

ABA Committee on Federal Regulation of Securities

**March 16, 2007
Washington, D.C.**

Dialogue with the Director

John White, Director, Division of Corporation Finance, Securities and Exchange Commission

Keith Higgins, Chair of the Committee, welcomed White, who prefaced his remarks by stating that they did not necessarily represent the views of the Commission, the Commissioners or other members of the Commission staff. Joining White and Higgins were Mark Vilaro of the Division's Office of Chief Counsel and Jack Bostelman of Sullivan & Cromwell LLP.

White referred to a speech he had recently made in Dallas, outlining 11 items on which the Division's attentions were focused. He said that he planned to mention 6 of these items, but not go deeply into them, and then discuss in more depth four additional items.

Foreign Private Issuer Deregistration

White noted that this proposal was on the agenda for the upcoming Wednesday meeting of the Commission. The Commission received 30 comment letters, which were on the whole very positive. White identified two issues on which commenters had focused. The first relates to the denominator to be used in the 5% test – is it the trading in the primary market or worldwide trading volume? The second relates to the one-year ineligibility period following termination of an ADR facility and delisting and whether those situations should be treated the same. Stay tuned Wednesday to find out.

Because the rule is considered a major rule, White said that it cannot become effective until 60 days after publication in the Federal Register. A question was asked whether that delay period applied in situations where the rule relaxed existing regulation. White expressed confidence that there would be time for foreign private issuers to exit the system under the adopted rule in advance of the upcoming 20-F due date.

Electronic Proxy

The rule implementing the voluntary model becomes effective July 1. White expressed mild surprise that he had not heard more comment on the proposed “universal availability” model. He reminded the audience that the Commission has proposed universal availability and that the comment period on that is still open.

404 Internal Control over Financial Reporting

White observed that three business-oriented reports had come out recently that had generally been pleased with the SEC's and PCAOB's efforts to improve implementation of Section 404. It is an issue that the Division staff is obviously looking at seriously. White reminded the audience about the roadmap the Commission had announced last May: interpretive guidance to companies, revisions to AS #2, oversight of the PCAOB inspection program and extension of compliance dates for non-accelerated filers. He observed that they were on track in following the roadmap.

Proxy Access

White stated that the staff had declined to take a view on the proposal submitted to HP to effect what has been characterized as a binding by-law proposal that would implement a form of proxy access. The vote on the proposal had occurred the previous day and it had not received a majority of the votes cast. A proposal that had been submitted to Reliant Energy has been withdrawn, and the staff has one no-action request pending from UnitedHealth. He gave no indication of what was on the Commission's agenda on this topic but reiterated that Chairman Cox is committed to addressing the topic before next year's proxy season.

XBRL

White urged everyone to learn about XBRL and invited the audience to tune into an upcoming webcast on Monday at which he would be demonstrating XBRL.

PIPEs

The staff has disseminated its views on PIPEs at the San Diego securities conference and at SEC Speaks. The area of most concern relates to convertible PIPEs that have a conversion formula that increases as the price of the underlying stock goes down and which can potentially result in substantial percentages of the outstanding shares being ultimately delivered. These transactions present both disclosure issues and the issue of whether they should properly be viewed as primary offerings. White said that the staff has a set of review guidelines that are now being applied in all the review offices consistently. A question from the audience suggested that some clearer differentiation among different scenarios might be desirable.

White next turned to the items he planned to talk about in more depth.

Division Website

Assisted by Mark Vilardo, White demonstrated the new layout and content of the Division's website. A principal reason for the reorganization has been to provide greater transparency for staff interpretations, with a hoped-for reduction of the 30,000 calls that the Chief Counsel's office receives each year. White pointed out that the Division's interpretive advice is being organized topically (regardless of the form in which it first appeared) and also highlighted several new sections of the Division's web pages, including "Frequently Requested Materials" where key documents have been posted that are not otherwise easily available on the web.

White expects that shortly users will be able to sign up for RSS feeds to several of the Division's web pages so that you will be notified when something is posted to that page.

Executive Compensation

Obviously we are right in the middle of seeing how issuers respond to the new disclosure rules on executive compensation, related person transactions and corporate governance. White outlined three initiatives that the Division will undertake following this proxy season:

- *Targeted Reviews and Summary Report.* Following this season, the Division staff will select a "critical mass" of issuers whose proxy disclosure they will review. Comment letters will go out, making both future comments as well as possibly seeking amendments to previously filed reports (likely the 10-K, as the meeting for which the proxy statement was used will likely have already occurred). Sometime after the comment process the Division will compile a summary report, in the vein of the Division's 2003 Fortune 500 report. In response to a question, White noted that examiners were already reviewing disclosure in S-1s and had received training across the Division.
- *Data Tagging.* The Division expects to tag executive compensation data from the Summary Compensation Table and perhaps some other tables from the 500 largest issuers and load it into a separate XBRL database on the Corp Fin website. The information will be manipulable so that, for example, you would be able to replace the FAS 123R expense data in the equity awards columns of the SCT with the grant date fair value from the Plan Grants table. This project could be a demonstration of the promise of XBRL.
- *Possible Amendments and Interpretations.* The Division expects to take all of this information and it may suggest amendments to the rules or interpretive advice. White was mindful of the timing for any amendments and expects that this will happen sometime in the fall of 2007.

Restatements

Item 4.02 of Form 8-K is triggered when a company concludes that previously issued financial statements can no longer be relied upon. It is not triggered simply when a company concludes that it must restate prior financials. Although these two triggers may be the same, they are not necessarily so. FAS 154 prohibits the correction of a prior error in the current period if it would have a material impact on the current period. It would require restatements of prior periods even when the effect is not material to any individual prior period. White suggested that the trigger in 4.02 may not be correct, particularly if the goal is to make investors aware of restatements.

White reminded the audience of the FAQ that states that the requirement to disclose the information required by Item 4.02 cannot be satisfied by including it in another Exchange Act report, although a number of people in the audience pointed out that a strict reading of the rules seems to permit compliance in that way.

White was asked about the guidance by the Staff given on the speaking circuit that a 4.02 filing of non-reliance may not necessarily require an issuer to shut down its S-3s or S-8s. He affirmed

that he believed there could be situations where cessation of those offerings would not be necessary following a non-reliance 4.02 filing, but noted that it would obviously depend on the particular facts and circumstances.

Private Offering Reform

White said that this issue is now on the table. He did not believe that the Commission would be headed for a “wholesale revision” to the private offering rules. Several items that may be considered are:

- Providing S-3 shelf benefits in some limited amounts to smaller companies
- Possibly shortening the Rule 144 holding periods
- Developing an electronic Form D
- Amending Reg D to permit limited general solicitation for offerings to some class of “larger” investors

On the registered front, White said that there was some thought being given to providing the benefits of Regulation S-B to smaller companies using S-1, which would obviate the need to have the separate S-B forms.

IFRS

Finally White noted that international financial reporting standards were coming. He believed it is only a matter of time. He will be speaking at the New York Stock Exchange on Friday, March 23 on this topic.