2008 NATIONAL DIRECTORS INSTITUTE

SEC, NYSE, NASDAQ, PCAOB UPDATE 9:45 AM

Patrick Daugherty, Foley & Lardner LLP

Jarett Decker, Public Company Accounting Oversight Board

James Duffy, NYSE

Michael Emen, NASDAQ

Merri Jo Gillette, U.S. Securities and Exchange Commission

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PATRICK DAUGHERTY
PARTNER
Foley & Lardner LLP

Patrick Daugherty is chief strategy partner in the Business Law Department of Foley & Lardner LLP. In practice, Mr. Daugherty directs multi-office, multi-disciplinary teams of lawyers in the planning and execution of public and private offerings of equity, debt and hybrid securities, secondary, mezzanine, high-grade and high-yield issues), structured financings, tender offers, exchange offers, restructurings, recapitalizations, mergers, acquisitions, divestitures, management buyouts, "going private" transactions and corporate governance assignments.

Clients include investment banks and institutional investors, but mainly Mr. Daugherty serves multinational corporations and small-cap domestic companies that he has taken public and nurtured. Chambers reports that he is "very practical and business-oriented," providing clients a "good understanding of issues that should be taken into account."

Mr. Daugherty regularly coaches corporate boards and committees to make business decisions that comply with the Sarbanes-Oxley Act, securities laws, stock exchange rules, corporate codes and best practices. He routinely represents corporate clients in dealings with every division of the SEC.

Mr. Daugherty was counsel to SEC commissioner Edward F. Fleischman in Washington, D.C. Mr. Daugherty advised Commissioner Fleischman on all major initiatives of the SEC and the reform of domestic financial market regulation after the 1987 market crash. He has been tendered and qualified as an expert in securities law in criminal fraud proceedings brought by the U.S. Department of Justice and has testified as an expert witness for the defendants in a civil fraud matter.

He is licensed to practice law in New York, Washington, D.C., North Carolina and Michigan. He earned a bachelor's degree, with distinction, from Northwestern in 1978 and a law degree, *cum laude,* from Cornell University in 1981.

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Jarett Decker is Deputy Director and Chief Trial Counsel in the Division of Enforcement and Investigations at the PCAOB in Washington. Before that, he served as Senior Trial Counsel for the SEC in Chicago. Decker also has 14 years of experience in private law practice, specializing in securities litigation and white-collar criminal defense. Decker has published articles on law enforcement issues in the New York Times, Reason magazine, the Cato Institute's Policy Analysis, and other publications. He is a graduate of the College of William & Mary and the University of Michigan Law School.

JARETT DECKER
DEPUTY DIRECTOR AND
CHIEF TRIAL COUNSEL
Public Company
Accounting Oversight
Board

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JAMES F. DUFFY
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
NYSE Regulation, Inc.

James F. Duffy is an Executive Vice President and the General Counsel of NYSE Regulation, Inc. Since joining the New York Stock Exchange in 1999, Jim has been extensively involved in both domestic and international listings matters, market regulation and market structure issues. Jim was centrally involved in the formulation of the Exchange's expanded corporate governance listing standards, and in the changes to the Exchange's own governance structure as well. He has also worked extensively on the Exchange's demutualization and mergers over the last several years, and the recent consolidation of NYSE Member Firm Regulation with the NASD to create the Financial Industry Regulatory Authority (FINRA).

Previously, Jim served for ten years as General Counsel of the American Stock Exchange. Earlier he practiced corporate and securities law on the legal staff of GTE Corporation, and with the firm of Lord, Day & Lord in New York.

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MICHAEL EMEN
SENIOR VICE PRESIDENT
NASDAQ

Mr. Emen graduated from Cornell University with a Bachelor of Arts degree and received the degree of Juris Doctor from the New York University School of Law. He has been involved in the securities industry for many years working at the New York Stock Exchange, the Securities and Exchange Commission, the American Stock Exchange and now at the NASDAQ Stock Market where he serves as Senior Vice President in charge of the Listing Qualifications Department.

Mr. Emen has participated in numerous programs, including those sponsored by the Comptroller General, the University of Michigan, the University of Wisconsin, Yale University, Corporate Women Directors International, Directorship Boardroom Forum, the National Association of Corporate Directors, the National Investor Relations Institute, the North American Securities Administrators Association, the Securities and Exchange Commission and various other groups including bar associations and law and accounting firms.

Mr. Emen has written several articles concerning corporate governance including, “Corporate Governance – The View from NASDAQ”, Global Corporate Governance Guide 2004: Best Practice in the Boardroom, Global White Page Ltd, London, 2004.

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MERRI JO GILLETTE
REGIONAL DIRECTOR
U.S. Securities and Exchange Commission

Merri Jo Gillette, Director of the Chicago Regional Office (CHRO), oversees the SEC's second largest regional office. The office has jurisdiction over enforcement matters and regulatory examinations arising in nine Midwestern states, which are resident to 25% of the U.S. population and more than 25% of the nation's 1000 largest corporations

Merri Jo was appointed Regional Director in June 2004. Under her leadership, the office has brought a number of significant enforcement matters, many of which have involved extensive coordination with criminal authorities and have resulted in parallel criminal indictments. The region is home to approximately 1,650 registered investment advisers with over $3.3 trillion of investor assets under management; and 230 investment companies, including 116 mutual fund complexes, with total assets of more than $750 billion. The region's investment company population includes four of the fifty largest investment company complexes and over one-third of all of the insurance product complexes in the nation.

Within the Commission, Merri Jo has been particularly active in the current Seniors Initiative and in matter relating to various diversity initiatives. During 2006, she also served as Chairperson for the Midwest Interagency Committee, a working group sponsored by the Federal Reserve Bank of Chicago and comprised of federal and state regulators of banks and other financial institutions throughout the Midwest.

Prior to her current appointment, Merri Jo was the Associate District Administrator for Enforcement in the SEC's Philadelphia Office, where she worked on litigation and enforcement matters for 18 years. During that time, Merri Jo was responsible for numerous enforcement matters, many with precedent setting outcomes. She is a graduate of Northwestern University (1979) and received her J.D. from The Dickinson School of Law in Carlisle, Pennsylvania (1982).

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SEC, NYSE NASDAQ, PCAOB UPDATE
Breakout Session 9:45-11:45 a.m.

AGENDA

SEC (Pat Daugherty)

1. Chairman Cox's Agenda
   a. Global Strategy
      - International Organization of Securities Commissions' Subprime Task Force
      - Credit Rating Agency Task Force
      - Reforms under GAAP and IFRS
      - International enforcement
   b. Enforcement (*see below*)
   c. Protection of Seniors
2. Corporation Finance
   a. Financial Reporting
      - "Fixing" SOX §404 – SAS No. 5 (*see below*)
      - Advisory Committee on Improvements to Financial Reporting
      - Mutual Recognition/Convergence with IFRS
      - XBRL
   b. Foreign Issuers Deregistration Initiative
   c. Executive Compensation Disclosure (10/9/07 SEC Staff Report)
   d. Proxy
      - eProxy
      - Shareholder Access Proposals
3. Trading and Markets
   a. Credit Rating Agency Reform Act
   b. Municipal Market
      - "muni-EDGAR"
      - Floating rate municipal bonds (auction rate) pricing transparency
      - SEC SRO rule approval process streamlining
4. Investment Management
      - Mutual fund "summary prospectus"
      - Principal trading rule (rationalizing regulatory regimes of BD's and IA's)
      - Overhaul of Rule 12b-1 (mutual funds reimburse brokers)

PCAOB (Jarett Decker)

1. Intro to PCAOB
2. Distinctions between PCAOB jurisdiction and SEC jurisdiction
3. Reg S-X Rule 2-07 (Communication with Audit Committees)
4. Cases

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NASDAQ and NYSE (Michael Emen and James Duffy)

1. Competitiveness of U.S. stock exchanges
2. Securities markets consolidation

NASDAQ (Michael Emen)

1. Acquisition Vehicle Listing Proposal ("spacs")
2. New Nasdaq Marketplace Rulebook
3. Proposal to allow initial/continued listing based on IFRS
4. Rule Change re: Related Party Transactions
5. Proposed/Recent Changes to Disclosure Rules
6. DRS
7. Delinquent Filers
8. Legal/Compliance Website
9. Public Reprimand Letters
10. Independent Director Definition
11. PORTAL
12. OMX Transaction

NYSE (James Duffy)

1. NYSE Euronext
2. Participation in the discussions about U.S. competitiveness in the global market
3. Proxy Working Group

SEC Enforcement (Merri Jo Gillete)

1. Office of Collections and Distributions
2. Phoenix
3. Office of Internet Enforcement
4. Hedge Funds
5. CDOs
6. Microcap Fraud
7. Municipal Fraud Working Group
8. “The Hub”
9. Office of Risk Assessment
10. Subprime Task Force
11. Consolidated Supervised Entity Program

December 3. 2007

New NASDAQ Marketplace Rulebook – Request for Comments

NASDAQ Listing Qualifications has just concluded a complete review of the NASDAQ Marketplace Rules, which contain all of the initial and continued listing requirements of The NASDAQ Stock Market. As these rules have evolved over the last 30 years, numerous alterations to the Marketplace Rules document have created a very complex organization that can be difficult to navigate — especially for those who are unfamiliar with its structure. In reviewing the entire rulebook, we found several opportunities to reduce redundancies and greatly improve the overall organization of the rules.

As a result of this review, NASDAQ has rewritten its listing rulebook with the objective of making the rules as clear and understandable as possible. We have attached the draft of the new rulebook to this notice to give our listed companies the opportunity to review and provide comments. Once we have reviewed and considered all comments from listed companies, the new rules will be filed for review and approval with the Securities and Exchange Commission.

Our goal in this process was to simplify the organization and presentation of the rules to make them transparent and easy to use. The proposed new rules begin with a discussion of NASDAQ's overall regulatory authority and the universal rules required of all companies, regardless of listing tier, both in terms of initial and continued listing. The tier-specific requirements of companies trading on the NASDAQ Global Select, Global or Capital Markets follow in discrete, simplified sections. The succeeding reorganized sections address corporate governance requirements, structured products and other non-traditional securities listings, and the compliance process for companies that fall below the continued listing requirements or are denied initial listing. The final section of the new rulebook contains all initial, continued and other listing fees.

We have tried to simplify the rules in both language and structure, adding subject headers throughout and a more detailed table of contents to make it as easy as possible to find any particular topic.

We hope you will take advantage of this comment period and provide any suggestions you may have before the comment period ends on Friday, February 1, 2008. We welcome your comments on any aspect of the draft rules, however, please keep in mind that no substantive rule changes are being proposed in this project. We plan to file the rules with the SEC by the end of the first quarter 2008. To submit your comments please email marketplacerules@nasdaq.com.

We thank you for your time and consideration in this effort and hope that the resulting new NASDAQ Marketplace Rules are greatly improved for you, your advisers and your shareholders.

NASDAQ Draft Marketplace Rulebook:
http://www.magnetmail.net/images/clients/NASDAQ/attach/MarketplaceRulebookDraft.pdf

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percentage was not adequately addressing the particular event. Any GCF Repo net short settlement amount that exceeded the GCF Repo Event Parameter would be subject to a ''GCF Repo Event Clearing Fund Premium'' and a ''GCF Repo Event Carry Charge.''[16]

FICC would set 12% as the minimum percentage on which the GCF Repo Event Clearing Fund Premium would be based and 50 basis points as the minimum on which the GCF Repo Event Carry Charge would be based, and would have the discretion to increase these amounts during a GCF Repo Event if FICC believed that the minimums were not adequately addressing the particular GCF Repo Event.

FICC would retain the right to waive imposition of the GCF Repo Event Clearing Fund Premium and the GCF Repo Event Carry Charge if FICC determined, based on monitoring against the GCF Repo Event Parameters, that these measures were not necessary to protect FICC and its members.

4. Statutory Basis

FICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[17] and the rules and regulations thereunder applicable to FICC because it should allow GCF Repo participants to expand their use of the GCF Repo service to include GCF Repos done with dealers that clear at a different clearing bank in a manner that will support the prompt and accurate clearance and settlement of securities transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change would have any impact or impose any burden on competition.

[16] For example, assume that FICC has declared a GCF Repo Event, and on the day of implementation of the protective measures, Dealer A's average net short settlement amount is $1 billion. This means that Dealer A's GCF Repo Event Parameter is $1.4 billion. On the day of implementation of the protective measures, Dealer A's net settlement amount is $1.9 billion, so the measures will be applied to $500 million (*i.e.*, $1.9 billion minus $1.4 billion). If the percentage for the GCF Repo Event Collateral Premium is 12 percent and the GCF Repo Event Carry Charge is 50 basis points, Dealer A will pay a GCF Repo Event Clearing Fund Premium of $60 million and a GCF Repo Event Carry Charge of $6,944.44 on the day of implementation. On each succeeding day that the GCF Repo Event remains in effect, FICC will reevaluate, Dealer A's net settlement position.

[17] 15 U.S.C. 78q–1.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments have not been solicited with respect to the proposed rule change, and none have been received. FICC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FICC–2007–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FICC–2007–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://www.ficc.com/gov/gov.docs.jsp?NS-query.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2007–08 and should be submitted on or before March 4, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2471 Filed 2–11–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57290; File No. SR–NASDAQ–2007–090]

Self-Regulatory Organizations; the NASDAQ Stock Market, LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Accept Financial Statements Prepared in Accordance with International Financial Reporting Standards, as Issued by the International Accounting Standards Board, for Certain Foreign Private Issuers

February 7, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 16, 2007, the NASDAQ Stock Market, LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed Amendment No. 1 to the proposed rule

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change on February 6, 2008. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to determine compliance with its listing standards based on financial statements prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, for companies that are permitted to file financial statements using those standards with the Commission.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.[3]

* * * * *

4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for listing on Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a)–(d) No change.

(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on Nasdaq.

(1) No change.

(2) (A)–(B) No change.

(C) An issuer's qualifications will be determined on the basis of financial statements *that are either: (i)* Prepared in accordance with U.S. generally accepted accounting principles; or *(ii)* [those accompanied by detailed schedules quantifying the differences between] *reconciled to* U.S. generally accepted accounting principles *as required by the Commission's rules* [and those of the issuer's country of domicile]; *or (iii) prepared in accordance with International Financial Reporting Standards, as issued by the International Accounting Standards Board, for companies that are permitted to file financial statements using those standards consistent with the Commission's rules.*

(D)–(E) No change.

(3)–(26) No change.

(f) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Under current Commission rules, a foreign private issuer[4] that files financial statements with the Commission that are prepared on a basis other than U.S. generally accepted accounting principals (''U.S. GAAP'') is required to include a reconciliation to U.S. GAAP. Similarly, Nasdaq's rules require a foreign private issuer to evidence compliance with the listing standards based on financial measures prepared in accordance with U.S. GAAP or reconciled to U.S. GAAP.[5]

The Commission has recently approved a rule change to eliminate the requirement for a U.S. GAAP reconciliation for foreign private issuers that file financial statements prepared in accordance with International Financial Reporting Standards (''IFRS''), as issued by the International Accounting Standards Board (''IASB'').[6] These changes apply only to foreign private issuers that file on Form 20–F, regardless of whether the issuer complies with IFRS as issued by the IASB voluntarily or in accordance with the requirements of the issuer's home country regulator or the exchange on which its securities are listed.[7] A foreign private issuer will continue to be required to provide a reconciliation to U.S. GAAP if its financial statements include deviations from IFRS as issued by the IASB, if it does not state unreservedly and explicitly that its financial statements are in compliance with IFRS as issued by the IASB, if the auditor does not opine on compliance with IFRS as issued by the IASB, or if the auditor's report contains any qualification relating to compliance with IFRS as issued by the IASB.[8] The Commission's rules are applicable to annual financial statements for financial years ending after November 15, 2007, and to interim periods within those years, that are contained in filings made after March 4, 2008.[9]

To allow foreign private issuers to take full advantage of this development, Nasdaq proposes changes to allow such issuers to evidence compliance with Nasdaq's listing requirements on the same basis as permitted by the Commission.

Nasdaq believes that requiring companies to provide a U.S. GAAP reconciliation in order to obtain and maintain a listing on Nasdaq when they are no longer required to do so under Commission rules may result in issuers choosing not to list in the U.S. and so deny U.S. investors the ability to easily invest in such issuers. The proposed rule change would be compatible with the Commission's stated goal ''to facilitate cross-border capital formation while ensuring adequate disclosure for the protection of investors and the

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaq.complinet.com.*

[4] A ''foreign private issuer'' is an issuer, other than a foreign government, that is incorporated in a foreign country and either: (i) Has a majority of its voting securities held other than by United States residents, or (ii) a majority of its executives are not United States citizens/residents, a majority of its assets are located outside of the United States and its business is principally administered outside the United States. *See* Securities Exchange Act Rule 3b–4(c), 17 CFR 240.3b–4(c).

[5] Nasdaq Rule 4320(e)(2)(C).

[6] *See* Securities Exchange Act Release No. 57026 (December 21, 2007), 73 FR 986 (January 4, 2008) (the ''IFRS/IASB Adopting Release''). *See also* Securities Exchange Act Release No. 55998 (July 2, 2007), 72 FR 37962 (July 11, 2007) (the ''IFRS/IASB Proposing Release''). The Commission is also considering whether to allow U.S. issuers to satisfy their reporting requirements through the provision of financial statements prepared in accordance with IFRS instead of U.S. GAAP. *See* Securities Exchange Act Release No. 56217 (August 7, 2007), 72 FR 45600 (August 14, 2007). This proposed Nasdaq rule change would be applicable only to foreign private issuers and would not apply to domestic U.S. companies.

[7] IFRS/IASB Adopting Release at 992.

[8] *Id.* at 993. A foreign private issuer using a jurisdictional or other variation of IFRS will be able to rely on the amendments if that issuer also is able to state compliance with both IFRS as issued by the IASB and a jurisdictional variation of IFRS (and does so state), and its auditor opines that the financial statements comply with both IFRS as issued by the IASB and the jurisdictional variation, as long as the statement relating to the former is unreserved and explicit. *Id.*

[9] *Id.* at 994.

promotion of fair, orderly and efficient markets.''[10]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 6 of the Act,[11] in general, and with section 6(b)(5) of the Act,[12] in particular. Section 6(b)(5) requires that an exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Nasdaq believes that the proposed rule change is consistent with these requirements in that modifying the U.S. GAAP reconciliation requirements will ease the burden of compliance on foreign private issuers, in a manner consistent with proposed changes to the federal securities laws, and will not adversely affect investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change; or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2007–090 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2007–090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2007–090 and should be submitted on or before March 4, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2567 Filed 2–11–08; 8:45 am]

BILLING CODE 8011–01–P

[10] *See* the IFRS/IASB Proposing Release at 37965. *See also* IFRS/IASB Adopting Release at 1006 (noting that moving towards a single set of globally accepted accounting standards will have positive effects on investors).

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57278; File No. SR–FINRA–2007–010]

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1 To Amend an Exemption to NASD Rule 1050 and NYSE Rule Interpretation 344/02 for Certain Research Analysts Employed By a Member's Foreign Affiliate Who Contribute to the Preparation of a Member's Research Report

February 6, 2008.

I. Introduction

On September 12, 2007, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] Notice of the proposal was published for comment in the **Federal Register** on September 26, 2007.[3] The Commission received two comment letters in response to the proposed rule change.[4] On January 16, 2008, FINRA filed Amendment No. 1 to the proposed rule change to make certain modifications to the original rule filing. This order provides notice of the proposed rule change, as modified by Amendment No. 1, and approves the proposed rule change as amended on an accelerated basis.

