-Oxley Act**,” sponsored by **Lorman Education Services** at the **Hilton Garden Inn**, Westbury, New York.

*If you are interested in attending or would like 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.*

Davidoff Malito & Hutcher LLP  
200 Garden City Plaza  
Garden City, New York 11530



## CORPORATE CHRONICLE

Third Quarter 2006

Volume 5, Issue 3

### New Executive Compensation Disclosure Requirements

In an attempt to provide investors with clear and understandable disclosure regarding executive compensation arrangements, the SEC adopted new requirements requiring more comprehensive and uniform disclosure of executive and director compensation, related-person transactions, director independence, security ownership of officers and directors and other corporate matters. The new rules will alter current disclosure requirements in proxy statements, annual reports, registration statements and Form 8-Ks. The effective date for compliance is for the fiscal years ending on or after December 15, 2006, or filings made on or after that date.

#### A. Executive and Director Compensation

The new requirements enhance current disclosure requirements and add additional narrative disclosure requirements regarding compensation of the principal executive officer, principal financial officer, three other highest paid executive officers and all directors.

**1. Compensation Discussion and Analysis (“CD&A”).** Issuers will now be required to address the objectives and implementation of executive compensation programs.

- The CD&A is to be deemed filed with the SEC, which will result in the disclosure being subject to the certification by the issuer’s principal executive and principal financial officers.
- Compensation committees are required to provide a *Compensation Committee Report* which includes a statement of whether the compensation committee has reviewed and discussed the CD&A with management and based on the review, recommended that the CDA be included in the issuer’s annual report and proxy statement.
- The *Performance Graph* will no longer be required under executive compensation disclosure, but will be required to be included with market price of common equity and related disclosure matters.

**2. Tabular and Narrative Disclosure.** Executive compensation disclosure will be arranged in three categories:

- Compensation over the previous three years. A *Summary Compensation Table* is the primary mechanism for disclosure of executive compensation over the past three years. The table is to be supplemented

with narrative disclosure and a *Grant of Plan-Based Awards Table* to further explain the compensation information. Additional NEO-type disclosure is required for up to three employees who were not executive officers during the last completed fiscal year, but whose total compensation was greater than that of any of the other named executive officers. These three non-executives need not be named, but can be identified by title or position.

- Holding of outstanding equity-related interests. This disclosure will be required with respect to:

- *Outstanding Equity Awards at Fiscal-Year End Table*, displaying potential amounts that may be received in the future from outstanding awards, such as the amount of securities underlying exercisable and unexercisable options, the exercise prices and the expiration dates for each outstanding option (rather than on an aggregate basis); and

- *Option Exercises and Stock Vested Table*, displaying amounts realized on equity compensation during the previous fiscal year.

*(continued on page 2)*

### Court Strikes Down SEC Hedge Fund Rule

On June 23, 2006, the D.C. Circuit Court of Appeals in *Goldstein v. SEC*, vacated the SEC hedge fund rules requiring the registration under the Investment Advisers Act of 1940 (the “Advisers Act”) of certain hedge fund advisers. Prior to the promulgation of these hedge fund rules, many hedge fund advisers qualified for an exemption from registration because they had fewer than fifteen clients, the threshold number requiring registration under the Advisers Act, as the fund advisers treated an entire hedge fund as one client. The new hedge fund rules interpreted “clients” on a look-through basis so that the number of clients equaled the total of the individual shareholders, limited partners, members, or beneficiaries of each hedge fund investor.

The Court in *Goldstein* found that the SEC exceeded its authority in expanding the definition of “client”. The Court noted that the definition of “investment adviser” in the Advisers Act requires a direct relationship between the adviser and the investor-client. In 1980, Congress added to Section 203(b)(3) of the Advisers Act language providing that for a share-

## DAVIDOFF MALITO & HUTCHER LLP

#  
ATTORNEYS AT LAW

605 THIRD AVENUE  
34th Floor  
NEW YORK, NEW YORK 10158

200 GARDEN CITY PLAZA  
SUITE 315  
GARDEN CITY, NEW YORK 11530

ALBANY WASHINGTON, D.C.  
MELVILLE NEWARK, N.J.

