

News in Brief

November 8, 2007

**Securities and Exchange Commission/
Corporate****Increased Transparency of Issuer/Underwriter
Relationship Sought**

Five pension funds and two financial institutions, including the California Public Employees' Retirement System, recently petitioned the Securities and Exchange Commission (SEC) to require additional disclosure under Regulation S-K regarding the relationship between underwriters and issuers.

Currently, Item 508(a) of Regulation S-K requires registrants to identify underwrites with which they have a material relationship, and to describe the nature of such relationship. The petitioners have submitted amendments to Regulation S-K to (1) enhance disclosure relating to any loans or credit facilities (other than in the ordinary course of business) provided by an underwriter or its affiliates in the prior year to the issuer or its officers and directors, (2) require disclosure of any allocations of securities from initial public offerings by the underwriter to the issuer's executive officers and directors, and (3) require disclosure of whether a book running underwriter or its affiliates will provide research coverage for an issuer's common shares.

The petitioners believe that such increased transparency of the relationship between the issuer and underwriter will lead to greater confidence in the capital markets.

**The IPO is on Course for a Comeback with Some
Help From the SPAC**

At the end of October and with 10 months of 2007 under Wall Street's belt, the Securities and Exchange Commission's filings indicate that 220 IPOs have been priced. While the numbers certainly are up, the monthly average of 22 is still less than half the monthly average for the 1990s, 47 per month from January 1990 to December 1999; October 1996 saw 109 IPOs price. The busiest month in 2007 was may with 35 IPO pricings. However, the numbers are not as far off from the previous

decade; the 1980s saw an IPO average of 32 pricings per month.

As of the end of September, 37 SPAC (Special Purpose Acquisition Companies) have been priced and 45 more are in registration. The SPACs raised a total of \$4.74 billion by the end of September. For comparison in 2006, a record year for SPACs, \$3 billion was raised through 38 SPACs. In 2005, 29 SPACs were priced for \$1.98 billion and in 2006, 4 SPACs for \$237 million.

**New Study of The SEC's E-Proxy Program
Reveals Concerns**

Pursuant to recent amendments to the Securities and Exchange Commission (SEC) rules on proxy solicitations, nearly 30 companies have begun supplying proxy materials to their shareholders via the internet. Although this new e-proxy program is designed to facilitate investor access to information, some concerns exist that the program may be producing unintended consequences.

The SEC recently adopted amendments to the proxy rules under the Securities Exchange Act of 1934 to provide shareholders with the ability to choose the means by which they access proxy materials. Under these new amendments, issuers will be required to post proxy materials on the web, and will also be required to provide shareholders with notice of online availability of proxy materials. Issuers may also choose to provide paper copies of proxy materials along with the notice. This proposal was intended to afford all shareholders the opportunity to select the means by which they access proxy materials, including via paper, e-mail or the internet, while still granting issuers flexibility in determining how to furnish their proxy materials. In a companion release issued along with the e-proxy amendment adoption, the SEC adopted a "notice and access" model that issuers may comply with on a voluntary basis for proxy solicitations commencing on or after July 1, 2007. This "notice and access" model enables issuers to provide shareholders with proxy materials

by mailing shareholders notice that annual meeting materials may be accessed online.

According to a study released in late October, 2007 by Broadridge Financial Services, issuers participating in the e-proxy program are experiencing significantly lower shareholder participation in annual meetings employing the notice-and-access model. The Broadridge study analyzed voting participation results of more than ten companies that have used the e-proxy model on a voluntary basis since the summer of 2007. The results show markedly lower participation rates in a year-over-year comparison, which reflects participation rates before the "notice and access" model was available. Specifically, the study found that only 3.4% of retail shareholder accounts voted in 2007, compared with over 15% in 2006. In addition, the cumulative number of beneficial shares voted was lower as well; down 7.3% from a year earlier.

<http://www.irwebreport.com/daily/2007/10/23/participation-plummets-in-notice-and-access-votes/> <http://www.thecorporatecounsel.net/blog/index.html>

<http://www.sec.gov/rules/final/2007/34-56135.pdf>

Verizon Gives Shareholders Say on Pay

On November 1, 2007, the board of directors of Verizon Communications Inc. decided to provide the shareholders of the company with an annual advisory vote on executive pay. Verizon will be one of the first major companies to provide such a "say on pay". The annual advisory vote will begin at Verizon's 2009 annual meeting.

The shareholder vote will not be binding, but a "no" vote may embarrass the company's directors. James F. Reda, an independent executive pay consultant, indicated that most United States and foreign investors he interacts with favor say on pay proposals. Although Reda explained that there really are not any investors that do not like the say on pay concept, the directors hate the idea because the vote undermines their position.

The Securities and Exchange Commission requires that public companies report how much their top executives are paid. The recent rise in executive compensation has become an issue for many investors. Shareholders have attempted to pass proposals at several companies so that investors would have a say on pay. The RiskMetrics Group indicated that in 2007, a majority

of shareholders voted in favor of say on pay proposals at seven companies. In May of 2007, 50.18 percent of Verizon shares cast at the annual meeting favored a proposal put forward by the Association of BellTel Retirees which would provide investors the right to vote up or down on pay practices annually. Similarly, 69 percent of shares cast at Activision's annual meeting supported a say on pay proposal.