II. Description

On September 12, 2007, FINRA filed with the Commission a proposed rule change to amend an exemption to NASD Rule 1050 and New York Stock

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 56481 (September 20, 2007), 72 FR 54700 (September 26, 2007).

[4] Securities Industry and Financial Markets Association (''SIFMA'') letter dated October 17, 2007; and WilmerHale (''WilmerHale'') letter dated October 19, 2007 on behalf of Credit Suisse Securities (USA), LLC; Goldman, Sachs & Co.; J.P. Morgan Securities Inc.; Lehman Brothers Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; and UBS Securities LLC.

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NASDAQ Proposes Listing Standards for Acquisition Vehicles

Move Will Enhance Protection and Transparency in This Active Market Segment

NEW YORK, Feb. 21, 2008 (PRIME NEWSWIRE) -- The Nasdaq Stock Market, Inc. (Nasdaq:NDAQ) will propose to the Securities and Exchange Commission (SEC) a rule change to list acquisition vehicles and subject them both to NASDAQ's initial listing requirements as well as additional criteria developed specifically for this type of entity. No other market has yet adopted such criteria.

Acquisition vehicles, often known as special purpose acquisition vehicles (SPACS), are companies which go public with a business plan to seek corporate mergers or acquisitions. In 2007 alone, more than 50 offerings by acquisition vehicles raised new capital exceeding $10 billion.

"Acquisition vehicles are an increasingly common capital-raising device," said Bob McCooey, Senior Vice President, NASDAQ. "We believe that listing them on NASDAQ, subject to these important investor protections, will benefit investors and issuers alike."

NASDAQ will introduce more stringent listing standards to this burgeoning market segment for the benefit of investors and issuers.

In addition to having to satisfy all applicable initial listing standards, NASDAQ will require that acquisition vehicles also meet the following criteria:

-- Gross proceeds from the initial public offering (IPO) must be deposited in an escrow account maintained by an insured depository institution as defined by the Federal Deposit Insurance Act or in a separate bank account established by a registered broker or dealer.

-- Within 36 months of the effectiveness of its IPO registration statement, the company must complete one or more business combinations using aggregate cash consideration equal to at least 80% of the value of the escrow account at the time of the initial combination.

-- So long as the company is in the acquisition stage, each business combination must be approved both by the company's shareholders and by a majority of the company's independent directors. Following each business combination, the combined company must meet all of the requirements for initial listing.

For information about NASDAQ's listing standards, visit http://www.nasdaq.com/about/listing_information.stm#fees.

NASDAQ is the largest U.S. equities exchange. With approximately 3,100 companies, it lists more companies and, on average, trades more shares per day than any other U.S. market. It is home to companies that are leaders across all areas of business including technology, retail, communications, financial services, transportation, media and biotechnology. NASDAQ is the

primary market for trading NASDAQ-listed stocks as well as a leading liquidity pool for trading NYSE-listed stocks. For more information about NASDAQ, visit the NASDAQ Web site at www.nasdaq.com or the NASDAQ Newsroom at www.nasdaq.com/newsroom/.

Cautionary Note Regarding Forward-Looking Statements

The matters described herein contain forward-looking statements that are made under the Safe Harbor provisions of the Private Securities Litigation Reform Act of 1995. These statements include, but are not limited to, statements about NASDAQ's strategic initiatives. We caution that these statements are not guarantees of future performance. Actual results may differ materially from those expressed or implied in the forward-looking statements. Forward-looking statements involve a number of risks, uncertainties or other factors beyond NASDAQ's control. These factors include, but are not limited to factors detailed in NASDAQ's annual report on Form 10-K, and periodic reports filed with the U.S. Securities and Exchange Commission. We undertake no obligation to release any revisions to any forward-looking statements.

NDAQG

Working Outline Dated February 13, 2008

Title: Northwestern University School of Law 35th Annual Securities Regulation Institute

January 23-25, 2008

Coronado, California

Prepared by: Yvette M. VanRiper of Foley & Lardner LLP

FOLEY

FOLEY & LARDNER LLP

NORTHWESTERN UNIVERSITY SCHOOL OF LAW
35th ANNUAL SECURITIES REGULATION INSTITUTE
January 23-25, 2008
Coronado, California

I. **Welcome and SEC Division of Corporation Finance Overview—**
John W. White (Director, Division of Corporation Finance, SEC)

A. Plans for Corporation Finance in 2008

1. Importance of transparency, including having agenda disclosed to the public. Documents outlining these initiatives will be published on the SEC website

2. Two themes in 2008 for Corporation Finance
   a. Financial Reporting
      (i) Improve comparability, accountability
      (ii) Interactive data/XBRL
         a) Much progress last year
         b) Voluntary program now
         c) Will be mandatory for U.S. issuers on a staged basis
         d) Rulemaking proposal to come this spring, final rule requiring submission of financial data in XBRL format this fall
         e) Before we can have final rules, need successful filing by voluntary filers and update of EDGAR system
         f) This is a priority and will happen
      (iii) SEC Advisory Committee on Improvements to Financial Reporting (CIFR)
         a) Draft recommendations of CIFR on SEC's website (at left-hand side of home page)—many consistent with current Corporation Finance initiatives
         b) CIFR proposal addresses significant number of restatements in recent years. Two issues:
            i) Materiality of error
               (a) When should Staff issue guidance? Those who evaluate materiality should make decision based on perspective of reasonable investor. Qualitative factors can lead to determination that quantitatively large error may not be material
               (b) Staff is concerned when registrant takes legal/accounting advice and assumes what Staff will do, but does

not consult Staff. Don't presume Staff's answer—ask

ii) How to address and correct a material error? Staff to give guidance. Restatement of prior periods only when errors are material to prior periods. Can interpret SAB 108 that if an error is material in current period, SAB 108 requires a restatement of prior periods. CIFR recommends reviewing this

(iv) Corporate websites
- a) Last advice in 2000. Much has changed since—webcasts, podcasts, etc.
- b) Need to revisit. How to treat hyperlinked information? When is information on web/blogs "publicly available"?

(v) Accounting standards—SOX 404: Possible additional 1-year delay for non-accelerated filers

(vi) Oil and gas disclosure
- a) Current rules are out-of-date
- b) December 2007—concept release from SEC. Comments due February 2008
- c) Plan to propose rules in spring/adopt in fall

(vii) International Financial Reporting Standards (IFRS)
- a) 2007: Eliminated requirement for foreign private issuers to reconcile to U.S. GAAP; can report in IFRS alone
- b) Use of IFRS by U.S. issuers has profound implications to U.S. companies and U.S. public
- c) Link on left-hand side of SEC's home page to "Global Accounting Standards"

(viii) International issues/reporting
- a) Enhance rules: when do foreign issuers report?
- b) Eliminate automatic shelf registration for foreign issuers
- c) Six-month filing period for Form 20F—reviewing
- d) Cross-boundary tender offer rules
- e) Mutual recognition
- f) See J. White's speech in London on January 14, 2008 on SEC website

II. **Executive Compensation and Key Disclosure Issues—**

Keith F. Higgins (Ropes & Gray LLP; Chair of the Federal Regulation of Securities Committee, ABA)
Shelley Parratt (Deputy Director, Division of Corporation Finance)
Andrew M. Paalborg (Vice President, Corporate and Securities, Starbucks Corp.)
Scott P. Spector (Fenwick and West, LLP)

A. Review of 300 companies during 2007 focused on manner of presentation and CD&A

1. Manner of presentation
   a. Language—use plain English: short sentences, active voice, avoid boilerplate, jargon
   b. Longer text does not mean better disclosure
   c. Improve analysis of "How" and "Why" decisions are made
   d. Read disclosures carefully. Focus on how you applied policies, not what policies are
   e. Supplemental charts, tables and graphs are generally helpful
   f. Alternative summary compensation tables are acceptable, but can't be confusing or more prominent than required tables. Explain differences between required summary compensation table and supplemental tables

2. CD&A
   a. Principles-based disclosure regarding compensation policies for executives. Puts into perspective the numbers that follow in the tables
   b. Discuss/analyze material factors underlying compensation
      (i) Focus more on substance of compensation decisions—how did decision regarding one element affect other decisions? Focus on what you did rather than how you did it
      (ii) Explain difference in compensation policies applied to one officer compared to another officer. Show the issuer gave thought to compensating all officers, not just CEO
      (iii) Benchmarks—If material to decisions, identify and quantify. Describe nature of discretion that might be retained, if appropriate. Identify benchmark peers, how chosen
      (iv) Performance targets—received most comments
         a) Required to be disclosed only if material. What is "material"?
            i) If information is material to an investor's vote for directors—then the information should be disclosed in proxy
               (a) Does company use performance targets?

(b) Yes—Are they material? Think this through before you determine not to disclose. Be ready to discuss your reasoning with the Staff
(c) Yes—Will disclosure cause company harm?
(d) No—Must disclose
(e) Yes—Then review guidance on disclosure of certain portions of this information, difficulty of reaching target, request for confidentiality

ii) Disclosure of prior or current year targets may be material to an investor's vote for directors this year

3. Going forward, a review of registration statement will include executive compensation review. SEC wants more thorough review of 10-Ks—and has hired more attorneys to do so. Shift in 10-K review: more cover-to-cover review, not just accounting

4. Severance, Change of Control Disclosure
   a. Wrigley: First to use table of change of control payments. Thought all would follow
      (i) One-half of issuers do not use table, but describe in a narrative. Not nearly as effective as table. A table is easy to do—use this. Footnotes to this table are very helpful
      (ii) Many issuers do not do a good job in CD&A regarding analysis of why benefits/payments set forth in tables, particularly change of control, were paid; no cross-reference between tables and CD&A
   b. Good examples of change of control tables/disclosure
      (i) CVS Caremark—great chart, footnotes. Description of what executives forfeited on termination for cause
      (ii) Sara Lee—good cross-reference to CD&A
      (iii) Estee Lauder—ditto; also post-termination options exercises
   c. Staff comments/observations
      (i) How do arrangements work into overall compensation philosophy? This has not been addressed well initially or in response to comments
      (ii) Bristol Meyers, Beamis, Allstate—See these comment letters for good examples of back and forth between issuer and Staff
      (iii) Few companies that had 280G gross-ups provided details regarding assumptions regarding the gross-ups. To have meaning, should give these assumptions. See CVS Caremark as an example

(iv) Life insurance proceeds. Only GE put in tables actual proceeds that would be paid to executive beneficiaries on death

III. **Selected Hot Accounting Topics for Counsel—**
John J. Huber (Latham & Watkins LLP)
Wayne Carnall (Chief Accountant, Division of Corporation Finance, SEC)
H. Stephen Meisel (Assurance Partner and SEC Services Leader, PricewaterhouseCoopers)
Zoe-Vonna Palmrose (Deputy Chief Accountant, SEC)

A. Materiality. Two focuses: qualitative factors in materiality analyses and interim materiality

1. SAB 99: Misstatement that is large may still be immaterial based on other factors
   a. Perspective of reasonable investor
   b. Exercise of professional judgment

2. Interim error correction framework: How to deal with interim errors—what information does investor need?

3. Classification and disclosure
   a. If have error but does not impact net earnings/key performance; what to consider?
   b. Look at total mix of information

4. Offsetting errors—consider errors individually and in the aggregate; look at financial statement as a whole, taking into consideration implication of internal controls

5. Dealing with periods of significant earning changes

B. Item 404: Management Guidance and Audit Standard No. 5

1. Will non-accelerated filers ever have to implement 404(b)? SEC wants to evaluate implementation of its guidance—need data/takes time. Does not want to impose 404(b) on non-accelerated filers until this evaluation is done

2. What are the implications of not filing report or non-substantiating report?
   a. Not filed: deficient filing—lose S-3 eligibility
   b. Auditors do look at internal controls for non-accelerated filers in audit of financial statement. Responsible under audit standard to communicate material weakness, even if not making 404(b) evaluation
   c. Bring in audit committee

C. Goals and Expectations of Chief Accountant, Division of Corporation Finance

1. Make interaction between issuers and Accounting Division efficient and effective, so that:
   a. Improve quality of reporting
   b. Encourage domestic and foreign companies to register with the SEC

2. How to achieve goals?
   a. Encourage communication between accounting firms and Staff—outreach to leaders of major accounting firms on periodic basis to resolve issues on a timely basis
   b. Improve Staff communications with public—training manual, guidance, etc. Try to help issuers, improve compliance with rules
   c. Reduce restatements—many restatements hurt market credibility, discourages companies from registering with the SEC
   d. Consistency in comments and Staff approaches to solving issues
   e. IFRS: Issues of accepting IFRS by U.S. companies
   f. Address cost/benefit of reporting requirements

3. What to expect from W. Carnall?
   a. More flexibility in resolving issues
   b. Be pragmatic, solutions-driven
   c. Be proactive: anticipate problems and issues
   d. Be responsive regarding timing and content
   e. Will listen—open-minded to alternative views, fair evaluation of alternative viewpoints
   f. Reach out to the accounting profession—look to others to develop good policy
   g. Available to serve public. Invite calls/e-mails to him and to Staff—Be proactive in contacting Staff to address issues; don't anticipate the answer

IV. **How to Work with the SEC Corporation Finance Staff—A "How-To" Session**

Meredith B. Cross (Wilmer Cutler Pickering Hale and Dorr, LLP)
Vincent P. Colman (Assurance Partner and U.S. National Office Professional Practice Leader, PricewaterhouseCoopers LLP)
Linda L. Griggs (Morgan Lewis & Bockius LLP)
Shelley E. Parratt (Deputy Director, Division of Corporation Finance, SEC)

A. Common Q&As

1. Timing regarding answers on no-action letters
   a. 30 days: goal. Meet 50% of the time
   b. Simple request: generally 2-3 months
   c. Complex request: year or more

2. Any faster routes than no-action route?
   a. Call the Staff, get informal reaction—if simple issue
   b. Send in a "talking points" submission: write facts, analysis, proposed answer. Call then to discuss with Staff. Staff reacts to this. Sometimes leads to a formal no action request. Call first; ask if the Staff will consider this approach. Much faster than no action

3. Waiver process
   a. S-3 waivers
      (i) If late with required 8-K, 10-Q, 10-K, SEC may grant waiver to continue to be eligible
      (ii) Submit letter to Chief Counsel: describe why late, remediation measures, what information is publicly available
      (iii) Request must be ripe—you must plan to file S-3 within 30 days
      (iv) Oral answer given
      (v) When are these not granted?
         a) 10-K filed after 12b-25 period
         b) Generally not when 10-Q filed after 12b-25 period, but this is fact-specific
         c) Not for late 8-Ks under Items 4.01, 4.02(b), 9.01 of Form 8-K
   b. Accounting waivers—waiver of certain requirements for financial disclosure, but no waivers of GAAP requirements
      (i) Earliest year in five-year financial data
      (ii) Process:
         a) Call Chief Accounting office/submit letter to them
         b) Will get response in writing
         c) Takes two weeks. Sometimes get waiver but filing must be current

4. Response to SEC comments requested in 10 days from Staff. Often get extension—call Staff. Some want request in writing

5. Disclosure under Item 4.02 of Form 8-K (nonreliance on financial statements): Staff reviews all
   a. Read disclosure requirement carefully and respond carefully
   b. Disclose date in which issuer concluded that financial statements could not be relied on
   c. Disclose facts regarding restatement

6. "Reconsideration" process for comments from Corporation Finance
   a. Keep Staff informed—respect chain of command
   b. In-person meetings with Staff are generally not as efficient
   c. Most efficient way—submit letter responding to comments, give analysis. Easier for Staff to work without issuer present because

want to discuss internally. Can have phone call to follow up, so there is a mutual understanding of the facts

d. OK to ask to talk to reviewer, branch chief—no retribution for this

7. Do you get a closing letter after review?
   a. Yes, on all periodic and current reports, and proxy statements
   b. If do not get, ask

8. Summary of do's and don'ts when working with the Staff
   a. Read comments carefully and fully understand all comments
   b. Do not give proposal—respond to all comments
   c. Be thorough—address all issues, give page numbers
   d. Be expansive in response—issuer is not always required to change disclosure
   e. Be detailed and support response
   f. Provide marked copy of filing
   g. Set up conference call; tell Staff who will be on call
   h. Explain issuer's timing needs
   i. Identify novel issues

B. Dealing with accounting issues

1. Send comment letter to audit committee, accountant

2. Determine if others in company should be involved

3. If need extension of time, determine when audit committee will meet

4. If do not understand comment, clarify with Staff

5. If judgment is questioned, give information to Staff so they can make a determination

6. Response must be written by company, not auditor. Give careful response but focus on issue raised: do not go outside of comment and risk other comments/issues

C. Reconsideration process is available for Staff accounting comments:

1. Staff now acknowledges that there are times when there is more than one answer
   a. Present facts
   b. Describe how you considered various options/alternatives (include in response letter to begin with)
   c. Describe why decision is transparent to investors

2. Don't cave too quickly—Staff is working with issuers to resolve issues quickly. Tell Staff timing needs

V. **U.S. Capital Market Developments—**
Alan L. Beller (Cleary Gottlieb Steen & Hamilton LLP)
Steven E. Bochner (Wilson Sonsini Goodrich & Rosati)
Michael Wishart (Managing Director, High Technology Group, Goldman, Sachs & Co.)

