

News in Brief

January 11, 2008

**Securities and Exchange Commission/
Corporate**
SEC Expands Form S-3, F-3 Eligibility

The Securities and Exchange Commission (SEC) amended eligibility requirements of Securities Act Forms S-3 and F-3, broadening the scope of eligibility to include companies that do not meet the public float requirement, which seek to use the forms to register primary offerings of their securities. Shell companies and companies that were shell companies within the preceding 12 months are not eligible to use the forms. Additionally, companies are not eligible unless they were timely with their SEC filings for the preceding 12 months.

For those companies who are otherwise eligible under the amendments, two additional requirements apply. First, the company must have at least one class of equity security listed on an exchange. Second, the company cannot sell more than one-third of its public float during any 12 month period.

It estimated that some 1,400 smaller reporting companies will now be eligible to use Forms S-3 and F-3 under the amendments.

<http://business.cch.com/securitiesLaw/news/12-20-07a.asp>

SEC Mandates Electronic Filing of Form D

The Securities and Exchange Commission (SEC) has adopted amendments to mandate the electronic filing of Form D beginning in March 2009. The SEC will provide a six-month phase in period, under which electronic filing of Form D information will become available on September 15, 2008, and electronic filing will become mandatory commencing March 16, 2009. SEC Corporate Finance Director John White stated that the phase-in period would act as a test for the new electronic filing system.

Form D is the official notice of an offering of securities made by an issuer without registration under the Securities Act in reliance on an exemption provided by Regulation D. The switch to electronic filing is intended to ease the costs and burdens of preparing and filing the disclosures required by Form D. In adopting the amendment, the SEC noted that "the absence of an electronic system for filing Form D information prevents issuers from filing through efficient modern methods and limits the usefulness of the information collected on Form D."

In addition, the SEC is exploring the possibility of linking electronic filings of Form D to the North American Securities Administrators Association. According to Director White, the SEC staff hopes to be able to create a one-stop filing system where companies can file their Form D with the SEC and with state regulators at the same time.

<http://business.cch.com>

**SEC Announces New Online Executive Pay
Comparison Program**

The Securities and Exchange Commission (SEC) has launched a new online tool that will allow investors to compare executive pay among the 500 largest U.S. companies, and includes special features that will enable investors to process detailed compensation data.

The first of its kind, the Executive Compensation Reader tags executive compensation figures in an interactive data format called XBRL, and provides investors with more efficient access to Summary Compensation Tables and other data in the proxy statements of large companies. Since the SEC first introduced the XBRL Voluntary Program in 2005, it has encouraged issuers to use interactive data to facilitate investor access to information from the issuer's SEC filings. SEC Chairman Chris Cox stated that the rationale for these changes is to alleviate

“the complicated data expeditions that forced investors to hunt through financial statements, footnotes, proxy statements, and other disclosure documents to figure out how much a company pays its top executives,” and expressed his belief that “through its new rules and the power of interactive data, the SEC has transformed the landscape of compensation disclosure. The result is quicker and better analysis, and better-informed shareholders.”

The new tool will provide investors with several options. Investors can now rapidly view the total annual pay as well as dollar amounts for salary, bonus, stock, options and company perks for filers submitting data to the XBLR program. Special features also enable investors to compare executive compensation figures with those of other filers by sorting according to industry or size. Investors may also use the new program to compare methods of executive pay according to industry, public market capitalization, or revenue, by means of selected comparisons in both table and graph form. The data also can be downloaded into Microsoft Excel, enabling investors to process data in their own tables. Additionally, the new tool includes direct links to companies’ proxy statements, along with footnotes and explanations of compensation decisions.

The program may be accessed at the Security and Exchange Commission’s website at <http://www.sec.gov/xbri>.

See SEC Press Release at <http://www.sec.gov/news/press/2007/2007-268.htm>

Litigation/White Collar

Prosecutors May Begin Utilizing Sarbanes-Oxley Criminal Securities Fraud Statutes

The Department of Justice has another tool from the Sarbanes-Oxley Act to combat securities fraud. Section 1348 and Section 1349 have been in place for five years, but the provisions have not been utilized as much as Congress may have envisioned. Section 1348 was designed to provide a “more general and less technical” statute that would “be more accessible to investigators and prosecutors” than existing antifraud laws. Other criminal laws such as Section 10(b) of the Securities Exchange Act of 1934 and its implementing regulation, Rule 10(b)-5, already prohibit fraud “in connection with the purchase or sale of any security.” The use of Section 1348 may be limited because it requires evidence that the scheme

is linked to securities “of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 ... or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934.” Frauds in connection with transactions of securities for non-34 Act companies may not fall in the category of crimes addressed in Section 1348.

One website article in *The Deal* suggested that prosecutors will likely try to argue that Section 1348 does not require proof of a willful mens rea. The article indicated that this interpretation may have some support in the legislative history, specifically a report prepared for Sen. Patrick Leahy. The legislative history indicated that Section 1348 was intended to relieve the government of its burden to “prove ... willful violations of ... complex [securities] regulations [that] allow ... defendants to argue that they did not possess the requisite criminal intent.” Additionally, the language of the statute does not include the word “willfully” but instead uses the terms “knowing” conduct. The article indicated that there is existing case law that provides for a contrary view on the mens rea issue. The 7th U.S. Circuit Court of Appeals held that, in the context of the similarly worded mail, wire and bank fraud statutes, intent to defraud means “acting willfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for one’s self or causing financial loss to another.”