TELEPHONE: (212) 557-7200  
(516) 248-6400  
FACSIMILE: (212) 286-1884  
(516) 248-6422  
INTERNET: www.dmlegal.com  
E-MAIL: nmk@dmlegal.com

### INSIDE THIS ISSUE:

New Executive Compensation Disclosure Requirements .....	1-2
Court Strikes Down SEC Hedge Fund Rule .....	1
From the Editor .....	2
Current News and Notes .....	3
NASDAQ Global Select Market in Effect .....	3
About Davidoff Malito & Hutcher LLP .....	4

©2006 by Davidoff Malito & Hutcher LLP  
All rights reserved

holder, partner, or beneficial owner to be deemed a client, that person must be an investment adviser client separate and apart from the person’s status as a shareholder, partner or beneficial owner of any entity investor. The Court noted that hedge fund advisers have a direct relationship with the fund entities, not the individuals who invest in the entities, and that the SEC did not adequately explain the relationship between hedge fund entity investors and advisers. The Court stated that “client”, as defined in the SEC’s new hedge fund rules, “comes close to violating the plain language of the statute” and that “an agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency’s authority.” ■

**New Executive Compensation Disclosure Requirements***(continued from page 1)*

- Retirement plans, deferred compensation and other employment payments and benefits. Disclosure will be required with respect to:
  - *Pension Benefits Table*, displaying actuarial present value of each named executive officer's accumulated benefit under each pension plan;
  - *Nonqualified Deferred Compensation Table*, displaying executive contributions, company contributions, withdrawals, all earnings for the year and the year-end balances with respect to non-qualified deferred compensation plans; and
- Supplemental narrative disclosure of any arrangement that provides for payments or benefits in the event of any termination of a named executive officer, a change in responsibilities or a change in control of the company.

**3. Disclosure Regarding Option Grants.**

The new rules provide guidance and require additional disclosure regarding the issuer's programs relating to granting options, including the timing of option grants in relation to the release of material nonpublic information and setting exercise prices differing from the market

price of the underlying stock on the grant date. Disclosure of the following in clear tabular format is required for all option grants:

- the grant date fair value;
- the FAS 123R grant date;
- the closing market price on the grant date, if it is greater than the exercise price of the award;
- the date the compensation committee or full board of directors took action to grant the award, if the date is different from the grant date; and
- if the exercise price of an option grant is not the grant date closing market price per share, the issuer must disclose the methodology for determining the exercise price.

The tabular information must be supplemented by an enhanced narrative description of option grants to executives. Comparable disclosure requirements will apply if an issuer had a program of awarding options and setting the exercise price based on the stock's price on a date other than the actual grant date, or the issuer sets the exercise price of an option through formulas based on average prices of the issuer's stock in a period preceding or surrounding the grant date.

**4. Director Compensation.** A *Director Compensation Table*, supplemented with a narrative, will be required to disclose director compensation for the previous fiscal year.

**B. Related-Person Transactions, Director Independence and Other Corporate Governance Matters**

**1. Related-Person Transactions.** To streamline and update related-person transactions disclosure, the amended disclosure requirements include:

- an increased threshold for reporting related party transactions from \$60,000 to \$120,000;
- disclosure of the issuer's policies and procedures regarding review, approval and ratification of related-person transactions;
- eliminating distinctions between indebtedness and other related-person transactions and disclosure of specific types of director relationships; and
- specific exemptions for selected categories of transactions not required to be disclosed under related-person transaction disclosure.

**2. Director Independence and other Corporate Governance Matters.** New Item 407 of Regulations S-K and S-B combine existing and updated disclosure requirements concerning director independence and related corporate governance. The required disclosures include:

- whether each director and director nominee is independent;
- a description, by specific category or type, of any transactions, relationships or arrangements not disclosed as a related-person transaction that were considered by the board of directors when determining if applicable independence standards were satisfied;
- any audit, nominating and compensation committee members who are not independent; and
- the compensation committee's processes and procedures for the consideration of executive and director compensation.

**C. Security Ownership of Officers and Directors**

The amendments require disclosure of:

- the number of shares pledged by members of management, and
- the inclusion of directors' qualifying shares in the total amount of securities owned.

**D. Form 8-K**

The rules adjust the disclosure requirements on Form 8-K to include employment arrangements and material amendments under a single item. Compliance for Form 8-Ks will be required commencing upon triggering events that occur 60 days or more after publication in the Federal Register. ■

## CURRENT NEWS AND NOTES

**Further Changes to New York Publication Requirements**

As addressed in the *DMH Corporate Chronicle, Second Quarter 2006*, New York State amended the publication requirements applicable to domestic and foreign limited liability entities. However, on May 31, 2006, last minute legislation effectuated further changes, including the following, effective June 1, 2006:

- a reduction in time for existing limited liability entities to comply with the publication requirements from 18 months to 12 months;
- an increase in the number of required consecutive weekly newspaper publications from 4 to 6 weeks; and
- eliminating the disclosure requirement of the names of the ten most valuable interests in the limited liability entity.

**COSO's New Guidance for Smaller Public Companies**

The Committee of Sponsoring Organizations of the Treadway Commission ("COSO") recently released a new report entitled *Internal Control over Financial Reporting—Guidance for Smaller Public Companies*, in an effort to assist smaller businesses in implementing an effective and more cost-efficient system of internal control procedures to fulfill their requirements of Section 404 of the Sarbanes-Oxley Act. In 1992, COSO issued *Internal Control—Integrated Framework* to assist businesses and other entities in establishing a comprehensive framework for internal control. The *Internal Control—Integrated Framework* has remained the primary internal control standard for companies required to comply with the Sarbanes-Oxley Act and U.S. Public Accounting Oversight Board Standard 2, even though two other frameworks are also acceptable to the SEC. For a summary of the new COSO report, see: [http://media.cpa2biz.com/Publication/store/SB\\_Ex\\_Summary.pdf](http://media.cpa2biz.com/Publication/store/SB_Ex_Summary.pdf).