A. Where was market going after 2000?

1. 2002 – 2007: IPO volume doubled, secondary volume more than doubled (for equity securities). Rebound of technology companies

2. Tech IPO market still good, even in late 2007. Needed to demonstrate you had a real company and strong preference for growth with profits

3. Increasing sophistication of investors

4. NYSE in competition with Nasdaq for technology IPOs

5. Nasdaq/NYSE account for 15% of world's IPOs last year

6. Auction market (starting with Google)

7. Time to IPO—increasing significantly for venture-backed companies—from initial equity funding from IPO. 2.8 years in 1998, 7.1 years in 2007

8. Liquidity events: in 2007, approximately 10-15% IPO/remaining were M&A events

9. Time to M&A from initial equity funding has also increased from 2 years in 2001 to 6.7 years in 2007

10. So—need for additional funding prior to liquidity event

B. June 2007 to present

1. Private equity had been using significant leverage to do deals—market rejected this, within one week couldn't market commitments that had been made

2. Subprime issues

3. Fourth quarter: apparent that there would be write-offs, yet no significant impact on equity market

4. But—worst start in January for financial markets since 1960. Global markets down significantly in late January

5. Fear of recession, uncertainty regarding what more will go wrong—so IPO market now very difficult

C. Smaller Public Company Advisory Committee created to provide suggestions. SEC release to improve capital-raising for smaller companies—both pre- and post-IPO

1. Trend to longer time to IPO/liquidity event—how to get money and not trigger Exchange Act reporting?

2. Rule 12h-1 amendments: 12/7/07—relief for compensatory stock options
   a. Aligns ’34 Act with ’33 Act Rule 701 exemptions
   b. Applies to Rule 701 persons
   c. Transfer restrictions on options only
   d. Information requirement at 500 optionholders, must provide risk and financial information. Can’t be more than six months old. Confidentiality conditions

3. Private offering initiatives
   a. Proposed Rule 507: Modeled on Rule 506
      (i) Applies to large accredited investors
      (ii) Relax general solicitation prohibition—limited advertising permitted—similar to tombstone advertising. Internet advertising OK, but not TV advertising
      (iii) Add “investor-owned” test to accredited investor definition
      (iv) Shorten integration time period from 180 to 90 days

4. Integration Guidance from SEC in proposing release
   a. Pre-filing: Rule 152 guidance
   b. Post-filing: depends on how investors solicited filing registration. No per se prohibition on private placement, participation with existing investor group

5. Electronic Form D filings mandated after 3/16/07

6. Smaller public company initiatives
   a. Scaled reporting for smaller companies—lower-cost regime; eliminates SB filings. “Smaller Reporting Companies” is what these issuers will be called
   b. Expansion of Form S-3 eligibility—1/28/08
      (i) Below $75 million, other eligibility requirements apply
      (ii) Can’t sell more than 1/3 of value of published float in 12 months
      (iii) Must have equity securities listed on national securities exchange

7. Rule 144 Amendments—effective 2/15/08
   a. Reporting companies
      (i) For non-affiliates, holding period reduced to 6 months, but registrant must stay current on reports

(ii) Affiliates: Unrestricted sales after one year

b. Non-reporting companies
   (i) Non-affiliate: Unrestricted after one year
   (ii) Affiliate: Must hold one year; and then meet various requirements thereafter
c. Revised Form 144 filing requirements
d. Registration rights: What is negotiated may depend on how large issuer is, how confident the investor is regarding whether the issuer will stay current in reporting
e. Should reduce smaller companies' capital-raising costs

D. '33 Act—Short Sales Under Section 5: SEC will face these issues in next few months, given what is going on in courts

1. Commission settled many cases in PIPEs area, although this isn't unique to PIPEs

2. Interpretation of Section 5 in context of short-selling
   a. "Sale" occurs at time of contract of sale is entered into
   b. Strict liability: right of rescission if security sold in violation of Section 5—forces registration of security, enter into disclosure system/liability

3. Registration of transactions, not securities—each offer/sale needs registration or an exemption

4. Liability applies to registration statement at time the registration statement becomes effective. So—can't sell security until registration statement is effective

5. Securities are not fungible for purposes of Act

VI. **The Impact of International Trends and Developments—**
Edward F. Greene (General Counsel, Citigroup Corporate & Investment Banking)
Gareth Lake (Managing Director, Equity Capital Markets, Citigroup Global Markets)
Ethiopis Tafara (Director, Office of International Affairs, SEC)
Mary B. Tokar (Seconded Partner KPMG IFRG Limited International Financial Reporting Group)
John W. White (Director, Division of Corporation Finance, SEC)

A. Studies on U.S. regulatory environment/competitiveness have focused too much on U.S. regulation and not enough on growing overseas markets

B. Competitiveness of U.S. Markets

1. Competitiveness of U.S. markets has changed significantly
   a. Now many other places to raise capital and trade shares

b. Capital-raising outside of U.S. has increased—U.S. losing market share. Economic growth, valuation; liquidity more important than increased regulation in the U.S.
c. Oil markets have generated significant money in certain regions
d. Weakness of U.S. dollar impacts global M&A

2. Growth in equity and debt markets outside of U.S.
a. U.S. listings declining in market share
b. Largest IPOs occurring outside of U.S. and most proceeds in these IPOs are funded by non-U.S. investors
c. Non-U.S. equity markets have significantly outperformed U.S. markets/economic growth of non-U.S. markets much more significant now than U.S. market. U.S. valuations flat/multiples higher in China, Russia, India
d. Liquidity of overseas markets is increasing

3. U.S. regulatory environment
a. Impact has been exaggerated—many considerations are taken into account by issuers
b. Economics more significant

4. M&A Perspective
a. Growing impact of sovereign wealth funds
b. Weakening dollar
c. Foreign reserves are significant
d. New capital—hedge/private equity funds—looking for overseas opportunity to capture/obtain higher rates of return

C. Cross-border securities regulation

1. Mergers of stock exchanges

2. More U.S. investment in foreign securities

3. U.S. investment banks have substantial overseas presence

4. Regulatory strategies:
a. Close borders—no foreign products allowed unless subject to U.S. regulation
b. Open borders to anyone—allow foreign products without U.S. regulation
c. Regulatory convergence—difficult, time-consuming
d. Selective mutual recognition—recognize foreign regimes that have same objectives, seek same outcomes of U.S. regulation

D. International Financial Reporting Standards

1. Goal: single set of high-quality, globally acceptable accounting standards. Different opinions on how to achieve this

2. Benefits:
   a. Greater comparability among issuers
   b. Reduced costs for issuers
   c. More efficient markets

3. International Financial Reporting Standards (IFRS)
   a. Developed by International Accounting Standards Board
   b. Principles-based
   c. Permitted/required in over 100 countries, including European Union
   d. Convergence between IFRS and U.S. GAAP being discussed by IASB and FASB—there has been movement
   e. Focus on IFRS as promulgated by IASB, not as adopted by individual jurisdictions—most countries have imposed changes when adopting. Translation also creates differences

4. Foreign private issuers. No reconciliation to U.S. GAAP required if the foreign issuer uses IFRS as published by IASB. For fiscal years after 11/15

5. IFRS review project
   a. SEC looked at how companies actually applied IFRS
   b. Provided sample comments—these weren't significantly different than comments issued in U.S. GAAP reviews
   c. So—the Staff has comfort that IFRS is a stable, developed financial reporting system

6. Issues/considerations for SEC regarding U.S. issuers' use of IFRS
   a. Provide roadmap
   b. Voluntary compliance for U.S. issuers—many think this would cause significant complexity
   c. Mandatory compliance for U.S. issuers
   d. Wait and see (for more convergence)
   e. Combination of above

7. How does SEC choose?
   a. Is this a critical competitive issue? Yes—we are moving to a single set of standards: clear that this will be IFRS, not U.S. GAAP
   b. Even if U.S. GAAP is "better," more companies/jurisdictions use IFRS

c. U.S. GAAP's attempt to standardize, avoid engineering around margins—still happens
d. If one believes in a single set of global standards, we're going to IFRS
e. Need to manage change

8. How would SEC interact with International Accounting Standards Board?
   a. Review financial statements
   b. Determine compliance with IFRS
   c. If unresolved issues, contact IASB staff
   d. Engage in dialog with regulators in home country of issuer
   e. Other than FASB, no other regulator of U.S. GAAP. With IFRS, many regulations—need to build infrastructure to reach out to other regulators

9. Who wants IFRS?
   a. Global companies
   b. U.S. issuers whose competition is non-U.S.—want same base of comparison (pharmaceutical companies, for example)
   c. Other U.S. issuers may not want to change—so there will be some resistance

VII. **Hedge Funds in the M&A Environment—**
Brian J. McCarthy (Skadden, Arps, Slate, Meagher & Flom LLP)
Patricia A. Vlahakis (Wachtell, Lipton, Rosen & Katz)
Brian V. Breheny (Deputy Director, Division of Corporation Finance, SEC)
Joele Frank (Joele Frank, Wilkinson Brimmer Katcher)
Peter C. Harkins (D.F. King & Co., Inc.)
Harvey L. Pitt (Chief Executive Officer, Kalorama Partners)

A. Two types of shareholder activists:

1. "Governance gurus"

2. Hedge funds: different type of activism
   a. Desire to make changes to create short-term value for shareholders. Activist hedge funds ask for changes in management, other items to increase share value, dividends
   b. Descendants of '90s corporate raiders
   c. Target companies are across the board
   d. Many more funds now—managing significant amounts of money

B. Impact of market trends on hedge funds

1. Investors can remove their money

2. Performance has declined

3. Activism still strong

C. Benefits of activism

1. Hedge funds' interests aligned with other shareholders

2. Disinterested, unlike management

D. Concerns regarding hedge fund activism

1. Short-term focus, not long-term

2. Does not create value for company or shareholders unless there is a sale of company (which might be the point)

E. Tools used by hedge funds

1. Toe-hold positions

2. Private letter to management or board

3. Public letter

4. Nasty public letter to board of directors: fix or sell company

5. Proxy proposals/contest

6. Bear hug

7. Tender offer

8. PR campaign

9. Hold-outs in announced acquisitions—opposing sale by target or acquisition by acquirer

F. Defenses against hedge fund

1. Rights plan/pill—this is under attack

2. Classified boards—but activist shareholders will put their representatives on

3. Advance notice bylaws—most important, particularly with new electronic forum release recently made by SEC

4. Company preparedness

VIII. **Corporate Governance Issues—Shareholder Power**

A. Gilchrist Sparks III (Morris, Nichols, Arsht & Tunnell LLP)
Thomas A. Cole (Sidley Austin LLP)
Peter C. Harkins (D.F. King & Co., Inc.)
Louise M. Parent (Executive Vice President and General Counsel, American Express Company)
John F. Olson (Gibson, Dunn & Crutcher LLP)
Myron T. Steele (Chief Justice, Delaware Supreme Court)

A. New North Dakota Publicly Traded Corporation Act

1. Very shareholder-friendly

2. Presumably incorporates all current "best corporate practices"

3. If a publicly traded company is incorporated under North Dakota law, must take all provisions—no mechanism to opt out or make changes

4. Provisions:
   a. Requires majority voting for directors
   b. Advisory shareholder vote on compensation committee report
   c. Proxy access—large, long-term shareholders (who own 5% of equity for 2 years) have right to include unlimited number of directors nominated in proxy
   d. Reimbursement for successful proxy contest—shareholder-nominated candidates must be reimbursed for expenses
   e. Mandatory division of Chairman/CEO positions
   f. Shareholder meeting date must be fixed each year. 10% of shareholders can call special meeting
   g. Limited director terms: Directors must be elected each year and for one year only—no staggered terms
   h. Poison pills: limited in duration; shareholders can prevent adoption
   i. Supermajority provisions in bylaws are limited
   j. Shareholder amendment by 5% of share ownership
   k. Limitation on anti-takeover provisions—approval by 2/3 of shareholders and majority of board
   l. Shareholder approval before company can issue more than 20% of voting power

5. North Dakota franchise fee rate will not exceed 50% of cost Delaware imposes

6. Legislation sponsored by activist hedge funds; drafted by Philadelphia attorney

7. Only two public companies in North Dakota—both are grandfathered out of this

B. What to expect in 2008 proxy season?

1. Factors affecting activists:
   a. Hedge fund ownership of corporate equity. Much money, lower overall returns—9,000 hedge funds. Generally, returns not better than index. How to keep capital?
   b. Macroeconomic environment

2. Risk Metrics—new owner of ISS. Specific proposals:
   a. Say on pay proposals
   b. Executive compensation
   c. Majority voting
   d. Severance packages approval
   e. Golden parachutes approval
   f. Chair/CEO split—detailed disclosure, comparison of duties of lead director and chair
   g. Eliminate supermajority voting
   h. Shareholder calls for special meeting
   i. Classified board
   j. If previously there was a recommendation by shareholders that was not taken by a board, ISS will recommend withhold or against votes for director nominees

3. Trying to include more financial analysis into recommendations

4. Performance-based policy: threaten to withhold votes for directors where companies continue to underperform peers

C. How to deal with Risk Metrics/ISS on a "no" recommendation to a merger?

1. Call ISS—ask for meeting after the proxy is definitive

2. ISS will review six factors in merger:
   a. Risk valuation
   b. Risk premium (how did market react?)
   c. Strategic rationale for deal
   d. Management track record
   e. Negotiation process—arm's length? Were there conflicts of interest in negotiations?
   f. Governance post-merger

3. If ISS has an issue with any of these items, they will ask for meeting

4. If there is no organized opposition to merger, do not reach out to ISS, just provide proxy, ask to review ISS draft report regarding the merger. Do make certain ISS gets metrics on the deal right. ISS looks at a number of metrics, may question need for revised fairness opinion

5. Prepare presentation to ISS carefully

6. How important is ISS recommendation in context of a merger? Depends on ownership based—index funds will adhere to ISS recommendation. Others not as much

D. Majority voting developments

1. 66% of Standard & Poor's 500 companies have adopted some form of majority voting

2. Only one director in 2007 received majority no vote—is this a non-issue? Probably not; no one looks to see how close the other votes were. Impact can't be measured just as who gets no vote—impacts how board, management deals with shareholder proposals

E. Electronic proxies/notice and access

1. Saves money for large companies, but responses from retail investors are very low

2. If something important on agenda and many shares are held by retail investors, electronic voting is not recommended

F. Hedge fund directors now on Board—How to react to this?

1. Don't treat as enemy at outset

2. More often someone becomes a dissident—founder of company, for example

3. How much information sharing by board members to hedge fund? Adopt Code of Conduct requiring confidentiality, but be careful—if the code is not enforced it's an 8-K event

G. Subprime problems—impact on boards?

1. Concern that there won't be a thoughtful response

2. Communication between board and shareholders important

3. Less agitation regarding corporate governance—focus on larger economic/financial issues

Speech by SEC Staff:
Corporation Finance in 2008 — A Focus on Financial Reporting
By John W. White, Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
35th Annual Securities Regulation Institute
San Diego, California
January 23, 2008

Good morning. Thank you David [Van Zandt]. I'm very pleased to welcome all of you to the 35th Annual Securities Regulation Institute. It is my privilege and honor to be chairing the program for the first time this year, and I thank each of you for being here. I believe we've put together a great series of panels for you over the next few days and I'd like to take this opportunity to thank everyone who has worked so hard to make this all happen. Our highlight will be at lunch today, when former Chairman of the SEC, David Ruder, who has been so closely associated with the Institute for many years, will give the Alan B. Levenson Keynote Address and offer his insights in a speech entitled "Challenges Facing the SEC in the Year 2008 and Beyond."

Wanting to get a jump on David's remarks, I will first mention a quote of Alan Levenson, one of my predecessors as Director of the Division of Corporation Finance, that we repeat year-after-year at this conference. In founding this conference 35 years ago in order to further the staff's outreach to the private bar, Alan explained:

I felt that the private bar was essential to effective operations of the SEC, and the more that we could share information and do away with the mystery, it would result in the protection of investors, both from a disclosure standpoint and in the raising of capital for our capital markets, which is so crucial.

I have tried during my time as Director to reinforce Alan's theme, by making a promise of transparency in Corporation Finance, which includes both speaking publicly about our plans and making sure that remarks at conferences like this are posted on our website to share with all who interact with the Division. As I said a year ago when laying out the Division's agenda for 2007, transparency is an important principle for regulators, as well as for the disclosure that we ask companies to provide in response to our regulations. So let me see if I can put that into action this morning.

When I laid out the Division's 2007 agenda early last year,[1] there were 11 items listed — by the time of my update in August, it had grown to 14.[2] We had a quite active year in following that agenda, producing a fair amount for us to discuss in the next few days. By my count, Corporation Finance recommended to the Commission in 2007, and the Commission approved, 27 rulemaking releases — final rules, proposed rules and even three concept releases and an interpretive release. Today, however, instead of giving you another numbered list of projects, I thought I would look at our activities a bit differently — somewhat more by theme. But I do intend to honor my promise of transparency and, as best I can, give you a review of where we have been in the last year and a preview of where we are headed in Corporation Finance in 2008. At lunch, David Ruder will offer some more global thoughts on the SEC's path for 2008 and beyond. Of course, before I get into the substance of my remarks, I'll start with my standard disclaimer — the views I express today are my own, and do not represent the views of the Commission or any other member of the

staff. This is particularly important to remember as I discuss possible future areas of rulemaking.

Last year, we had several themes that drove our agenda:

- executive compensation disclosure, including roll-out of our new rules adopted in 2006,
- management guidance and the PCAOB's new Auditing Standard No. 5, responding to concerns about the efficiency and effectiveness of implementation of Sarbanes-Oxley Section 404,
- smaller public company and private offering rulemaking, including responding to the 2006 report of the Advisory Committee on Smaller Public Companies,
- proxy matters, including responding to changes in technology and to a 2006 court decision, and
- international matters, including deregistration and International Financial Reporting Standards, and responding to our increasingly global markets.

So, I will include in today's report an update as to where we are on each of these, and discuss what remains to be done this year. But primarily I want to focus on the two themes that are driving our activities this year, particularly possible rulemaking plans. The biggest area of focus for us in 2008 is financial reporting, including reviewing the Commission's new Advisory Committee on Improvements to Financial Reporting (CIFiR), which is actually planning to vote on a number of recommendations to be included in a progress report in a few weeks. Within financial reporting (very broadly defined), I am including use of interactive data, IFRS for U.S. issuers, various proposed recommendations of the CIFiR (including on materiality and restatements and use of websites for disseminating financial information), SOX 404 and even oil and gas disclosures. The other leading area of focus for this year in Corporation Finance is international matters, which I discussed at some length last week in London, in remarks titled "Corporation Finance in 2008 — International Initiatives." I will touch on these international themes only in summary form today, and will point you to the full text of my companion remarks last week on our website.[3]

With that, let me get started.

Financial Reporting

A focus on financial reporting and steps to improve, on an effective and efficient basis, the comparability, accessibility and reliability of financial information is a hallmark of our current efforts in Corporation Finance. So I would like to discuss this morning how these themes are manifested in our plans for 2008.

Interactive Data. Interactive data continues to be a key priority for Chairman Cox and for the rest of us at the Commission, with substantial progress being made in 2007 and much more in store for 2008. By interactive data I am referring to a company's ability to use a computer software language to tag its financial data with codes from standard lists, called "taxonomies," so that investors and other users can more easily locate and analyze desired information. XBRL, or eXtensible Business Reporting Language is the primary software language that the Commission is focused on.

Probably the biggest XBRL accomplishment in 2007 was completion in September of the development of XBRL data tags mapping the entire system of U.S. GAAP.[4] These comprehensive U.S. GAAP taxonomies stretch across all industry and business sectors to tag complete sets of financial statements, including footnotes. The taxonomies, together with a users' guide, were released by XBRL U.S. for public testing and comment in December, with the comment period ending in early April this year.[5]

Other milestones in 2007 included formation in October of a new Office of Interactive Disclosure within the Commission,[6] expansion of our group of companies that have agreed to voluntarily tag their disclosure to more than 40 companies having a combined market capitalization of over $2 trillion,[7] and release of the second prototype of an Interactive Financial Report Viewer that enables investors to analyze companies' interactive data filings.[8] The voluntary program remains open and companies are urged to join. If there is any doubt in your mind where and how rapidly the use of interactive data is moving, I direct you to a November 9 press release on the Commission's website summarizing Chairman Cox's discussions in Tokyo with securities regulators around the world and the progress in other countries in implementing interactive data.[9]

How does all this relate to our agenda in Corporation Finance? As I have said before, we are ready in the Division to undertake further rulemaking whenever the technology is ready. That time is fast approaching. In September, the Chairman asked for a staff recommendation this spring (which could be a rulemaking proposal), with possible final action coming this fall. This would be an aggressive schedule but, importantly, there's time in that schedule for a real field test of the taxonomies released for comment in December by our voluntary filers in their 2008 quarterly filings. If successful, you can guess where this is all likely to lead.

Adding to this, the CIFiR plans to vote next month on a developed proposal that the SEC mandate the submission of XBRL-tagged financial statements. This step would be conditioned on successful taxonomy testing, the capacity of reporting companies to file XBRL-tagged financial statements using the new U.S. GAAP taxonomy on the SEC's EDGAR system, and the EDGAR system providing an accurate rendered version of all such tagged information. Under the Committee's draft developed proposal, use of XBRL-tagged financial statements would be phased in, starting with the largest 500 domestic public reporting companies furnishing a separate XBRL-tagged document, then adding in other domestic large accelerated filers. After this initial phase-in and the satisfaction of the above conditions, the Committee's draft developed proposal calls for the Commission to then consider whether and when to move from furnishing to filing of the XBRL-tagged financial statements for large accelerated filers, and the addition of other reporting companies. In doing so the Committee believes that the Commission should be sensitive to the needs of smaller public companies and the need for proven and inexpensive software for them to use.

Now I can't tell you how fast all this will develop and what we will recommend, but with the Chairman's prior request to the staff, in combination with the Committee's recommendations, there is a lot going on here. So this is a good one to start thinking about if you haven't already.