Another article on the *Financial Week* website also indicated that Section 1348 has not been used that much since it was enacted. The article indicated that since there are other criminal laws that may be used for similar conduct, Section 1348 has not been prosecutors’ primary tool. The Department of Justice reported that there have been approximately 50 prosecutions under Section 1348 since it was enacted. The article provided three potential reasons why there have not been more prosecutions using the statute. One reason for the lack of prosecutions under Section 1348 was that the conduct being prosecuted could not predate the enactment of Section 1348. A second reason provided was that since there was not that much case law on the statute, a court could choose to interpret Section 1348 in a different manner than a theory proposed by the prosecution. A final potential reason for the lack of Section 1348 prosecutions could be that the Sarbanes-Oxley Act also increased the maximum penalties for violations of the pre-existing mail and wire fraud statutes and Rule 10b-5 securities fraud to a maximum of 20 years.

In addition to Section 1348, the Sarbanes-Oxley Act included Section 1349, another powerful criminal statute tool prosecutors

could rely upon. Section 1349 indicates that someone who attempts or conspires to commit an offense can be liable even if the person did not make an overt act of fraud. The defendant could face the maximum penalty provided under the statute for the underlying criminal act. Since Section 1348 provides for a 25 year prison term, the defendant convicted of conspiracy could be subject to 25 years in prison. The article on the Financial Week website indicated that the potential prison term under Section 1349 would be significantly higher than the five-year sentence a defendant could face under the traditional conspiracy statute for conspiracy to commit securities fraud in violation of Section 10(b) and Rule 10b-5.

Securities Class Action Filings and Settlements Increase

According to a 2007 year-end study performed by NERA Economic Consulting, there has been an increase in securities class actions filed in 2007 over previous years, as well as an increase in the amounts paid to settle such cases.

Over the prior eighteen months, there had been a decrease in the number of securities class-action lawsuits filed in the United States. However, that trend appears to reverse course in 2007. The NERA study notes an approximate 58% increase in the number of cases filed compared to 2006.

Much of this increase is attributed to litigation against companies affected by subprime lending problems. However, NERA notes that the number of filed cases increased by almost 40% even when excluding subprime lending cases.

The NERA study also notes that average and median settlement values have increased for companies facing a securities fraud class action. The average settlement paid to plaintiffs in shareholder class actions in 2007 was \$33.2 million, which reflects a 50% increase over 2006. Moreover, the median settlement value also reached a record high in 2007, at \$9.6 million compared to \$7.0 million in 2006. Finally, NERA concluded that the median settlement as a percentage of estimated investor losses increased from 2.1% in 2006 to 2.4% in 2007, although the percentage is higher for smaller settlements involving \$100 million or less in investor losses (5.1% in 2007).

Lucent Settles SEC Case Concerning Payments For Chinese Officials' Travel

The Securities and Exchange Commission (SEC) recently filed a settled lawsuit against Lucent Technologies, Inc. concerning alleged violations of the books and records and internal control provisions of the Foreign Corrupt Practices Act ("FCPA"). The settlement requires Lucent to pay \$1.5 million in civil penalties and to be subject to a permanent injunction. In a related development, Lucent entered into a non-prosecution agreement with the United States Department of Justice, agreeing to pay a \$1 million fine.

The SEC's lawsuit against Lucent, a Delaware corporation which provides communications systems and services, alleges that Lucent spent more than \$10 million from 2000 to 2003 for approximately 1,000 Chinese government officials working for Chinese government enterprises which were prospective or existing Lucent customers. Specifically, the settled lawsuit alleges that the money was supposedly used to allow the Chinese officials to travel to the United States and elsewhere for inspection of Lucent factories and for training the Chinese officials to use Lucent equipment. But according to the SEC's lawsuit, the officials frequently traveled to tourist destinations, such as Las Vegas, Disney World and Niagara Falls, and did not inspect any Lucent facilities or receive any training.

The SEC contends that these Chinese officials, who traveled at Lucent's expense, were often identified in Lucent internal documents as "decision makers" for awarding new business.

Lucent, which agreed to the sanctions without admitting or denying the allegations in the lawsuit, allegedly recorded many trips with improper entries, such as booking more than 160 trips to its "factory inspection account" even though the Chinese officials did not visit a Lucent factory at any time during the trip. In addition to alleging that Lucent made incorrect entries, the SEC also contends that Lucent failed to properly train its officers and employees to appreciate the nature and status of its Chinese government customers in the context of the FCPA.

Enacted in 1977 after a series of domestic and foreign bribery scandals, the FCPA prohibits improper payments to foreign officials (to assist in obtaining or retaining business) and imposes record-keeping and internal controls requirements on

all entities subject to SEC jurisdiction. The FCPA's accounting provisions are generally enforced by the SEC. The record-keeping provisions are designed to prevent entities from disguising bribes paid overseas by inaccurately describing the payments on their books.

Concerning the SEC's allegation that Lucent did not adequately train its officers and employees, the FCPA internal controls require issuers to devise and maintain a system of internal accounting controls. They do not require a particular or specific type of control system – but it must be sufficient to reasonably meet the statute's specified objectives.

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