**Amendments to Delaware General Corporation Law**

Effective August 1, 2006 (except as specified below), the Delaware Legislature has adopted a series of amendments to the Delaware General Corporation Law ("DGCL"). Some of the more notable amendments include:

- **Majority Voting for Election of Directors.** Section 216 of the DGCL was amended to provide that any stockholder-adopted bylaw which prescribes a requisite vote for the election of directors may not be repealed or amended by the corporation's board of directors. Section 216 provides that the default standard for director elections is a plurality of votes. Prior to the amendment, even if stockholders adopted bylaws requiring majority voting, the board of directors could amend the bylaws and restore plurality voting.
- **Resignation of Directors.** Section 141(b) now provides that a director resignation is effective when the resignation is delivered, upon a specified later effective date or on an effective date determined upon the happening of an event. It also provides that resignations conditioned upon a future event, specifically the failure of a director to receive the required vote for re-election, may be made irrevocable. Prior to the amendment, a director resignation was effective when it was delivered in writing to the board of directors.
- **Failure to File Annual Franchise Tax Reports.** If a corporation fails to file a complete annual franchise tax report, the Secretary of State may not issue a certificate of good standing and is required to declare the charter of such corporation void. However, in the event a charter is declared void for failure to file a complete annual franchise tax report, the corporation may correct the filing on a retroactive basis, although during the period where a charter is declared void, the corporation is subject to losing its corporate name to another entity. These amendments are scheduled to take effect January 1, 2008.

**NASDAQ Global Select Market in Effect**

Effective July 3, 2006, the NASDAQ Stock Market, Inc. created a new market tier entitled NASDAQ Global Select Market. The new tier introduces heightened listing requirements that NASDAQ believes is a "mark of achievement and stature for qualified companies." NASDAQ will continue to list companies on its two other market tiers, NASDAQ Global Market (formerly NASDAQ National Market) and NASDAQ Capital Market (formerly NASDAQ

Small Cap Market). In order for a Company to have its securities listed on the NASDAQ Global Market Select, companies must meet specific financial and liquidity requirements. Companies also will be subject to NASDAQ's existing corporate governance standards, including a majority independent board, independent audit and compensation committees, and shareholder approval of significant transactions and equity compensation. NASDAQ initially assigned and trans-

**Section 404 Compliance Extension for Some**

On August 9, 2006, the SEC proposed minor relief from compliance with Section 404 of the Sarbanes-Oxley Act of 2002 for selected filers.

- **Non-Accelerated Filers extended compliance:**
  - \* until fiscal years ending on or after December 15, 2007 for providing a report by management assessing the effectiveness of the company's internal control over financial reporting. In the first year, non-accelerated filers are required to comply with only the management portion of the internal control requirements.
  - \* until the first annual report for fiscal year ending December 15, 2008 for providing auditor's attestation report on internal control over financial reporting in their annual reports.
- **Foreign Private Issuers (Accelerated Filers) extended compliance:**
  - \* until fiscal years ending on or after July 15, 2007, for providing a registered public accounting firm's auditor's attestation report on internal control over financial reporting in their annual reports. In the first year, required to provide only management's report in annual report filed for their first fiscal year ending on or after July 15, 2006.
  - \* DOES NOT CHANGE compliance dates for foreign private issuers that are large accelerated filers.
- **Transition for Newly Public Companies:**
  - \* any issuer that has become public through an IPO or a registered exchange offer, or a foreign private issuer that is listing on a US exchange for the first time, is not required to provide either a management assessment or an auditor report until its second annual report.

## FROM THE EDITOR

Dear clients and friends:

We are pleased to announce some key new additions to our firm.

In July 2006, David Denenberg and Michael Adler joined our firm, allowing us to develop a significant new intellectual property practice. David and Michael will continue to practice in the areas of intellectual property and environmental law. David is a highly experienced patent and other intellectual property litigator, particularly in federal courts all around the country. In addition to assisting David with patent litigation, Michael also prosecutes patent, trademark and copyright applications. We look forward to now being able to provide a full range of intellectual property representation to our clients. In addition, David also has an active environmental practice, which compliments our existing real estate practice.

We have also added Sean Crowley in our government relations/lobbying group. Sean will initially focus his efforts primarily in New York City and Albany, and we look forward to him being a key part of our government relations team.



Neil M. Kaufman,  
Chairman,  
Corporate & Securities  
Practice