Finally, as a demonstration of the use of data-tagging, this past December the Commission introduced on its website an "Executive Compensation Reader."[10] The reader enables investors, for the first time, to easily and instantly compare executive compensation disclosure of 500 large companies that have filed proxy statements using our new executive compensation disclosure rules. This is a useful tool for all to see how XBRL works in action, and it illustrates how user-friendly XBRL can be. The executive compensation data can be filtered and organized to give you the exact comparative data you want. So, if you want to compare, for example, the executive compensation data for all CFOs in the financial institutions industry, you can get it in two clicks. Go to our website and give it a try.

Advisory Committee on Improvements to Financial Reporting (CIFiR). As you are probably aware, last summer the Commission formed the Advisory Committee on Improvements to Financial Reporting to study the causes of financial reporting complexity and recommend to the Commission how to make financial reports clearer and more beneficial to investors, reduce the costs and unnecessary burden for preparers, and better utilize advances in technology to enhance all aspects of financial reporting.[11] Specific topics of study include how to approach setting financial accounting and reporting standards, how the process of regulating compliance by registrants and financial professionals with accounting and reporting standards can be improved (and this even includes a look at the Corporation Finance review process), and a focus on the systems for delivering financial information to investors and accessing that information.

The Committee has been remarkably active in its first six months, and though its report and recommendations are not due until next August, the Committee is scheduled to vote on interim proposals (called developed proposals) on February 11. The Committee held its most recent meeting on January 11, at which they released a Draft Decision Memo previewing what are likely to be their developed proposals. A copy of this memo is available on the SEC's website.[12] The staff is very interested in the Committee's work and we are looking at how best to react to the developed proposals when they are issued.

Some of the Committee's most interesting draft developed proposals relate to materiality and the correction and disclosure of accounting errors. As to materiality, the Committee stressed the distinction between materiality on the one hand, and the need to restate on the other hand. In the Committee's view, whether a material accounting error should lead to a financial restatement depends on the viewpoint of current investors. I agree that this is an important distinction. For example, there could be an error made six years ago that is material — but does not necessarily result in the need for a restatement. The passage of time does not make a material error immaterial — but it might impact what corrective action should take place.

The Committee discusses in the Draft Decision Memo a possible developed proposal that the Commission or the staff issue guidance reinforcing that those who evaluate the materiality of an accounting error should make the decision based on the perspective of a reasonable investor. In the Committee's view, materiality should be judged based on how an error impacts the total mix of information available to a reasonable investor, and the evaluation of errors should be made on a "sliding scale," recognizing that qualitative factors can lead to a determination that a quantitatively significant error may not be material (just as

qualitative factors can be used to lead to a conclusion that a quantitatively small error is material).

The Committee also discussed in the Draft Decision Memo a possible developed proposal whereby the Commission or the staff would issue guidance on how to correct an error consistent with specified principles, including the principle that prior period financial statements should only be restated for errors that are material to those prior periods. This might involve a revision of certain provisions of Staff Accounting Bulletin 108,[13] which today could be interpreted as causing a restatement if a correcting entry is material to the current period - even though prior periods are not changed materially as a result of the restatement. In this regard, the Committee discusses in the Draft Decision Memo an alternative to the approach in Staff Accounting Bulletin 108 under which errors that are not material to the prior annual periods in which they occurred, but would be material if corrected in the current annual period, could be corrected in the current annual period with appropriate disclosure.

Along these same lines, the Committee discussed a possible developed proposal that the Commission or the staff issue guidance, subject to specified principles, on applying materiality to errors identified in prior interim periods and how to correct those errors.

All of this is a focus for the staff. As many of you have read, or perhaps personally experienced, there have been a number of restatements in recent years to correct errors in financial statements. The determination if an error is material requires the professional judgment on the part of the preparer — frequently with the advice of its legal counsel — and the auditor. There have been situations in which a company has taken a view that an error is not material but the staff was unable to concur with that position. While these situations are not common, we have become aware of other situations in which a company is advised by its accounting and legal experts that it should restate based on the expectations of the staff's conclusion regarding materiality, without actually engaging with the staff. Please do not presume the staff's conclusion regarding materiality and the need to restate financial statements. Rather, I encourage a discussion with the staff. I have asked Wayne Carnall, our new Chief Accountant in the Division, to particularly focus on this process.

So, as you can probably imagine, we currently are looking closely at the topics of materiality and restatements and evaluating the Advisory Committee's draft developed proposals in this area.

On another topic, the Committee also discussed a draft developed proposal encouraging the Commission to consider various actions with respect to establishing a professional judgment framework and encouraging the PCAOB to consider similar action. Other draft developed proposals relate to XBRL, which I outlined a moment ago, and corporate websites, which I will get to shortly when I discuss our efforts in that area. Of course, I don't have time today to discuss all of the issues considered by the Committee to date.

So, in closing on this topic, I'd definitely recommend taking a look at the Committee's Draft Decision Memo and watching this process closely in the coming months.

Restatements and Item 4.02 of Form 8-K. I've discussed the topic of restatements and Item 4.02 of Form 8-K on a few different occasions over the past year, and this continues to be a focus for us. The issue here is "stealth restatements" — issuers placing disclosure of a decision that its past financial statements should no longer be relied on in a periodic report

rather than a separate 8-K filing. As you may know, the staff has an FAQ directly on point, which we had thought made clear that we believe that the disclosure is required in a separate Form 8-K filing.[14] However, as you may recall, the General Accounting Office has asked us to look into the practice further. I think it is likely that you will see rulemaking to address the issue this year, and you can infer from our FAQ what direction it likely would go, but I can't tell you much more than that at this point.

Corporate Websites. As I mentioned when I was going through the Advisory Committee's expected recommendations, the staff has been looking at whether and, if so, how we should update the interpretive guidance that the Commission issued in 2000 concerning the use of corporate websites for disclosures of information.[15] Consider how investors receive financial data today as compared to seven years ago — blast emails, webcasts of meetings, blogs, RSS feeds, electronic shareholder forums, podcasts, XBRL, electronic proxy solicitation. Consider also how technology can make it easier and more efficient for investors to find the financial data and analysis they are looking for. Legal issues that may need to be addressed or updated include treatment of hyperlinked information on a company's website, liability for disclosures, Regulation FD, and public availability of information. The Committee's draft recommendation that we look at these issues and issue new interpretive guidance to encourage further creative use of corporate websites and to promote industry best practices is timely in this regard, and we are certainly very interested in their thoughts. I wouldn't hazard a guess on timing of any new interpretive guidance here, but I can tell you it is something we've been thinking about pretty seriously for some time now.

Oil and Gas Disclosure. On to another disclosure area where you may be seeing some changes — after hinting for over six months now that we wanted to look at our disclosure rules concerning oil and gas reserves, last month the Commission issued a concept release seeking comment on the extent and nature of the public's interest in revising the oil and gas reserves disclosure requirements in Regulation S-K and Regulation S-X.[16] These disclosure requirements were originally adopted between 1978 and 1982 and in the time since then significant changes in the oil and gas industry have led many to believe that our disclosure requirements need updating. In particular, some commentators have expressed concern that the Commission's disclosure requirements have not adapted to current practices and may not provide investors with the most useful picture of oil and gas reserves held by public companies.

This is an area we've wanted to address — we even brought on an Academic Engineering Fellow, Dr. John Lee, from Texas A&M, with over 40 years of experience in the field, at the end of last year for a one-year term in Corporation Finance.[17] We're looking forward to working with Dr. Lee and also to seeing what ideas come out of the concept release. Comments on the release are due February 19 and I encourage any of you with an interest in this area to share your views with us. I hope we will be able to move forward on this one later this year.

Management Guidance and Audit Standard No. 5. We completed issuing management guidance last year after, I believe, 9 different concept, proposing, interpretive, adopting and postponing releases, and over a year of work. In addition, last summer the Commission approved the Public Company Accounting Oversight Board's Audit Standard 5, which replaced Audit Standard No. 2. Consistent with its ongoing efforts to reach out to the smaller public company community, the Commission most recently issued a small business guide for compliance with Section 404 last November.[18] In addition, in September the staffs of the Office of Chief Accountant and the Division of Corporation Finance updated the Frequently Asked Questions regarding Management's Report on Internal Control Over

Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports. These FAQs can be found on the SEC's website.[19] Non-accelerated filers are required to provide management assessment reports for the first time for fiscal years ending on or after December 15, 2007 and, in the case of calendar year companies, they are preparing those reports now. Under our current rules, the first auditor attestation reports for non-accelerated filers are due for fiscal years ending on or after December 15, 2008.

Up until last month, that was pretty much it for new developments in this area. However, on December 12, in testimony before the House Committee on Small Business, the Chairman announced that he would be recommending that the Commission authorize a further one-year delay in implementation of the Section 404(b) requirement — the auditor's attestation report — for non-accelerated filers to fiscal years ending on or after December 15, 2009. As he indicated, the staff plans to conduct a study of the costs and benefits of Section 404 compliance under the new management guidance issued in 2007, as well as new AS 5, which was approved by the Commission in July 2007 and is effective for audits of fiscal years ending on or after November 15, 2007. Also, the PCAOB staff is working on guidance in this area focused on auditing smaller companies. Preliminary PCAOB staff guidance was published in October, so an additional deferral of one year would allow additional time to promulgate this guidance and for auditors of non-accelerated filers to incorporate such guidance into their audits. So stay tuned for more developments in this area soon.

International Financial Reporting Standards (IFRS). International Financial Reporting Standards, or IFRS, is a topic that we spent a great deal of time on in the past year, and one in which you should see more from us in the coming year. It obviously relates to both of our principal initiatives for 2008 — financial reporting and international matters — so I will talk about it now in the context of both. In December the Commission adopted final rules under which foreign private issuers that prepare financial statements in their SEC filings using IFRS, as issued by the International Accounting Standards Board (IASB), will not be required to include a U.S. GAAP reconciliation.[20] This was an incredibly important step toward our long term goal of having a single set of high quality, globally accepted accounting standards. The new rules apply to financial statements for financial years ending after November 15, 2007 and interim periods within those years.

I want to draw your attention to one issue raised by the timing of the new rule with respect to eliminating the reconciliation requirement. The rule is effective March 4, 2008, and until the rule is effective companies are subject to the existing rules regarding the inclusion of U.S. GAAP information. Some foreign private issuers with a fiscal year ending after November 15, 2007 may wish to file their annual report on Form 20-F prior to March 4, 2008 using financial statements prepared in accordance with IFRS as issued by the IASB and exclude the U.S. GAAP reconciliation. If you or your clients are in this situation, I encourage you to contact the Division of Corporation Finance's Office of Chief Accountant to discuss your facts and circumstances. Of course, any accommodation or waiver request must be made in writing.

Outstanding still in this area is the Commission's concept release, issued in August, which explores the possible use of IFRS by U.S. issuers.[21] This topic remains before the Commission, and it really is one that you all should be paying attention to, if you aren't already. This is significant for U.S. companies and their advisors, as well as for U.S. investors, and is a project that appears to have some momentum.

The concept release seeks information about the extent and nature of the public's interest in allowing U.S. issuers to prepare financial statements in accordance with IFRS as issued by

the IASB for purposes of complying with the rules and regulations of the Commission, rather than preparing financial statements in accordance with U.S. GAAP, as is currently the standard. The comment period closed November 13, 2007 and members of the staff have been hard at work reviewing the comments submitted.

In an effort to obtain additional feedback from stakeholders, the Commission held two roundtables on IFRS in December 2007.[22] The first roundtable focused on the "big picture" question of whether U.S. issuers should be permitted to report their financial statements using IFRS rather than U.S. GAAP, while the second roundtable focused on the practical issues surrounding the possible future use of IFRS by U.S. issuers — that is, the mechanics of making the transition successful.

Repeating a few of my remarks from London, I would like to mention some of the interesting and thoughtful comments and points raised at those roundtables. Looking back, it appears there were three issues that generated near universal agreement among participants:

- First, our goal should be a single set of high-quality, globally accepted accounting standards. Panelists believed that uniform global standards would provide significant benefits to all stakeholders in the global capital markets, including U.S. investors.

- Second, the rest of the world is already heading in this direction and their endpoint is IFRS — not U.S. GAAP. There was little consideration given to the idea that U.S. GAAP could become the uniform global standard. This is an "inconvenient truth" for many in the U.S.

- Third, the possible future use of IFRS by U.S. issuers would require a multifaceted transition process and, as such, requires a comprehensive plan to make the transition to IFRS reporting successful.

Of course, with any important policy decision there is going to be disagreement and we received quite diverse opinions from participants on a number of topics. Participants discussed the options for proceeding on the matters discussed in the concept release by proposing rules, the feasibility of two GAAPs coexisting in the U.S. capital markets, the problems with jurisdictional adaptations of IFRS, the impact of the concept release on the convergence process between U.S. GAAP and IFRS, and concerns with respect to the IASB governance structure. Participants also discussed the costs and benefits of allowing the use of IFRS in the U.S., why issuers would or would not switch to using IFRS, the mechanics of the transition for U.S. issuers, transition timing, investor education, auditor education, the regulatory, contractual, and legal implications of a transition to IFRS, the impact on private companies, and even the CPA exam.

One of the more debated topics was how to proceed from the concept release. Participants expressed a wide range of views and a number of overlapping options emerged:

- Have the Commission lay out a so-called "road map" of steps forward.

- Allow the voluntary use of IFRS for an indeterminate period. Under this option, we would allow some or all U.S. issuers to use either IFRS or U.S. GAAP for an indefinite period of time.

- Set a fixed date in the future for the mandatory use of IFRS. Under this option, we would select a date in the future and require that all issuers switch to using IFRS at that time. This was the approach followed in Europe.

- A "wait and see" approach on further rulemaking by the SEC, allowing convergence, investor understanding and the infrastructure for IFRS to further develop over the next few years.

- Various combinations of the above.

As I mentioned, we currently are focused on working through all of the very helpful input received on the concept release, both from commenters on the release and from panelists at the roundtables. This is obviously an important matter for U.S. investors and U.S. public companies and a significant issue for us this year.

International Rulemaking

As I noted initially this morning, the other leading theme for us this year in Corporation Finance is international matters, which I discussed at some length last week in London. I've already gone through IFRS, and I'll now just touch on some of the remaining international topics. If you are interested, my companion remarks from London on our website contain significantly more detail on these topics.

Deregistration. In terms of our progress in 2007, on March 21 of last year the Commission approved new final rules that significantly changed the requirements regarding when and how foreign private issuers can exit the Exchange Act reporting system.[23] Unlike the older rules that required a foreign private issuer to have fewer than 300 U.S. holders before it could deregister, new Exchange Act Rule 12h-6 permits a qualifying foreign private issuer to deregister a class of equity securities if the U.S. average daily trading volume of the subject class of securities has been no greater than five percent of the average daily trading volume of that class of securities on a worldwide basis for a recent 12-month period. We met our goal of getting the new rule effective prior to June 30, 2007, to enable calendar year filers who desired to withdraw from U.S. registration prior to first being subject to filing SOX Section 404 reports in Form 20-Fs due on June 30 to do so. As anticipated, there was a small rush of filings immediately after effectiveness, and since then we have continued to see issuers use the new rule, but not in unexpected numbers.

As of year end, 100 foreign private issuers had filed Form 15Fs (not including 25 that had already deregistered under the older exit rules but filed Form 15Fs to gain the benefits of new Rule 12h-6). This corresponds to just under 9% of all foreign registrants, with the largest group (53 or 53%) coming from the European Union. As I've noted in other forums, some of our thinking here is that if you know you can leave when you want to, then it's more attractive to register or stay registered with us. I might also note as an aside, that during all of 2007, more than 75 new foreign private issuers registered securities with us.

Upcoming International Initiatives. After dealing with two of the more visible issues facing foreign companies — IFRS and deregistration — this coming year I anticipate that we will be turning to several less high profile, but nonetheless important, matters relating to foreign private issuers. I expect that these foreign issuer reporting enhancements may take a variety of forms and relate to a variety of rules — as we move forward, we may recommend providing relief and easing requirements for foreign issuers in some areas, while establishing new requirements in others, to achieve a fair and balanced regulatory approach to foreign issuers.

One area that I think we should consider revisions in is the Exchange Act Section 12(g) "entrance rules" for foreign private issuers, particularly in light of the new deregistration rules, or "exit rules" if you will. This area was raised in comments on the deregistration rulemaking, and is one that we've been thinking about for some time on our own as well. Our current exemption and exemption process under Rule 12g3-2(b) dates back 40 years and is ripe for revisiting.

A second area involves the use of automatic shelf registrations by foreign companies that are well-known seasoned issuers (WKSIs). Here, the current rules regarding the age of financial statements may limit their ability to use automatic shelf registrations. Even though this issue is mitigated for some by our recent rule change eliminating reconciliation for issuers using IFRS as issued by the IASB, it will remain for those foreign private WKSIs that do not report in IFRS or U.S. GAAP. I believe that this particular area could be addressed by us in a way that is beneficial to foreign private issuers and investors.

Another, and related, area where change may be warranted, is the annual report filing deadline for foreign issuers. In this regard, the Commission has sought comment on advancing the six-month Form 20-F filing deadline several times since the late 1970s, most recently in connection with the IFRS proposing release. Though I cannot predict what may be proposed here, much less adopted, I will note that when the accelerated filing deadlines for U.S. issuers were implemented a few years ago, they were phased in gradually — I would think that a similarly measured approach could be appropriate here.

The basic application of the foreign private issuer definition itself is also on our radar for 2008. Whether a foreign company comes within or falls outside the foreign private issuer definition is a continuous determination that has extremely important regulatory consequences, such as compliance with Section 16, the proxy rules, Form 8-K reports and full U.S. GAAP financial statements. While the definition itself seems to be working, we think it may be appropriate to provide a definitive process with specific measurement dates that companies can look to for certainty as to their status.

The cross-border tender offer rules are another area in which the staff may recommend revisions in the near future. In fact, revisions to these rules are currently the number one rulemaking priority in our Office of Mergers and Acquisitions. With eight years of experience using the current rules, I believe that most will agree that the rules have worked well in balancing the need to promote the inclusion of U.S. security holders in cross-border transactions against the need to provide the protections of the federal securities laws to those holders. Despite the success of these rules however, the staff is considering revisions to address areas that may not be working as well as expected and areas where relief could be expanded. For example, it may be appropriate to make revisions with respect to the way U.S. ownership of a subject company's securities is calculated.

Mutual Recognition. With that, I'd like to touch just briefly on a final area on the international front, and one in which I anticipate the staff will be spending a significant amount of time in 2008 — mutual recognition. This is an area that crosses across Divisions and Offices at the Commission, and in which there has been a lot of discussion. Under the mutual recognition arrangements being discussed, foreign brokers and exchanges from selected jurisdictions would be allowed to operate in the U.S. without registration under certain circumstances. The mutual recognition model is premised in large part on a determination that a foreign regulatory regime provides comparable protections and results to those afforded to U.S. investors under our securities laws. I won't repeat all that I said in London last week, but I do want to reiterate the importance of thinking not just about issues relating to the foreign brokers and exchanges themselves, but also issues relating to the foreign companies whose securities would be tradable through a mutual recognition system.

This focus on foreign companies is appropriate because, under a mutual recognition model, foreign exchanges and brokers could become, to a large extent, significant conduits for foreign issuer securities entering the U.S. markets and reaching U.S. investors. If I could try an analogy, it would be as if the federal government regulated the companies that imported cars into the United States and the dealerships that sold those cars, but did not assure that those cars being sold to U.S. drivers met appropriate standards for emissions and passenger safety. A good regulator should look at the products that are offered and sold through an import arrangement. In this case, the product of course is corporate securities. Issuer disclosure is obviously a hallmark of the U.S. regulatory regime and, in assessing comparability, a foreign jurisdiction's issuer standards with respect to financial and non-financial disclosure and corporate governance should be carefully considered. As I noted in London last week, this is all very preliminary, and it is unclear what direction the Commission ultimately may go, but I think it is important that we start thinking along these lines in developing any recommendations for the Commission to consider concerning a mutual recognition arrangement.