The board of directors of Verizon also adopted policies that would amend Verizon's executive severance policy to define more specifically the types of payments that are included when calculating the amount of severance owed to an executive. The other policy adopted required that the independent compensation consultant employed by the board would only provide services to the human resources committee. There are concerns that if the consultant provides services to other business units, there may be a conflict of interest. One proposal that did not pass at the annual meeting was a requirement that Verizon disclose other business arrangements with the compensation consultant.

<http://money.cnn.com/news/newsfeeds/articles/apwire/ea7a3de3433cedaa4dd74348d02af694.htm>

Litigation/White Collar

Industrial Equipment Firm Pays \$4.2 Million in Illegal Kickback Case in Iraq Food Program

Ingersoll-Rand Company Ltd., a New-Jersey based industrial equipment company, has agreed to pay more than \$4.2 million in connection with a Securities and Exchange Commission (SEC) lawsuit accusing the company of kickbacks which violated the Foreign Corrupt Practices Act.

The SEC's lawsuit alleges that from 2000 through 2003, four of Ingersoll-Rand's subsidiaries paid almost \$ 1 million in kickback payments and agreed to contracts in which more than a half million dollars more in kickbacks were to be paid. The contracts were for the sales of humanitarian goods to Iraq under the U.N. Oil for Food Program.

According to the SEC, the kickbacks were disguised as "after-sales service fees" but no legitimate services were provided for the payments.

Without admitting or denying the allegations, the firm consented to the entry of final judgment, enjoining it from

future violations and ordering the disgorgement of profits and the payments of civil fines and penalties pursuant to a deferred prosecution agreement with the Fraud Section of the U.S. Justice Department.

Court to Consider Liability of Secondary Actors in Securities Fraud

The United States Supreme Court recently heard oral argument in *Stoneridge Investment Partners LLC v. Scientific Atlanta*, considered by some to be the most important securities case the Supreme Court has heard in more than a decade.

At issue in *Stoneridge* is whether third parties such as investment banks, accountants, law firms, and even vendors can face private lawsuits for doing business with a U.S. company that commits fraud, even if the third party did not have knowledge of, or participate in, the fraud itself. In legal terms, the concept is known as “scheme liability.” The heart of the issue raised by *Stoneridge* is whether investors should be permitted to sue not only the company that issued the securities and the corporate officers who made misstatements to investors about the company’s condition, but also third parties who did business in some form with the company but made no false public statements about it.

Presently, there is a bright-line distinction between “primary liability and “secondary liability.” As it stands today, only those who actually broke the law can be sued. The Plaintiffs in *Stoneridge* are seeking to expand their private right of action for securities fraud.

In *Stoneridge*, the Plaintiffs contend that the two partner companies should have known that their partners were engaged in fraudulent conduct, and therefore should also be held liable for violations of the federal securities laws. Specifically, Stoneridge Investment Partners sought to hold vendors of Charter Communications liable for their alleged participation in sham business transactions that created the appearance of additional revenue for Charter and furthered a fraud against Charter’s investors.

During oral argument, the Supreme Court appeared strongly inclined to leave it to Congress to define the circumstances under which secondary players like investment banks, auditors and vendors can be sued in private securities fraud actions. Chief Justice Roberts noted that the Court should not “get in the business of implying private rights of action any more” and that since Congress had picked up the responsibility, the plaintiff was limited to what Congress had enacted to cover “aiding and abetting” conduct – namely, the exclusive pursuit of aiding and abetting claims by the Securities and Exchange Commission, not lawsuits by private parties. Roberts also stated that, “my suggestion is not that we should go back and say that there is no private right of action. My suggestion is that we should get out of the business of expanding it.”

Many legal commentators believe that the Supreme Court has shown itself to be pro-business in the last term, with, for example, a decision which further protected corporations from so-called “nuisance lawsuits.” In light of that case and other recent decisions, commentators say the Court has given the impression that it will likely continue its pro-business posture and not open the floodgates to additional litigation and a possible overhaul of corporate liability that a widening of the rights being contested in *Stoneridge* would provide.

Many believe that the *Stoneridge* case is a proxy for Enron shareholder suits against the banks which financed the fraudulent Enron deals. A court ruling in the plaintiffs’-shareholders’ favor in *Stoneridge* could increase the viability of claims against third parties, including suits against banks that allegedly helped Enron defraud investors.

A decision in the case is expected by the end of this year or in early 2008.

Government Brands Insider Trading as “Rampant”

High-ranking government officials contend that illegal insider trading appears to be widespread among Wall Street professionals and have formed a special working group to focus on the unlawful practice.

The enforcement director for the Securities and Exchange Commission, Linda Chatman Thomsen, told reporters attending a recent securities fraud conference in Washington, D.C. that insider trading appeared to be “rampant.”

Echoing this opinion, Alice Fisher, assistant attorney general with the Justice Department’s criminal division, said, “the number of insider trading cases don’t seem to be going away.”

The SEC’s webpage almost always contains litigation news updates about insider trading prosecutions and enforcement action lawsuits being filed. Earlier this year, federal prosecutors charged 13 defendants, including employees at top Wall Street banks, in what they branded on of the most pervasive insider trading rings since the 1980s.

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