So that's it on our two big initiatives for 2008 — financial reporting and foreign initiatives. Let me now go back to three areas where we were very active in 2007 and review what we did and what additional work lies ahead in 2008.

Executive Compensation

As you probably know, in the fall of 2006 the Commission adopted new and expanded disclosure requirements relating to executive compensation and related person disclosure. This timing meant that the 2007 proxy season provided us with our first opportunity to see the new disclosures in companies' proxy statements. In an effort to both evaluate compliance with the revised rules and provide guidance on how companies could improve their first-time disclosures in this area, the Division undertook a review of the proxy statements of 350 companies last spring. These reviews are in many cases winding down, with many of them completed. Following our normal procedures, comment and response letter packages are beginning to be posted in EDGAR this month, not less than 45 days after completing the reviews.

After sending out the first round of comments, we put together our observations on companies' first efforts to comply with the new rules in a report published last October.[24] Overall, we thought companies generally made a good faith effort to comply with the new rules, and we applaud all those companies that worked with us to get the new and expanded disclosures out to investors. As I discussed at some length in a speech in San

Francisco on the same day that the report was issued — "Where's the Analysis?"[25] — there definitely were some areas for improvement in companies' second year under the new rules. The two main themes in our comments are manner of presentation and analysis. I'll give you just a couple highlights now, and refer you to the report and my San Francisco remarks for more detail.

With regard to manner of presentation, I urge companies and their counsel to focus on the idea that disclosure can be clear and understandable yet not meaningful or responsive to our disclosure requirements, and vice versa — it can be responsive in content, but not clear and understandable. Though manner of presentation does not refer only to plain English, plain English is a key part of all of this as well.

With regard to analysis, this was a frequent shortcoming. We saw a real lack of disclosure in the CD&A of the "how and why" of compensation decisions. This section is much like the MD&A with which you all have become so familiar and, as the Commission noted at adoption "is intended to put into perspective for investors the numbers and narrative that follow it."

From what I've heard back from company advisors over the past few months, the report and other materials on our website, including various interpretations we posted several times last year, have been helpful resources for companies in beginning to work with their disclosures for this proxy season, and I am very optimistic about second-year disclosures. As to our plans for this year, it's still too early to comment on that front.

Small Business Capital Raising and Private Offering Reform

First, as many of you know, last summer the Commission published a package of six proposals addressing small business capital raising and private offering reform. In November and December the Commission voted to adopt final rules on five of these proposals. This has been a very important project for us in the Division, and one to which we devoted a great deal of thought and resources in an effort to really get it right. In putting together the original recommendations to the Commission, we looked at the Advisory Committee on Smaller Public Companies recommendations, considered other helpful public input, and then came up with proposals that we thought were practical, and that accomplished what we could accomplish in the near term. We also took very seriously the comment process on each of these proposals and reflected the input we received in the final products. With one proposal still pending, this project continues as a focus for us, but I am happy to report that with five final rules behind us, it is substantially complete.

With regard to the five that we have completed, I'll mention those only briefly:

- In *Smaller Reporting Company Regulatory Relief and Simplification*,[26] the Commission expanded eligibility for our scaled disclosure and reporting requirements for smaller companies by making the scaled requirements available to all companies with up to $75 million in public float (which now are referred to as "smaller reporting companies"), and also simplified the disclosure and reporting requirements for smaller companies.

- In *Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3*,[27] the Commission revised the

eligibility requirements of those forms to allow companies that do not meet the requirements of the forms for $75 million in public float to nevertheless register primary offerings of their securities, subject to a restriction on the amount of securities those companies may sell pursuant to the expanded eligibility standard in any one-year period. As I noted in my August remarks, it is our hope that the amendments provide eligible smaller public companies with access to the greater flexibility and efficiency in accessing capital afforded by Form S-3 and Form F-3, thus hopefully addressing some of the pressure on the PIPEs market.

- In *Exemption of Compensatory Employee Stock Options from Registration under Section 12(g) of the Securities Exchange Act of 1934*,[28] the Commission adopted two new exemptions from Section 12(g), including an exemption, subject to several conditions, from registration for private non-reporting companies issuing options to employees, directors, and others provided for under Rule 701.

- In *Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates*,[29] the Commission shortened the holding period for the free resale of restricted securities by non-affiliates from two years to six months for reporting companies and to 12 months for non-reporting companies. Although the Commission did not reintroduce tolling for hedging activities, as was proposed, we will of course continue to monitor and revisit the issue if necessary. The amendments also raise the Form 144 filing thresholds and eliminate the presumptive underwriter provision in Rule 145, except with respect to transactions involving shell companies.

- And finally, in *Electronic Filing and Simplification of Form D*, the Commission mandated the electronic filing of the information required by Form D, revised and updated the Form D information requirements, and simplified and restructured Form D. This one isn't published yet, but you should be seeing it shortly, both on our website and in the Federal Register.

Still outstanding is *Revisions of Limited Offering Exemptions in Regulation D*,[30] in which the Commission proposed a new exemption from the Securities Act registration provisions for offers and sales of securities to "large accredited investors," with respect to which the issuer could engage in limited advertising. The proposals also would address the standards for qualifying as "accredited" investors under Regulation D, shorten the timing required by the integration safe harbor in Regulation D, and apply uniform disqualification provisions to all offerings seeking to rely on Regulation D. In addition, the release provides guidance regarding integration of concurrent public and private offerings. This one remains on our short list and I hope that we will have final recommendations to the Commission soon.

And finally, as I have been hinting at for some time, we also continue to think about how our rules apply to so-called "voluntary filers" and whether further rulemaking or guidance in this area might be advisable. Still no promises on this one, but I'm hopeful that you will see something from us in the coming year.

A related topic that I will leave you with, which I think fits here even though it isn't part of the small business capital raising and private offering reform rulemaking, concerns "private investment public equity" offerings, or PIPEs offerings. And as I mentioned earlier, it is our hope that the Form S-3/Form F-3 rulemaking will take some pressure off this market.

This is a topic that I really thought was winding down when I spoke about it last August in my report on the Division's activities, but a recent court decision has reinvigorated the discussion on the topic, both inside and outside the SEC. In a recent case, *SEC v. John F. Mangan, Jr. and Hugh L. McColl, III*,[31] the Commission charged a PIPE investor with, among other things, violating Section 5 by using shares that the investor purchased from the issuer in the PIPE transaction and then re-sold pursuant to a resale registration statement to cover short positions it created prior to the filing and effectiveness of that resale registration statement. The North Carolina district court judge in *Mangan*, in a bench ruling without opinion, dismissed the Section 5 charge brought by the Commission. More recently, the Southern District of New York dismissed a similar Section 5 claim in *SEC v. Edwin Buchanan Lyon, IV*.

Although I cannot comment directly on the cases, I will take this opportunity to restate the Division's position concerning short sales and Section 5 generally. With respect to short sales, the time of the sale is when the seller of the securities establishes its short position. The staff has made a similar point as far back as at least the early 70s and nothing has changed on our end. So, applying this to a PIPEs offering, if the investor takes the shares it is selling off the resale registration statement to settle the short (or to return shares to the lender when borrowed shares were used to settle the short sale), that violates section 5 because the short sale was completed before the registration statement for those shares was effective.

As you can imagine, we are watching closely the developments in this area and assessing what, if any, response may be appropriate — obviously our priority here is to make sure that investors remain protected.

Proxy Matters

Proxy matters were another big area for us in 2007, and it looks like they will continue to be an important topic for us in 2008 as well. As I'll discuss in a moment, we took some really important steps last year with e-proxy and electronic shareholder forums in embracing technology and, hopefully, increasing shareholders' and companies ability to communicate with each other effectively. We also spent some significant time thinking about and discussing how our federal proxy rules interact with shareholders' state law rights and whether we need to take steps to better align these two. Of course, shareholder director nominations were a big part of this thought and discussion.

***E-Proxy*.** First, with regard to e-proxy, last year we saw the voluntary model go into effect as of July 1. This was followed, on January 1, 2008 with the second stage of the rulemaking, the revised model, becoming effective for large accelerated filers, other than registered investment companies. The revised model will go into effect for all other soliciting parties — issuers that are not large accelerated filers, registered investment companies, and soliciting

shareholders — on January 1, 2009. This revised model, when fully implemented, will require that proxy materials be available on the Internet for the shareholders of all public companies (and that those companies and other soliciting persons follow the e-proxy rules for all proxy solicitations not related to a business combination transaction). Of course, shareholders will still be able to opt out and continue to receive their proxy materials in paper form.

Although this rulemaking is complete, we'll continue to monitor how the revised model is working so that we can make any changes necessary next year to smooth its use. In terms of what we've seen so far, we've heard from some that companies are still waiting to decide whether to use the voluntary model themselves this year. Although we've heard that the companies that have used e-proxy have seen significant savings, we've also heard that the retail vote goes down under e-proxy, so that may be one of the reasons that companies are being a bit cautious about using the model. On this point I'll just say that we're paying attention and this type of information is really helpful to us. So keep sharing your experiences with us — good and bad.

***Shareholder Director Nominations*.** The other big rulemaking project in the proxy area in 2007 concerned shareholder director nominations. The Commission grappled with the question of shareholders' ability to have their director nominees included in company proxy materials. Unlike in 2003, when the Commission last issued rule proposals in this area, in this instance the question arose in the context of Rule 14a-8 — the shareholder proposals rule. Here the question was whether Exchange Act Rule 14a-8(i)(8), the "election exclusion," enables shareholders to have included in company proxy materials proposals that would establish procedures for shareholder director nominations. The purpose of the election exclusion is to ensure that investors receive adequate disclosure and an opportunity to make informed voting decisions in election contests, as stated by the Commission at the time the election exclusion was proposed in 1976.[33]

Accordingly, the agency has determined shareholder proposals that may result in a contested election — including those which establish a corporate procedure to list shareholder-nominated director candidates in the company's proxy materials — fall within the election exclusion. However, in September 2006, in *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.*[34] the U.S. Court of Appeals for the Second Circuit declined to defer to the agency's longstanding position and held that AIG could not rely on Rule 14a 8(i)(8) to exclude AFSCME's proposal. The Second Circuit interpreted the Commission's statement in 1976 as limiting the election exclusion "to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely." This decision created significant uncertainty in the 2006-2007 proxy season regarding what proposals were properly excludable under the election exclusion.

In an effort to address the issue, in May of last year the Commission held three roundtables on the proxy process, focusing on the relationship between the federal proxy rules and state corporation law, proxy voting mechanics, and the evolution of both binding and non-binding shareholder proposals within the framework of the federal proxy rules. After considering what we had heard at the roundtables, as well as from public commenters, the Commission published for comment two alternative rule proposals. The first of these proposals would have amended Rule 14a-8 to enable shareholders to include shareholder nomination bylaw proposals in the company proxy materials under specified circumstances (e.g., where the

shareholder held more than 5% of the company's shares and provided extensive disclosure concerning its background and relationship with the company). The proposal also included proposed revisions to the proxy rules to promote greater online interaction among shareholders.

In a second proposal the Commission discussed the agency's longstanding interpretation of the election exclusion and proposed an amendment to the language of Rule 14a-8(i)(8) codifying that interpretation (thus clarifying that a company may exclude from their proxy materials proposals that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings). We received over 34,000 comments in total on the two releases. So, as I probably don't need to say, this is an area that people feel strongly about in both directions.

After considering the numerous and helpful comments, on November 28, the Commission voted to adopt as a final rule the second proposal, codifying the agency's longstanding interpretation of the election exclusion.[35] The amendment is effective as of January 10. As was discussed at the open meeting, the Commission felt it necessary to act in advance of this year's proxy season to address the uncertainty created by the Second Circuit's decision. In this regard, we've already seen a few no-action requests concerning shareholder proposals to set up procedures for shareholder director nominations — from Bear Stearns, JP Morgan Chase, Verizon (which has since been withdrawn), and Croghan Bancshares. We will be responding to those in the coming month or so in accordance with our normal processes. Chairman Cox also made clear at the Open Meeting in November, however, that he would like us to continue to consider the broader question of shareholder director nominations — so we are gearing up for further work in this area in 2008.

At the same meeting the Commission voted to adopt amendments to the proxy rules to facilitate the use of electronic shareholder proposals.[36] These rules were proposed in the first release, on which the Commission did not otherwise act. As was proposed, the amendments provide an exemption for solicitations on an electronic shareholder forum, and clarify that persons communicating on the forum will be liable for their own statements (in other words, a sponsoring company or shareholder would not be liable for statements made by others on the forum). These rules will be effective in mid-February.

Other Priorities and Projects

We also have quite a few Division priorities and projects for 2008 that, though they don't fit into a larger theme, like international reform or proxy matters, are quite important to the Division. For example, last month the Commission proposed amendments to Form S-11, the registration statement used by real estate entities to register offerings under the Securities Act of 1933.[37] The proposed amendments would permit an entity that has filed at least one annual report and that is current in its reporting obligations under the Securities Exchange Act of 1934 to incorporate by reference into Form S-11 information from its previously filed Exchange Act reports and documents. These proposed amendments mirror the amendments to Forms S-1 and F-1 that were adopted by the Commission during Securities Offering Reform, and have been on our short list of issues to address since then.

In addition, the project to update the guidance on the Corporation Finance website, and to update our website generally, is continuing to progress. I view our website as an important tool in carrying through with the transparency I mentioned earlier, so look for further

developments this year, particularly with respect to continuing to update and organize the staff's interpretations so they are easily accessible and understandable.

Conclusion

So, as you can see, we were pretty busy in the Division of Corporation Finance in 2007, and I don't think that will be changing in 2008. I hope that I have provided some insight into what we've done and some of the promised transparency with respect to our plans for 2008. Again, thank you all for joining the Institute this year and for your kind attention this morning.

Endnotes

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[7] See SEC Press Release 2007-191, "Market Cap of 'Interactive Data' Filers Tops $2 Trillion," September 20, 2007, available at http://www.sec.gov/news/press/2007/2007-191.htm.

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[14] See Current Report on Form 8-K Frequently Asked Questions, Question 1, November 23, 2004, available at http://www.sec.gov/divisions/corpfin/form8kfaq.htm.

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[30] SEC Release No. 33-8828, "Revisions of Limited Offering Exemptions in Regulation D," August 3, 2007, available at http://www.sec.gov/rules/proposed/2007/33-8828.pdf.

[31] *SEC v. John F. Mangan, Jr., et al.*, 3:06CV531 (W.D.N.C. October 24, 2007).

[32] *SEC v. Edwin Buchanan Lyon, IV, et al.*, 06 Civ. 14338 (S.D.N.Y. January 2, 2008).

[33] "[T]he principal purpose of [Rule 14a 8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a 8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including [Rule 14a 12], are applicable thereto." SEC Release No. 34-12598, "Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders," July 7, 1976.

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Current Regulatory Developments

Working Outline Dated February 22, 2008

Notes from the PLI's

"SEC Speaks in 2008"

in Washington, D.C.

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THE SEC SPEAKS – 2008

Notes on Presentations

1. Chairman Cox

The SEC Agenda for 2008

Thank you, John [White, Director, SEC Division of Corporation Finance], for that very kind introduction. And thank you, Linda [Thomsen, Director, SEC Division of Enforcement], for kicking off this exceptional program once again.

I don't know how your morning was, but even before arriving at this outstanding opportunity for continuing education credit, I've had a bit of an education today. Each day, I drive four teenage boys to Gonzaga College High School — and I learn a lot along the way. This is a Jesuit school, where they teach Latin. But I'm discovering that even though Latin is an ancient language, it's changed a lot since I studied it. For example, did you know that *Domino vobiscum* means "the pizza guy is here?" Or that *sic semper tyrannis* means "your dinosaur is ill?" Perhaps the most relevant for all of us here in law enforcement this morning is what the classically-trained securities swindlers must be saying to themselves when they get caught: *Et tu, pluribus unum*? — which loosely translated means, "the U.S. government stabbed me in the back."

This gathering of the faithful for SEC Speaks is, of course, very special, because we're celebrating the 75th anniversary of the 1933 Act — and the informal kickoff of the agency's own 75th anniversary, which commences in earnest next January. Tonight, at our alumni annual dinner, I will have the opportunity to reflect on all that the SEC has accomplished over that long period, and to join in recognizing Mary Schapiro as this year's winner of the William O. Douglas Award. But even this morning, a 75th anniversary calls for some tradition. At SEC Speaks some years back, David Martin, who was then Director of the Division of Corporation Finance, asked each member of the staff to stand and be recognized. We've carried on that tradition ever since. So just as I've had the honor of doing each year, I'd like to thank every one of our professional staff here this morning for your hard work, and for your dedication to America's investors. Please stand and take a bow.

And to the many SEC alumni here, let me say that to my mind there is no better confirmation that the agency is a great place to work than your constant participation in our shared efforts. Thank you, too, for all that you do.

In this 74th anniversary year of the agency's life, I'll begin my fourth year as Chairman. And while some things about the SEC will forever endure, other things have been changing with amazing speed right before my eyes. Without a doubt, the most striking change of the last few years is that it is no longer possible for the SEC to do its work in the United States without a truly global strategy. That's because what goes on in other markets and jurisdictions is now intimately bound up with what happens here. And in turn, what we do with our regulatory authority impacts the rest of the world.

In Amsterdam this week, I joined representatives of two dozen countries to sort through the latest data and the many unanswered questions from the subprime turmoil. As Co-Chair of the International Organization of Securities Commissions' Subprime Task Force and its Credit Rating Agency Task Force, I have been leading an analysis of how the domestic securitization of U.S. mortgages, and the rules governing U.S.-based rating agencies such as Moody's, Standard & Poor's, and Fitch, affected risk management by banks and institutional investors half a world away.

Earlier this week, our Enforcement Division settled a high-profile insider trading case that accused a tipper in Hong Kong of threatening the integrity of markets here in the U.S. by enabling illegal profits from trades in the securities of Dow Jones.

A week ago today, Charlie McCreevy, the European Union Commissioner for the Internal Market, and I took the most recent step in exploring mutual recognition of high-quality securities standards.

Two weeks ago, as Chairman of the international Monitoring Group overseeing worldwide auditing standard setting, I hosted a gathering of representatives from the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, the World Bank, the International Association of Insurance Supervisors, the European Commission, and the Financial Stability Forum, focused on implementing reforms in audits under both International Financial Reporting Standards and U.S. Generally Accepted Accounting Principles.

In Vancouver recently, I met with representatives from more than 100 nations who are developing a new computer language for financial information that may soon be used in every major market on earth.

In a little over a month, here in Washington, the SEC will host securities regulators from over 80 countries who are working with us to better integrate our enforcement, supervisory, and regulatory systems.

And a few days later, I'll represent the SEC at the Financial Stability Forum meetings in New York focused on, among other topics, the risks that the financial weakness of U.S. monoline insurers could pose to global markets.

The subprime crisis and its fallout are showing that while U.S. securities regulation may be the most robust in the world, it is not a guarantor against systemic failures in other parts of the financial system that we don't regulate. Yet those failures, too, can have enormous consequences for investors. The crisis is also making plain that those failures are of concern to investors worldwide.

As the SEC embarks upon an exceptionally ambitious agenda for 2008, we are intensely aware that all three elements of our tripartite mission — to protect investors, maintain fair and orderly markets, and promote capital formation — go hand in hand, and that each is of global economic importance.

Each December and January for the last several years have been devoted to strategic planning in our Divisions and Offices. Through that process, and in consultation with the Commissioners, the staff have laid out detailed agendas for public roundtables, rulemakings, enforcement priorities, inspection and compliance initiatives, technology investments, and internal management initiatives. This year's agenda is going to be especially crowded because, in addition to several new initiatives, a number of major rulemakings and organizational reforms that have been progressing for many months will come to fruition.

There is no better time and place to lay out the SEC's 2008 agenda than here at SEC Speaks. So in fifteen minutes, let me offer a cook's tour of the more than two dozen top priorities for the agency in the coming year.

First and foremost, the SEC is a law enforcement agency, and so it's with Enforcement that I'll begin.

Over the past year, the SEC has distributed more than $2 billion in penalties and disgorgements to injured investors — and more than $3.5 billion since 2005. This year, we intend to significantly exceed last year's mark, and return the bulk of the remaining $5 billion we've collected from fraudsters and securities law violators to the investors they cheated. To see to it this happens, we've just announced the creation of the Office of Collections and Distributions, which is headed by an exceptionally talented team of financial experts and managers led by Richard D'Anna and Lynn Powalsky. Their job will be to build on what the agency has learned in the first few years of our experience using the Fair Funds authority of Sarbanes-Oxley, and truly professionalize these distributions back to investors. By mid-2008, this new Office and its dedicated staff will be contiguously located in dedicated space in the Headquarters office, and they will be up and running with their full complement of 34 professional staff. Another of their important tasks will be centralizing the collection functions of the agency — and by doing that, they'll free up valuable enforcement resources in each of the SEC's 12 offices.

As you know, we've just celebrated the Chinese New Year, which inaugurated the Year of the Rat. But at the SEC, 2008 will be the year of the Phoenix. That's the name of our updated software system that will track every disgorgement, penalty, and other monies owed to the SEC and to investors. The new Phoenix system will carefully track these claims and funds from the beginning of the process until the last dollar is returned to its rightful owner. Ever since the Sarbanes-Oxley Act vastly expanded the SEC's responsibilities in this area over five years ago, the agency has needed such a system. This year, for the first time, we will have it.

Another significant 2008 initiative is designed to confront the problem of suspected insider trading, securities fraud, and market manipulation by hedge funds and other large, non-public investors. This kind of activity remains a significant threat to market integrity. In 2008, a special enforcement working group, headed up by Bruce Karpati, will integrate the skills of a number of professionals to tackle this problem. Any hedge fund or other large investor who thinks they'll get away with dishonest and unfair dealing in our markets will face the concentrated resources of a relentless SEC.

To deal with the global threat of Internet fraud and the special enforcement challenges it presents, the Division's Office of Internet Enforcement, under the leadership of John Stark, will continue to focus a spotlight on this shadowy technological underworld. This group's message to cybercriminals is clear: we'll find you, wherever in the world you are, and make you pay for what you're doing to innocent and unsuspecting investors.

The subprime crisis and its still-unpredictable consequences present immediate problems for both the United States and global markets. We've already launched an initiative in this area to investigate possible fraud or breaches of fiduciary duty involving collateralized debt obligations. Among the issues confronting us this year will be determining whether bank holding companies and securities firms made proper disclosure in their filings and public statements of what they knew about their CDO portfolios and their valuations. We'll determine whether brokers carefully followed suitability requirements when they sold complex debt-related derivatives that shortly afterward went bad. And in this area, as elsewhere, we'll be investigating whether unscrupulous insiders used non-public information to bail out of these securities or to sell them short, in violation of the securities laws. Our subprime working group, led by Cheryl Scarboro, is well underway with these investigations.

Each year, hundreds of thousands of ordinary investors are victimized by unscrupulous manipulators who prey upon the OTC markets in what we call microcap fraud. These financial sharks are betting that because of such mammoth responsibilities as the subprime mess, the federal government won't have the resources or the inclination to go after them. They've bet wrong. In 2008, our microcap fraud group in the Enforcement Division will set new standards for the efficient use of resources in tracking down shell company manipulators, pump-and-dump artists, and Internet spam fraudsters. John Polise, who leads this group, has an exceptionally able team who will be developing innovative ways to cover the very broad waterfront in this area.

Ensuring the integrity of the municipal securities market is another priority for our enforcement program in 2008. The reason for this priority is simple: the size of the municipal market is enormous, with $2.5 trillion of securities outstanding. That's roughly the GDP of China. And more than two-thirds of that amount is held, directly or indirectly, by individual investors. Our municipal fraud working group, headed up by Mark Zehner, will be firmly focused in 2008 on ferreting out fraud in the municipal bond market and punishing its perpetrators.

Yet another Enforcement initiative is designed to let every professional in the Division be more efficient and more successful in uncovering evidence of fraud, and in winning the agency's cases. For the first time ever, in 2008, every Enforcement attorney and staff member will have access via our Intranet to the entire inventory of agency cases, and the knowledge base that goes with them. This remarkable new law enforcement system, called "The Hub," has just been rolled out nationally in every one of the agency's regional offices and at headquarters. It will allow Division management to allocate professional talent to best fit the needs of each case, and it will permit us finally to realize the dream of a truly national enforcement program that seamlessly integrates all of the SEC's resources.

This coming year will also see the inauguration of a major initiative to knit together the agency's resources in another area: the identification of market risks and dangerous illegal practices before they metastasize into truly lethal consequences for investors. This year, the Office of Risk Assessment — an important addition to the

Commission's structure under the leadership of former Chairman Bill Donaldson — will be significantly expanded to provide resources and analytical support to the Divisions of Enforcement, Trading and Markets, Investment Management, and Corporation Finance, as well as the Office of the Chief Accountant and the Office of Compliance Inspections and Examinations. Our 2008 management plan will more than double the professional staff devoted to the vital function of looking around the corners and over the horizon, so that the SEC's efforts will not always be focused on the money that got away, and the lessons of the last major scandal. With the brainpower of nine men and women and the latest quantitative and analytical surveillance tools, the significantly expanded Office of Risk Assessment will help direct agency resources to where they can do the most preventative good.

Another high-profile collaborative effort that will bring together the resources and talents of multiple Divisions and Offices during 2008 is our agency-wide Subprime Task Force. I've already described the significant initiative being taken by Enforcement through its Subprime Working Group. But of course the events that gave rise to the current market turmoil involve far more than enforcement issues.

In particular, through our Consolidated Supervised Entity program for the largest investment banks, the SEC is focused on the central questions of the quality of risk controls and liquidity at the level of the holding company for these systemically important firms. Under this program, the Division of Trading and Markets monitors both the regulated broker-dealer and the holding company's unregulated affiliated entities at Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, and Morgan Stanley. Beyond its overarching responsibilities for supervision of these firms, the Division of Trading and Markets also has lead responsibility for executing the agency's new regulatory authority under the Credit Rating Agency Reform Act. Of course, the role of the credit rating agencies in the subprime developments is also of central importance. For all of these reasons, our agency-wide Subprime Task Force is chaired by Erik Sirri, the Director of the Division of Trading and Markets.

One important aspect of evaluating liquidity for an investment bank's holding company, including its unregulated affiliates, is the strength of the firm's internal risk management systems. The Division of Trading and Markets is particularly focused on this through the CSE program. In addition, the Office of Compliance Inspections and Examinations, through its broker-dealer examination program, is collaborating with Trading and Markets on the oversight of brokerage firms and investment banks.

There are also significant accounting questions in the subprime area, such as when off-balance sheet CDO-related liabilities will be forced back on to a sponsor's balance sheet. For these reasons, the Office of the Chief Accountant is also a key member of the Task Force.

The adequacy of public company disclosure surrounding these issues is a key focus for the Division of Corporation Finance, and so they too are important participants. We've had to rely heavily on the expertise of the Division of Investment Management as well on questions including the impact on money market funds, and the Office of the General Counsel is consulted on a daily basis on close questions of law in each of these areas. Each of the heads of these Divisions and Offices is therefore also a member of the SEC's Subprime Task Force, which is truly an ambitious organizational response to the entire spectrum of subprime issues.

2008 will be a big year for rulemaking as well.

The Division of Trading and Markets, under the leadership of Tom McGowan and Mike Macchiaroli, will lead the way with proposals for new, more detailed rules under the new Credit Rating Agency Reform Act that respond directly to the shortcomings we have seen through the subprime experience. Among the proposals that the Commission may consider in the spring are rules that would require credit rating agencies to make disclosures surrounding past ratings in a format that would improve the comparability of track records and promote competitive assessments of the accuracy of past ratings. In addition, the Division may propose rules aimed at enhancing investor understanding of important differences between ratings for municipal and corporate debt and for structured debt instruments.

I have also asked the Division to present proposed rules to the Commission that begin to address the significant shortcomings that we've identified in the municipal market. The recent financial stress on monoline insurers has heightened the importance of timely and rigorous disclosure that investors can understand. We have had ample

illustration already of what happens when investors fail to look past an AAA rating to do independent analysis themselves — a problem that was exacerbated when important information was not supplied to the market in real time.

One of the shortcomings we have seen in the municipal market is the difficulty that investors often experience trying to get their hands on the disclosure documents for municipal securities. To deal with this problem, next month the Commission will consider amendments to Rule 15c2-12 that will authorize the Municipal Securities Rulemaking Board to create a "muni-EDGAR," modeled on the SEC's own EDGAR system that gives investors access to all filings by public companies. This would be a free, one-stop electronic database, accessible to all investors via the Internet, that would contain official statements, annual financials, and material event notices filed in connection with a municipal security.

Another problem we've seen in the municipal market is the inadequacy of pricing information for floating-rate municipal bonds, such as auction rate securities. Later this year, the Division of Trading and Markets will recommend to the Commission a rule aimed at improving the pricing transparency for these securities.

Under the direction of David Shillman and Martha Haines, the Division is currently working on additional 2008 municipal rulemaking initiatives as well that will address other deficiencies in municipal disclosure and accounting.

The Division of Trading and Markets is also tackling two major issues in market regulation that have arisen as a result of the demutualization of exchanges: the new imperative for SRO rules implementing responses to exchange competition to take immediate effect; and the competitive importance of market data revenues to the business model of today's exchanges. For many years, although the Exchange Act by its terms requires the SEC to publish SRO rule filings for comment — and if the rule is to be approved, to do so within 35 days — the Division has routinely requested that the exchange agree to extend these deadlines while the rule was weighed and considered within the agency. The result was that it could take years before exchange rule filings were finally approved.

This regulatory model is obviously incompatible with the current exigencies of competitive exchanges, in which a competitor operating under a different regulatory regime might be free to pirate a new proposal while it is under review by the SEC for an extended period. For several months, Trading and Markets has been focused on redesigning the rule approval process to make it more efficient. And during the first half of 2008, the Division will propose to the Commission a new rule of internal procedure that will codify the new approach. This streamlining of the SRO rule approval process will be an important contribution to keeping U.S. exchanges competitive.

During the last year, the Division of Trading and Markets and each of the Commissioners have been intently focused on the novel and important questions of the pricing of market data. Market data permits the essential price discovery upon which a well ordered market depends. Internet and media companies petitioned the Commission to consider their point of view on these issues, and in that connection as well as others, the Commission and its staff have carefully weighed the available evidence. The result of that analysis, which was deliberately thorough because the Commission's first decisions in this area will be precedent setting, will be reflected in an upcoming vote by the Commission.

Yet another important issue that will be resolved through rulemaking in 2008 is the kind of disclosure that investors are entitled to at the time of sale when they buy mutual funds. For several years now, the SEC has been studying how to improve the information that customers get at the point of sale about fees, expenses, and conflicts of interest. I have asked the Division of Trading and Markets, under Erik Sirri's leadership, to prepare a rule for Commission consideration that takes full advantage of the latest Internet technology to get investors the very best information on these subjects in a form they can readily understand. You should expect the Commission to consider this rule proposal by summer.

2008 will also be the year in which, after many years of debate, frustration, and litigation, the confusing thicket of intertwining broker-dealer and investment adviser regulation will be cut down to size. At my direction, the

long-awaited RAND study of the marketing, sale, and delivery of financial products and services to investors was accelerated — and the completed work product was delivered to the agency in December.

It is hardly the fault of modern investors that, seven decades ago, the Congress didn't foresee the evolution of discount brokerage, electronic information, 401(k)s, and full-service financial institutions. But while the statutes are old and don't quite fit today's markets and investor needs, the SEC's exemptive authority is broad — and through a combination of rulemaking and working with Congress, we can revitalize the essential purposes of these laws. I have tasked the Directors of the Divisions of Trading and Markets and Investment Management to work together to reconcile these seemingly ancient statues with today's marketplace realities. Beginning this spring, the Commission will consider the comments we've received on our interim final principal trading rule that rationalizes the two very different regulatory regimes governing broker-dealers and investment advisers in a way that benefits both investors and markets. And shortly afterward, the Commission will consider approving an agency-wide work plan that lays out a definitive roadmap for future action.

Beyond this important collaboration with Trading and Markets, the Division of Investment Management is taking the lead on another 2008 rulemaking designed to improve disclosure for mutual fund investors. Last fall, thanks to the leadership of Susan Nash, the Commission proposed rules to authorize a "summary prospectus" for mutual funds — a short, investor-friendly document that discloses a mutual fund's investment objectives, as well as all of the information about fees, risks, performance, and other vital subjects that customers need to understand to make a sound investment decision. Using the Internet, investors could drill down from the summary prospectus to more detailed information, depending on their interests and needs. This month marks the end of the comment period on this proposal, and I anticipate that the Division of Investment Management will present a final rule to the Commission by the summer that responds to the public's comments and suggestions — and makes Internet delivery of the mutual fund summary prospectus a reality.

Yet another major rulemaking for 2008 on the Division of Investment Management's agenda is a complete overhaul of Rule 12b-1. As most of you know (but most retail investors don't know), this is the rule that permits mutual funds to pay out nearly $12 billion a year in investors' assets for purposes such as reimbursing brokers for their expenses of marketing the funds to other investors, and for various administrative services. The rule was adopted nearly three decades ago, and this past year I announced that the Commission would be conducting a major reevaluation of how it is or isn't serving investors. Since then, the Commission and our staff have hosted a roundtable of experts and met with representatives of investors, mutual funds, broker-dealers, and academics to discuss a variety of options for reform or repeal of the rule. Based on all of this input, the Division of Investment Management, headed by Buddy Donohue, is readying a formal rule proposal for this spring.

The Division of Corporation Finance also has an aggressive rulemaking agenda for 2008, as Division Director John White recently outlined in San Diego in his speech (available at http://www.sec.gov/news/speech/2008/spch012308jww.htm) before the Securities Regulation Institute. One important rulemaking effort will be a continuation of the work begun in May of last year, when the Commission held three roundtables on the proxy process. Those roundtables focused on the relationship between the federal proxy rules and state corporation law, as well as new developments in technology that have led to the Commission's adoption of our e-proxy rules and the creation of new opportunities for electronic shareholder forums. During 2008, the Division will continue to pursue our fundamental objective of making the federally-regulated proxy system fit better with the state-authorized rights of shareholders to determine the directors of the companies they own.

Another of our priorities in 2008 will be the protection of our nation's seniors from investment fraud that threatens their life savings. Already, the 37 million Americans who are 65 and older account for 12% of the nation's population — and because the next generation of older Americans will live longer than ever before, that fraction is rapidly growing. Many of them will outlive their retirement savings unless they become more aggressive investors, making this demographic especially vulnerable to fraud. That's why, in 2006 and 2007, we strengthened our investor education programs for seniors, and conducted targeted examination sweeps of firms that sponsor misleading "free lunch" sales seminars. We brought dozens of enforcement actions against swindlers who target seniors, and we joined with state securities regulators, the North American Securities Administrators Association, the Financial Industry Regulatory Authority, AARP, and others to expand our scope and impact.

Today, I'm pleased to announce that in 2008, the SEC, NASAA, and FINRA will launch a new initiative designed to identify effective practices used by financial services firms in dealing with the special challenges faced by senior investors.

Neither we, nor our fellow regulators, nor even the best financial services firms have all the answers to such tough questions as how to deal with the sudden onset of diminished capacity, the not-unknown problem of unscrupulous relatives, and the competing demands that uncertain medical needs and longer time horizons place on seniors' risk profiles. All of us — and particularly senior investors — will benefit from this effort to stimulate fresh thinking. As part of this work, we will solicit input from investors, broker-dealers, investment advisers, and a broad cross-section of the business community. The results will help inform the special approaches that firms may wish to take when it comes to marketing and advertising to seniors; opening accounts for clients of all ages; conducting reviews of the firms' relationships with clients as those clients grow older; and tailoring surveillance and compliance reviews and employee training to focus on these issues of special significance for older investors. We'll make our findings from all of this work public at the 3rd Annual Senior Summit later this year. I would particularly like to thank Lori Richards and Kristi Kaepplein for leading this important initiative.

Not only for senior investors, but for market participants of all ages, cutting through the fog of complexity in financial statements has never been more important. One of the lessons from Enron and the other major accounting scandals of the late 1990s is that our current system of financial reporting is so complex that fraud can easily be hidden in its thicket of rules. Last summer, the SEC, the Financial Accounting Standards Board, and the Public Company Accounting Oversight Board established an advisory committee, the Committee on Improvements to Financial Reporting (CIFiR), to study the causes of complexity in the U.S. financial reporting system. I particularly want to thank Bob Pozen, the Chairman of CIFiR, and each of the 16 other members who have brought their diverse perspectives and expertise to bear on this project. Next week, this Committee will make a number of concrete proposals for SEC action aimed at reducing unnecessary complexity and making financial information more useful for investors. I have asked the professional staff of the agency's offices and divisions to analyze these proposals as soon as we receive them, and to provide recommendations to the Commission for possible consideration later this year.

I said at the outset that it is no longer possible for the SEC to do its work in the United States without a truly global strategy — because, in large measure due to today's instant communications and technology, what goes on in other markets and jurisdictions is now intimately bound up with what happens here. That's why the most significant initiatives we expect to complete in 2008 are in the international and technology arena. Mutual recognition, international accounting standards, and interactive disclosure will all be the subjects of important rule proposals that will be presented to the Commission in late spring. And they are all closely interrelated.

"Mutual recognition" describes the concept of allowing U.S. investors to have the benefit of direct access to foreign markets and foreign broker-dealers, provided those entities are supervised in a foreign jurisdiction with high standards under a securities regulatory regime that will provide investors with a high level of protection similar to what they enjoy in the United States. Over the past year, the Office of International Affairs, the Division of Trading and Markets, and the Division of Corporation Finance have been working together to develop a proposal for Commission consideration that will establish an overall framework for mutual recognition. At the same time, the Division of Trading and Markets has been preparing amendments to our Rule 15a-6 governing U.S. investor contacts with foreign broker-dealers to ease some of the anti-investor restrictions that hinder international commerce in financial services. I expect that the Commission will consider both sets of proposals in early 2008.

The same imperatives of ever-faster communications, ever-more-closely linked markets, and truly global competition for capital that underlie our conceptualization of mutual recognition have for several years been driving the project to converge the world's two great accounting systems — U.S. Generally Accepted Accounting Principles and International Financial Reporting Standards. Because of the significant progress that has been made in developing IFRS as a high-quality accounting standard — and in light of its rapid and growing acceptance around the world — the Commission last year voted unanimously to take the next step on the SEC's "roadmap" announced three years ago. As a result, foreign issuers can now file their financial statements with the SEC using IFRS, without need of keeping a second set of books under U.S. GAAP.

Then, last August, the Commission issued a Concept Release seeking advice on whether U.S. issuers should be allowed to choose to prepare financial statements using IFRS. And in December 2007 we held roundtables on this subject and heard from more than two dozen experts. The many comments the Commission has received make one thing exceptionally clear: the rapidly growing acceptance in the rest of the world of IFRS as a high-quality accounting standard will make the U.S. GAAP-IFRS convergence project increasingly important for U.S. investors and issuers. In 2008, the Division of Corporation Finance and the Office of the Chief Accountant, led by Wayne Carnall and Julie Erhardt, will formally propose to the Commission an updated "roadmap" that lays out a schedule, and appropriate milestones on which the schedule will be conditioned, for continuing the progress that the United States is making in moving to accept IFRS in this country.

The third pillar of this international strategy — the adoption of a global computer language for the exchange of financial information — goes hand in glove with the concepts of a common accounting language and mutual recognition of high-quality securities regulation. A standard data format for sharing financial statements and other information that is important to investors will facilitate the kind of comparisons among global investment options that investors need. The international movement to employ eXtensible Business Reporting Language for this purpose will let investors easily find and compare business and financial data with the same ease of doing a Google or Yahoo! search today. And it promises to let companies prepare their financial information more quickly, more accurately, and for less cost. In 2008, following years of evaluation and experience through the SEC's voluntary XBRL pilot program, the Commission will consider a rule for the use of interactive data by U.S. reporting companies that will parallel efforts already underway in other countries. David Blaszkowsky, who heads the SEC's Office of Interactive Disclosure, has been an important leader in this initiative.

All of this may seem like a dizzying array of rule proposals, and a remarkably ambitious agenda for a single year. But the truth is, there are more than two dozen more pending Commission initiatives that I have not had time to outline here this morning. Almost every one of the proposals I did describe has been developed over a period of several years, so that each of them is primed for consideration and action in 2008. Above all, every one of them has in common that it is focused on building stronger markets, better protecting investors, and promoting the international integration of high standards for securities trading.

Each of you in this room understands the work of the SEC at a very high level of complexity. But sometimes for that reason, we don't often step back and consider the sum total effect of the work that we do on building the global economic strength that is so essential to peace and freedom here and around the world. Yet every one of you implicitly knows it. That's why you're here. Many of you have devoted your lives to what this agency does. It is truly a noble calling. There is no clearer hallmark of that than the incredibly high caliber of the men and women who work at the SEC.

On this February morning of our 74th anniversary year, I'd like to hold out as a shining example for all of us a woman who literally dedicated her life to the work of the SEC and the well being of her fellow professionals here.

Until just a few days ago, Annie O'Donoghue was the Director of the SEC's Office of Administrative Services. She was a vibrant presence, and it is hard to imagine that she's no longer among us. Sadly, Annie passed away this week after a brave battle with Lou Gehrig's disease. Those of you who knew Annie can even now hear her laugh — which was all at once distinctive, hilarious, and contagious. She loved DC's soccer team. And hiking. And she was the best gardener in the neighborhood. That was fitting, because in everything she did Annie liked to help things grow. She was a builder. She knew that the SEC is more than its rules and regulations — it's all about people. And she believed that by giving the SEC's people the care and support they needed to do their jobs and to help others, she was every bit as essential to the agency's mission of investor protection and economic growth as the best rule writer or the sharpest trial counsel. And of course, she was right.

Among Annie's many remarkable achievements was the successful management of the construction and build-out of the SEC's new Washington headquarters, and the Commission's New York and Boston Regional Offices — all at the same time.

But her most cherished achievement was her work overseeing the construction of the new Child Care Center here at the SEC's headquarters. Annie cared deeply about the environment, and placed high priority on

constructing the Child Care Center in an environmentally conscious way. She would have been thrilled to know that, this very week, the Child Care Center into which she poured her heart and soul won a Building of America Award for its design and construction.

She loved children. And she loved the Center. And now, when you walk down that hall and see the happy faces of the young children, you know that Annie has built something that will endure for as long as the SEC's mission relies on caring people with loving hearts. So this morning, in honor of Annie's legacy and the agency's 75th anniversary, it is my privilege to announce that the SEC is inaugurating the Annie O'Donoghue Scholarship to assist deserving youngsters to attend the Child Care Center. I think she would have liked that.

Last year at this gathering, I reminded the men and women of the SEC that you are very real heroes, in every sense. Annie was certainly a hero. And so, too, are all of you who are upholding our country's high ethical standards and who work each day, in the government and in the private sector, to protect the integrity of our markets and to encourage capital formation and economic growth. That is our mission at the SEC, and I'm proud to be one of you.

2. <u>Division of Corporation Finance</u>

Shelley Parratt, Deputy Director for Disclosure Operations:

- Division is seeking increased transparency in its work
- Don’t hesitate to request reconsideration of Staff comments/opinions
    - Respond to Staff in writing
    - Go up the ladder rung by rung
    - Be thorough – discuss how/where you feel you’ve responded
    - Mark your amendments for ease of review

Brian Breheny, Deputy Director:

- In 2007 the Staff gave 15000+ phone interpretations and issued 500+ no-action letters

Tom Kim, Chief Counsel:

- There are 3 levels of review for no-action/interpretive letters
- There are 4 levels of review for shareholder proposals
- Interpretations are published
- The Staff has a 2008 project to reorganize and update all interpretations
    - Old FAQs/manuals/outlines to be replaced by “C&DIs”
    - SLBs to be continued

John White, Director:

- CIFiR (Advisory Committee on Financial Reporting)
    - Interim recommendations due next week – see CorpFin website

- You should focus on “Developed Proposals”

- IFRS for US companies under consideration

Shelley Parratt on XBRL:

- Taxonomy out for comment
- New Office of Interactive Data
- EDGAR is to be updated
- In the works is a software program to make the CorpFin website more user-friendly

Tom Kim on corporate websites:

- See CIFiR proposal for layered/tiered information à la Microsoft
- Issues that need to be addressed:
    1) liability for summary information
    2) treatment of hyperlinked information
    3) clarification of “public availability” of website information
    4) questions posed by new technology
- CorpFin Release likely re Regulation FD etc.

Comments/suggestions on website issues are solicited by CorpFin

Betsy Murphy, Chief of the Office of Rulemaking, on SarbOx §404 implementation:

- Following SEC’s management guidance for §404(a) will assure compliance
- Postponement of applicability of §404(b) for non-accelerated filers

Paul Dudek, Chief of Corp Fin Office of Int’l Finance:

- Issues of §12(g) registration and Rule 12g3-2(b) are on the public calendar for Feb 13
- Impact of FPI status needs review
    - Requirement of R/S within 60 days of determination is short
    - Requirement for filing 20-K six months after fiscal year-end is too long

[Breheny: re-thinking of cross border tender offer rules is overdue]

- IFRS reconciliation has been eliminated
- Rule 12h-6 re de-registration seems to be working fine

Betsy Murphy on Proxy Solicitations:

- Rule 14a-17 adopted re electronic shareholder forums
- Participants in forums may subsequently decide to solicit proxies
- Commission has given the Division's Director delegated authority to grant exemptions where state law mandates conflict with requirements of SEC rules

Shelley Parratt on Executive Compensation Disclosure:

- The Staff sent a second comment letter to 70% of the companies under inquiry
    - Issues surrounding performance targets have been difficult
    - The letters yield back-and-forth discussions

Betsy Murphy on Small Business developments:

- The Rule 144 holding period has been shortened to six months for non-affiliates of reporting companies
- The public information requirement still applies for another six month
- The manner of sale requirement has been eliminated for debt securities
- Hedging is being monitored, but the Staff has not found evidence of abuse
- S-3/F-3 amendments were intended to allow approximately 1400 more (smaller) public companies to benefit from the forms' flexibility
- Rule 12h-1 amendments exempting compensatory stock options from registration requirements

Gerald Laporte, Chief of Office of Small Business Policy, on private placements:

- Raised ceilings for smaller companies to qualify for scaled disclosure
- Internet filing will be mandatory for Form D from 3/09
- Regulation D revision still in the works, but the guidance on integration issues that was included in the proposing release was effective upon publication

John White:

Oil and gas revised rules proposal due in the spring

PIPEs – there are developments here, but time does not permit mention

3. <u>Division of Trading & Markets</u>

Eric Sirri, Divisional Director:

[see Sirri's February 1st speech on "dark pools", available at http://www.sec.gov/news/speech/2008/spch020108ers.htm]

- Impact of the subprime credit crisis

- The 5 largest SEC-regulated banks (Merrill, Goldman, Lehman, Morgan Stanley, Bear Stearns) were not involved in SIVs
- They were, however, underwriters/holders of CDOs
- Many dealers' cash flow models were based on non-subprime experience
- The hope is now to improve risk controls
- Valuation/pricing were based on available market prices, so modeling was not necessary and was not done
- Some firms didn't have solid models
- More robust scenarios and stress testing are required for analysis of liquidity/risk

- Credit-rating agencies
  - There are three new agencies and one more coming
  - Competition is encouraged
  - Rules re transparency and re conflicts of interest
  - SEC is not allowed to regulate the substance of the credit-rating process
- Mutual recognition
  - Proposals are based on a comparison/assessment of the foreign regulatory regime
  - Exemptive authority allows for tailoring of exemptions granted, e.g., re segregation or suitability
  - Rule 15a-6 is to be updated this year

Robert Colby, Deputy Director:

- Regulation R re banks' brokerage activity is done, effective for fiscal years after 9/30/08
- The regulation of BDs who also function as IAs has yet to be clarified, after the FPA decision
- Municipal securities
- In July 2007 Chairman Cox sent to Congress a Staff White Paper suggesting statutory amendments that would, among other things, affect the contents of disclosure in municipal financings, the timing of disclosure and the use of GAGAS (generally accepted government accounting standards) with oversight by the GASB – see http://www.sec.gov/news/press/2007/2007-148.htm
- There is also work being done to update EMMA (the municipal securities' EDGAR)

Michael Macchiaroli, Associate Director:

- The proposal in March 2007 for amendments to Rule 15c3-3 (the custody and control rule) would have accepted futures as a hedge against securities portfolios ("portfolio margining")

- There is a problem under SIPA – it doesn't cover futures
- There also are problems arising out of examination procedures for stock borrowed and stock loan transactions
- The proposal included amendments to Rule 15c3-1 (the net capital rule)
- A revision to the proposal is under way
- A portfolio margining rule in Regulation T is in effect, but it doesn't allow as much hedging as had been hoped
- The SRO has to approve hedging on a firm-by-firm basis
- So far, 12 firms are approved for portfolio margining ($60 billion of accounts in total)
- Some firms would like to go further, use proprietary margin models used in London
- Status as a "customer" is at issue

Elizabeth King, Associate Director, on the options market:

- Payment for order flow is declining with penny pricing – harder to claim "best price" is from the order flow broker when spreads are so narrow
- Some think option volumes have been hurt by penny pricing, but Staff hasn't found that yet

King on market consolidation:

- Demutualization is triggering M&A of exchanges, leading to capital-raising for exchanges
- SEC's role is narrow: assure SRO has regulatory capability and that SEC can oversee same; this means access to books and records of the surviving company
- T&S also working closely with CFTC on an MOU covering novel products (such as gold- and silver-backed instruments) and portfolio margining

James Brigagliano, Associate Director:

- Proxy voting – brokers' allocations of shares to be voted – disclosure
- Research/analysis
- Provisions of the Global Settlement expire 10/31/08; perhaps rulemaking will follow
- Short sale rule amendments 2007

Catherine McGuire, Chief Counsel:

- "Point of sale" initiative
- Possible exemptions from definition of "broker" and "dealer":
    - Granted to National Association of Realtors regarding "TIC" programs

- Staff is considering exemption grants for:
    - Private placement brokers
    - M&A brokers

4. Commissioner Atkins

Thank you, Linda [Thomsen], for your kind words. Through Linda's embrace of efficiencies, such as the automated case tracking system that is being introduced now, she has brought much-needed management improvements in the Division of Enforcement.

It is hard for me to believe, but I have known Linda now for almost 25 years! I first got to know Linda when we were colleagues at the same firm. I was a newly minted associate and came down on trips from New York to Washington to file securities registration packages. Now, for you youngsters in the audience, once upon a time, before EDGAR and e-mail, someone had to get on the airplane and fly to Washington to hand deliver the package to the SEC. That someone was always the junior associate who had been up all night at the printer. So I had to file the registration statement, deliver a courtesy package to the reviewer in Corp Fin, and call back to the lead underwriter's syndicate desk to tell them that the filing was effective. After doing that, I would go bleary-eyed to my firm's D.C. office. Linda was always the good-sport and organized lunches with other lawyers in the firm to celebrate my having escaped the fate of other junior associates who made it into the annals of associate lore — like the guy who did not get his registration statement filed because he checked it with his luggage, which got lost, or the guy who fell asleep and missed his flight. Linda's good nature and good humor continue to make it a pleasure to work with her more than two decades later.

It is an honor and pleasure to be a part of the nineteenth edition of "SEC Speaks." The idea for "SEC Speaks" program was conceived by Al Sommer, Alan Levenson, and PLI's Mary Mulé as a mechanism for private lawyers, accountants, and others to hear about the latest developments at the SEC, to get a glimpse into the minds of the commissioners and staff, and to share ideas in an informal setting. Before I begin, I must say that the views that I express here are my own and not necessarily those of the Commission or my fellow Commissioners.

I have noticed in my almost 10 years at the SEC — first working for two chairmen and then as a commissioner myself — that the audience of SEC Speaks seems to hang on every word that is said. Law firm associates take copious notes and then race back to their offices to see who can be first to get a newsletter out to advise clients on the current views. In recent years, the bloggers in attendance post what is said and opine on what it all means.

It is as if Hermes came down from Mt. Olympus to deliver the message from the Olympians. Well, unlike Greek mythology, there should be nothing mysterious about what we do. We should not require a Hermes to deliver our messages, although I know a few lawyers in this room who have made a rather good living trying to fill that role. Some sport Hermès scarves and ties to boot. The SEC is not Olympus, and we certainly are no Olympians. And besides, the last time I partied with the Greeks was in college!

I promise, that is as close as I will come to a joke. I began last year's speech with a series of jokes. I have been informed, however, that jokes could be too controversial given the current composition of the Commission. Therefore, I will wait until we get two more Commissioners before I joke again.

Seriously, there should not be anything mysterious about what happens at the SEC, but somehow we have allowed an Olympic-like cloud to shroud our workings. Investors, companies, brokers, advisors, attorneys, accountants, and others participating in our capital markets should be able to predict whether conduct is permissible or prohibited. Predictability is critical to protecting the rights of those with whom we interact and ensuring a fair and just process.

Predictability must exist both in procedure and substance. With respect to procedure, the SEC must follow uniform procedures both within headquarters and across divisions and regions. With respect to substance, the

SEC must provide predictable outcomes, and the manner in which those outcomes are reached must be transparent. As a government agency, we owe the taxpayers, investors, and marketplace no less.

Unfortunately, I think we at the SEC could do a better job of providing predictability to you and your clients in the private sector. We need to implement more systems and procedures to ensure better predictability and transparency in how we operate. The SEC must respect the rule of law and the rights of those with whom we interact.

With that in mind, this seems like a perfect opportunity to suggest a few steps that I hope the SEC will consider in the coming months to ensure better predictability.

One of the most glaring examples of lack of predictability is determining what constitutes materiality. The crux of our federal disclosure system is that all *material information* must be disclosed — with an emphasis on material. Yet the age-old question is: What does it mean to be "material"?

Issuers, investors, and regulators have struggled with applying the materiality test since the enactment of the securities laws. Materiality is an objective test: the Supreme Court has said that something is material if "there is a substantial likelihood that a reasonable shareholder would consider it … as having significantly altered the 'total mix' of information made available."

It is not enough that *some* investors may view a fact as important; rather, it must be important to the *reasonable* investor. In coming to this standard, the Supreme Court in 1976 in *TSC Industries v. Northway*, specifically overturned a test applied by the Second Circuit — that material facts include *all* facts that a reasonable shareholder *might* consider important. Can you imagine what prospectuses and proxy statements would look like if that standard had prevailed? *TSC Industries* is an example of the Supreme Court showing judicial restraint by not expanding the securities laws. Does this sound familiar? We have seen similar restraint in recent Supreme Court decisions this year and last in the area of securities law.

In *TSC Industries*, the Supreme Court clearly understood the problem of materiality. In the unanimous opinion written by Justice Thurgood Marshall, the Court observed that "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." The potential liability for a fraud violation can be great and, so Justice Marshall explained, "If the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decision making."

The SEC allowed the waters to be muddied on the issue of materiality in 1999 with Staff Accounting Bulletin 99. Anyone who has tried to apply SAB 99 is left with little certainty. Regardless of how quantitatively tiny a disclosure might be, the answer to any materiality question seems to be "it depends." (Of course, too often it is said to be clear later in 20/20 hindsight.) And yet that bulletin has been cited by courts, SEC staff, and lawyers as authority for materiality. As a result of SAB 99, issuers feel compelled to inundate shareholders with "an avalanche of trivial information," which was precisely the fear of the Supreme Court almost 32 years ago. Often, when you read a 10-K, it is as if you are reading Greek. Maybe we do need Hermes, after all, to interpret the content!

Would it surprise you to learn that SAB 99 does not necessarily represent the views of the Commission? As the title implies, it is a *Staff* Accounting Bulletin. The process of issuing Staff Accounting Bulletins is organized to avoid "complications" with the Administrative Procedure Act. Is that how a full-disclosure agency should operate? The Commission never voted on the views espoused within any SAB, so it does not and cannot represent the views of the SEC. Worse yet, SEC staff developed SAB 99 without public input. Substantive policy ought not to be made by the staff in private meetings, and ought not to be made based solely on the wisdom and experiences of SEC staff.

Moreover, since SAB 99 was released, a lot has changed. We now have Sarbanes-Oxley and new case law and regulations. Some persons are promoting new disclosure requirements on topics such as state sponsors of

terrorism, climate change, and global warming. As the Advisory Committee on Improvements to Financial Reporting will discuss at its meeting next week, the issue of materiality may need to be revisited. I support the work of that committee and appreciate Bob Pozen's leadership. When the SEC takes up this issue, we must approach it by returning to "first principles" — that materiality is determined based upon the objective "reasonable investor" standard. The Commission itself — after proceeding with public notice and comment — should clear up this issue with the full input of the investor, legal, accounting, academic, and business communities.

Another area where the SEC must provide more predictability is corporate penalties and settlements. Companies should have a clear understanding of what it takes to receive cooperation credit, and that credit should be fairly and evenly administered. And, as I have said in the past, in measuring cooperation, the SEC should neither credit nor debit a company for its decisions regarding waiver of the attorney-client privilege. Crediting waiver amounts to the inevitability of waiver, and the SEC should never adopt a position that leaves a person no meaningful choice on the waiver of such a fundamental privilege.

Resisting efforts to characterize waiving companies as cooperative (and non-waiving companies as non-cooperative) is particularly important after the SEC's January 2006 Statement Concerning Financial Penalties. Pursuant to the Statement, the extent of cooperation in an investigation is an element in determining how high civil monetary penalties against corporations could be set.

We have seen that the SEC's penalties statement already has had its challenges in implementation. Even after the penalty statement, too often our penalties seem to be justified on little more than that they "feel right." Companies, the shareholders that ultimately must shoulder a high penalty, and most importantly, the market place have little predictability when it comes to how much the SEC will seek in penalties. In most cases, one of the greatest economic uncertainties for a company under investigation is the penalty that ultimately will be levied against it.

That is not to say that the SEC's discretion should be eliminated in favor of rote application of a mathematical formula for calculating penalties. Discretion plays an important role in forgoing certain theories of liability where a company and its shareholders have been punished enough through other avenues. However, discretion in other areas such as formulating a theory of liability can be dangerous. For instance, discretion must not serve as a license to the SEC to test novel theories of liability and "push the envelope" of the law. Can you imagine how the SEC would respond to a company that claims merely to "push the envelope" of the law or accounting principles? If we are to enforce the rule of law, we must follow the rule of law in our approach.

One way we can achieve better predictability is through an internal Enforcement Manual, similar to the U.S. Attorney Manual. Such a manual is long overdue. One item that I would like to see in that manual is a written and uniform "open jacket" policy for Enforcement matters. This is not a novel idea. Those of you who practice in the area of criminal defense may recognize that phrase. That means the government shows defense counsel the evidence it has against the defendant. That is called due process. If we have a strong case and feel we can win in court under the "preponderance of the evidence" standard (which is far short of the "beyond a reasonable doubt" standard in criminal cases), should we not be open with our evidence? In addition to protecting the rights of individuals and companies, an open jacket policy has practical benefits to the SEC; defense counsel sees the evidence the SEC has against its client and, as a result, is less inclined to fight it out in court.

I understand that an open jacket policy is used by some in Enforcement, and it has not hurt their efforts. We should take every step to apply this policy across all the regions and headquarters — not only because it works, but because it is the right thing to do.

Speaking of Enforcement, I would be remiss if I did not mention some of the recent efforts of those in the Enforcement Division in combating fraud on investors. Last year, the SEC halted a massive pyramid scheme with as many as 70,000 victims in 64 countries. According to the complaint, the scheme involved the purported sale of English and Spanish language tutorials and preyed on Hispanic communities in Orlando, Florida, and Puerto Rico. The tutorials allegedly were merely a front for unregistered sales of pools of securities with promises of large returns. The SEC stopped the wrongdoing in its tracks through an asset freeze, emergency relief, and appointment of a receiver. I applaud the efforts of Eric Busto, Chad Earnst, Cecilia Danger, Jorge

Riera, Tonya Tullis, Chris Martin, and Trisha Sindler in our Miami Regional Office in bringing this case and deterring other similar wrongdoers.

And just last month, the SEC brought an action to halt an alleged fraudulent investment scheme run by an Omaha, Nebraska man who promised investors — many of them seniors — that they would earn a sizable monthly return from their investment. According to the SEC's complaint, he paid the earlier investors with the money from newer investors, and he misappropriated over $3.5 million in funds to purchase luxury vehicles, renovate two homes and capitalize other businesses that he owned. The court already has frozen the assets and converted the temporary restraining order to a preliminary injunction. I congratulate the SEC Enforcement team of Scott Friestad, John Polise, Chris Ehrman (who also helped to apprehend the so-called "Bishop" bomber who was threatening to kill mutual fund executives), Alexis Palascak, and Paul Kisslinger on their continuing efforts to thwart this alleged fraud. Bringing cases like these also helps to foster predictability: would-be fraudsters should know with certainty that the SEC will bring the full weight of the government against them if they yield to their temptation to defraud investors. These sorts of cases deserve more public attention.

I have been speaking a lot about Enforcement, but the need for better predictability and transparency extends well beyond the Enforcement Division. Our Office of Compliance Inspections and Examinations (OCIE) must use its powers with prudence, caution, and measure. OCIE should tailor its information requests to avoid imposing unnecessary costs on firms, and should refrain from asking firms to produce documents and information that they are not required to keep. OCIE should continue and expand its initiatives to provide greater predictability through such programs as the CCOutreach program, the publication of Compliance Alerts, and efforts to make communications with firms more uniform regardless of which office transmits them.

The Division of Investment Management is working to restore predictability in the exemptive application process. Many applicants have expressed frustration at a process that can take years with long periods of inaction. Rather than risk delaying an application's processing further, applicants are likely to accede to any and all demands made on them. Because exemptive orders allow for innovation, creating unnecessary obstacles to their processing hinders developments that would expand the options available to investors.

Predictability is particularly lacking in areas in which cooperation among Divisions is required. For example, Investment Management may be on the way to approving a product only to find that Trading and Markets, the Office of Economic Analysis, Corporation Finance, or another agency such as the IRS or the CFTC has an eleventh-hour objection. These sorts of occurrences point to the need for a cross-divisional new products czar. That czar should be responsible for the process and be able to coordinate all of the relevant parts of the SEC to ensure that all aspects of the proposed new product are considered in an orderly, efficient and timely manner. Predictable, systematic, and efficient consideration of new product ideas is important not only out of a general sense of fairness but also because the first-mover advantage is often critical to the success or failure of the product. Firms with new product ideas need to know what to expect in the approval process and, if their products are going to get approval, need to have a sense of timing so that they can plan the marketing and other release-related activities.

In closing, I am reminded of Sir Thomas More's words from "A Man for All Seasons," "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." The SEC must ensure that the causeway upon which its laws rests is well marked and well lit. We must provide as many road signs as possible, and we must encourage companies and individuals to keep to the causeway, rather than celebrate when we have caught them having gone astray.

Thank you for your attention and enjoy the remainder of SEC Speaks.

Endnotes

[1] *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976). *TSC Industries* applied materiality to the proxy solicitation rules under the Exchange Act. Subsequently, the U.S. Supreme Court extended the same definition to the general antifraud rules under the securities laws in *Basic v. Levinson*, 485 U.S. 224 (1988).

[2] *TSC Industries*, at 448-49.

[3] Remarks by Commissioner Paul S. Atkins at the Federalist Society Lawyers' Chapter of Dallas, Texas (Jan. 18, 2008).

5. <u>Investment Management</u>

Andrew (Buddy) Donohue, Division Director, on effects of the subprime crisis:

Susan Nash, Associate Director:

- Interactive data tagging
- Application to disclosure of funds' risk/return
- Disclosure reform
    - Standardized and user-friendly summary information
    - Layered disclosure:
        - Delivery of summary prospectus
        - With statutory (full) prospectus posted online
        - En route to tagged data
- Rulemaking under the Sudan Divestment Act, signed into law 12/31/07
    - Rules are mandated to be in effect 4/30/08

Douglas Scheidt, Chief Counsel:

- Actively-managed ETFs
    - To date all ETFs have been index-based
    - Staff has now issued public notice of intention to exempt the first actively-managed ETFs
    - Full transparency has been required
    - Believe that arbitrage works for these funds
    - Applications pending for not-fully-transparent funds
    - "Looking forward to seeing further developments in this area"
- Types of ETFs granted relief so far:
    - Plain vanilla index-based funds (e.g., S&P 500)
    - Esoteric indexes such as those not weighted by market capitalization
    - ETFs with "affiliated" index providers

- Funds that return to investors a multiple of an index, or an inverse of an index, or a multiple of the inverse
- High-yield bonds
- Foreign bonds

Robert Plaze, Associate Director:

- Rulemaking is desirable to codify the ETF exemptive orders
- Including exemptions for investment in other ETFs

Doug Scheidt:

- An interpretive release is proposed to give guidance on valuation responsibilities
- The number of exemptive applications (including 22 on ETFs, a 340% increase over 2006) was up 80%, to 81, in 2007 from 2006

Barry Miller, Associate Director:

- Applications to be made via EDGAR when rule is adopted in next couple months
- Now, all notices and orders are kept in chronological order for one year at SEC website
- SEC is working toward a system where all notices and orders will be classified in three ways, whereupon they can be "found" in the same three ways:
    1. chronologically
    2. by type
    3. by applicant name
- Disclosure review; 1400 new funds in 2007, a net increase of 300 to a total of 10,000; most if not all of the net increase is attributable to new ETFs
- "Target data life cycle" funds aimed at aging baby boomers
- Hedge-like funds, e.g., "130/30 funds" and "absolute return" or "market-neutral" funds; for market-neutral funds, the disclosure needs to state what the portfolio manager will actually do, not just what he might do
- International global funds

Bob Plaze:

- 12b-1 fees
    - The rule needs to be rationalized
    - The salience (to investors) of the fee needs to be increased
- Amendments to Form ADV Part II

- Electronic filing/access

- Books/records requirements need to be updated to electronic data

6. Commissioner Casey

Speaking about the "three elephants in the room":

1. XBRL
2. IFRS
3. CIFiR

Casey sees these three items as very positive and very much linked to one another

She also states that the reality that the SEC is now a three-member body, all of the same (Republican) party, will have no impact on decision-making

7. Judicial/Legislative Developments

Jacob Stillman, Solicitor, on *Stoneridge:*

- Supreme Court found no reliance
- Therefore no impact on SEC actions

Andrew Vollmer, Deputy General Counsel, on *Tellabs*:

- Plausible opposing inferences to be considered
- Inference needn't be irrefutable, but must be more than permissible
- Requirement is a cogent inference, at least as likely as any plausible opposing inference

Stillman on *Tambone*, a First Circuit market-timing case:

Richard Humes, Assistant General Counsel, on *Billings v Credit Suisse:*

- Immunity from anti-trust law

Vollmer, on the constitutionality of the PCAOB:

Joan McCarthy, Assistant General Counsel:

- "state action" by the relevant SRO
    - *Turk*, 5th Amendment privilege against self-incrimination, "state action" by NYSEx
    - *Hines* and also *Fawcett*, similar
- Interlocutory review – see Rule 400(a) of Rules of Practice
    - Sassano, Lammert, Troutman Wasserman

Vollmer, on DC Circuit decision in *FPA* – fees are special compensation for IA Act:

Humes, on 9th Circuit decision in *Stringer* – SEC/DOJ cooperation:

Stillman, on naked short selling:

- Claims against facilities of the national clearance and settlement system
- *Nanopierce Technologies; Whistler*

Stillman, on Rules 16b-3/16b-7:

- SEC filed amicus in 9th Circuit (*Dreiling)* and 2nd Circuit (*Bessemer)* – exemptions upheld
- *Levy* (3rd Circuit) – rules were amended after the first opinion by the circuit court

8. <u>Corporation Finance Workshop</u>

Barry Summer, Associate Director, on executive compensation:

- 45 days after completing comment process, all correspondence goes on website
- Comments have focused on "performance targets":
  - This is principles-based disclosure
  - May or may not be material, depending on facts and circumstances best evaluated by registrant
  - Staff will comment if disclosure on this topic seems inconsistent with registrant's disclosure as a whole
  - Decision tree:
    - Does registrant use performance targets?
    - If so, are they material?
    - If so, is there competitive harm?
    - If not, is there some other obstacle to disclosure?
    - Competitive harm, like materiality, is a facts-and-circumstances determination

9. <u>Accounting</u>

James Kroeker, Deputy Chief Accountant:

- Advisory Committee – "CIFiR"
  - Complexities in accounting represent areas where improvement is needed
  - Diverse perspectives of members of Committee – 5 of 17 are users of financial statements

- Progress report is on the CIFiR website
- Themes:
    - Investors' perspective is preeminent
        - Delivery should be via corporate websites (see Microsoft)
        - Data tagging (XBRL) is essential
        - Materiality and judgment are critical
    - Process of standard setting and interpretation
        - Prioritization in setting FASB's agenda; FASB needs an advisory committee for this
        - Need increased cost/benefit analysis and field testing
    - Accounting standards design
        - Substance, not form; "activity" focus rather than "industry" focus
        - Should eliminate "alternative" accounting for subjects
    - Professional judgment
        - Principles-based accounting requires judgment, e.g., in revenue recognition
    - Other OCA work:
        - Valuation issues
        - Consolidation/OBS issues
    - Pre-filing consultation with OCA is recommended and the protocol for same is posted on the SEC website
- Global convergence, to IFRS

Wayne Carnall, Chief Accountant in CorpFin Division:

- Goals of Office of the Chief Acct in CorpFin:
    - Improve financial reporting
    - Attract investment capital to US markets
- How to achieve these goals:
    - Efficient interaction with the public
    - Outreach to the major accounting firms – open dialogue

- Apply Staff website documents not to interpret GAAP but to comply with SEC rules
- The Office is pragmatic/proactive/responsive/open-eared/outreaching
- Address issues before they become "issues"

- IFRS becoming the global standard
  - A common language for accounting is beneficial to the market – it won't be US GAAP
  - Approaches: 1) roadmap, 2) voluntary use in the US, 3) mandatory use on a fixed date
  - There remain significant differences between GAAP and IFRS
  - Migration to IFRS is the most important financial accounting development ever
- Materiality vis-à-vis restatement of financials
  - Don't presume the Staff's conclusion, one way or the other, on either issue
  - Re materiality, there's no magical bright line – the **total mix to a reasonable investor,** likely to be company-specific
- "Fair Value" accounting – the issue is how
- Problems exemplified by troubled company recording gains from the devaluation of its debt
- What can be expected from OCA:
  - Pragmatic
  - Proactive
  - Responsive
  - Listening – an open-minded attitude
  - Reaching out to the relevant public

Susan Markel, Chief Accountant in Enforcement Division:

- Financial fraud is different from errors: managing the numbers
- Frauds often become cover-ups
- Categories of fraud: 1) get rich quick, 2) greed or ego, 3) survival
- Recent actions: Delphi, Nortel, Collins & Aikman ,Veritas, ConAgra, Zomax, SmartForce, Nicor, Quovadx, Globetel
- Continued coordination with criminal prosecutors

Richard Sennett, Chief Accountant in Inv Mgmt Division:

10. Enforcement Division

Linda Chatman Thomsen, Division Director, on review of 2007:

- 655 actions brought (2nd highest number)
- 46 fraud cases against seniors
- 24 options backdating cases – 19 individual defendants, including 7 lawyers
- 47 insider trading cases – 110 defendants
- 21 hedge fund cases, with fraud on markets or on investors
- 5 municipal finance cases
- 5 "intrusion" cases (hacking in to IT systems)
- 219 financial fraud cases (one-third of all cases), including 15 issuer penalties (a record)
- 94 trading suspensions – some from spam e-mails
- 24 trials, with 70% success rate
- $2B+ fair funds distributions
- 4 working groups, on special topics (such as subprime lending)

Scott Friestad, Associate Director, on insider trading:

- Dow Jones case – four Hong Kong citizens
- Credit Suisse case – tip to a Pakistani
- Two-thirds of insider trading cases are trading in advance of M&A transactions – 50 of these, including 8 married couples
- Amounts are larger
- Increasingly international
- Individuals are securities professionals, gatekeepers, corporate officials ("people who should know better") – every major U.S. investment bank, lawyers
- Sanctions: from people who should know better, typically extract 1X or 2X penalties, D&O bars or "time out" from the industry

Cheryl Scarboro, Associate Director, on subprime effects:

- *Doral* (9/06) and *First Bank* (9/07) involve valuation of future income streams and IO strips
- Issue of true sale in transaction between the parties; full recourse agreements were not disclosed

George Curtis, Denver Regional Director, on FCPA cases:

- Since 2004, 23 cases coordinating with Dept of Justice
- Self-reporting is on the rise
- Lucent: $10MM paid to transport 1000 Chinese officials to places like Disney World
- Cross-border cooperation
- Extensive range of penalties
- Self-reporting of violations is advised
- *Stat Oil* found its scheme revealed in the Norwegian press
    - Company did diligence to confirm the Iranian official's authority to pay out these sums
    - Management delayed disclosure and then responded inadequately

Katherine Addleman, Atlanta Regional Director:

- Options backdating cases
    - 7 cases included former general counsel – not entirely surprising because options backdating usually requires cooperation of GC acting as keeper of corporate minutes
    - Parallel to US Attorney's prosecution
- Brocade – the first criminal conviction
- Monster – civil and criminal charges for conduct from 1997 to 2005
- SarbOx §304 clawback first used in *United Health*
    - Officer repaid $46MM in addition to penalty and O&D bar
- Have 80 cases in inventory – expect it will run off in 2008

Joan McKown, Chief Counsel, on cooperation and attorneys:

- 39 cases against lawyers in 2007; average is 20 per year since 2002
- 15 issuer disclosure/reporting cases; 8 insider trading charges
- 8 pump-and-dump cases with lawyers as enablers
- Cooperation and remedial acts can avoid issuer penalty:
    - "The stick of penalties"
    - "The carrot of cooperation"

- Apple is the gold standard here; wasn't sued at all; many cases closed without public mention because of (i) cooperation and (ii) remediation; even if not closed without action, can result in "no penalty"

Luis Mejia, Chief Litigation Counsel:

- 9 trials in 2008 to date, 8 victories
- Insider trading, financial fraud, touting, etc.
- Real remedies obtained: getting penalties of 2X or more in victories, and long D&O bars
- Over 3 years in federal courts, 26 wins and 3 losses
- In administrative proceedings, 80% victorious over 3 years

Linda Thomsen:

- "Tone at the top" is key to avoid trouble
- Problems are expensive to fix; big problems are very expensive to fix
- Best is to preclude having a problem by adopting correct "tone at the top," "ethical culture," "compliance systems," etc.; this is in the *Seaboard* report
- But, if you develop a problem anyway, "credible cooperation" will reduce the all-inclusive cost of fixing the problem (meaning cost of defense and ultimate cash settlement with the government)
- Cooperation is especially helpful in avoiding criminal charges
- "Independent counsel" is not always necessary in an investigation
    - Depends on how high the misconduct, how pervasive the misconduct, etc.
    - But it must be "credible" cooperation to count

11. <u>Ethics Developments</u>

Richard Humes, Associate General Counsel:

- Rule 102(e) proceedings
    - 1/30/08 *Altman*, based on violation of state ethics rule*
    - First Rule 102(e) case against an attorney based on violation of state ethics rules, but without a predicate finding by the state bar or anyone other than the SEC; order alleges he violated NY "DRs," including those based on deceit; conduct occurred during an administrative proceeding; per Humes, the Staff relied on interpretations of NY state bar ethics rules in bringing this case
- Troutman & Wasserman
- OGC investigation into lawyer*

- Respondent doesn't have an absolute right to the counsel of its choice
- Part 205 – no prosecutions to date
- SarbOx §806 whistleblower provision
    - 5% of claims to Dept of Labor involve lawyers, who typically claim they have been fired for making a Part 205 report
    - See also *Allen v. Administrative Review Board* [not a lawyer]
- Legislation
    - S2450 re materials provided to SEC under confidential treatment agreement (legislation adverse to the private bar) passed by Senate Judiciary Committee
    - HR8013 re attorney-client privilege and work product (legislation favorable to the private bar) passed by the House

Brian Cartwright, General Counsel:

Matters marked with an * above reflect egregious circumstances

William Lenox, Ethics Counsel, on pro bono work by SEC lawyers:

12. <u>Accounting Workshop</u>

Palmrose, on PCAOB on SarbOx Section 404:

- SEC and PCAOB guidance issued in May 2007
- Cannot conclude "internal control of financial reporting" is "effective" if there is a "material weakness"
- Must disclose plans to fix the material weakness(es)
- Need reasonable basis to conclude there is no material weakness

E**rhardt, on international accounting:**

- Travels abroad 20 times a year on SEC accounting missions, 40% to London
- Policy work is toward objective of a single set of standards applied globally
- Seminal article in Northwestern U. L. Rev. (2005)
- It is IFRS, not U.S. GAAP, that will prevail
- So SEC's goal is to "improve" IFRS
- Who's who in international accounting:
    - London-based IASB establishes IFRS

    - 14 board members, drawn globally (currently 4 from U.S.; supported by professional staff, like FASB; "due process" similar to FASB; in general, very like FASB; accountable to aboard of trustees, also drawn from a global pool of candidates; founding chairman was Paul Volcker; current chairman is from the Netherlands

- Acceptance of IFRS:

    - 100 nations currently either require IFRS or allow it; Mexico and Canada are about to adopt and thus "surround" the U.S.; basically used everywhere except South America and Africa

    - Europe "most aggressively" has come to require IFRS; Australia, too

- Unlike accounting, international auditing standards are established the old-fashioned way (the "pre-SarbOx" way): the profession itself does it

- No self-executing authority here – each nation either adopts, or not, or "tweaks" and adopts

- In the U.S., and nowhere else (the SEC has been told), international auditing standards are not acceptable for public company use

- No SEC roadmap toward international standards exists; they are being drafted elsewhere nonetheless

- U.S. Auditing Standards Board, which governs private company audits, is working toward international convergence