



U.S. Securities and Exchange Commission

Speech by SEC Staff: The Promise of Transparency — Corporation Finance in 2007

by

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Thank you. I am very happy to be here today, and I very much appreciate your accommodating my last-minute scheduling changes. Since joining the staff of the Commission last March, I have had the privilege of speaking many times on the East Coast, on the West Coast, and even in Europe. But this is my first trip to Texas as the Director of Corporation Finance, and I am really pleased to be here.

Before I speak any further, I want to be sure to provide the so-called "standard disclaimer" and remind you that as a matter of policy, the Securities and Exchange Commission disclaims responsibility for any private statements of any SEC employee. The views I'm going to express today are solely my own and do not necessarily reflect the views of the Commission or of any members of its staff other than myself.

As securities lawyers, we are all familiar with the often-quoted adage that "sunlight is the best disinfectant."¹ We also hear a lot about "transparency" as the bedrock principle of good disclosure. I think in its most common usage, "transparent" refers to something that you can *see through*. And maybe that's a good metaphor, although left on its own, I think "seeing through something" may have a certain negative connotation. I was actually given a dictionary for Christmas — I won't speculate about what those close to me think of my command of the English language. But when I looked up the word "transparent", I found a whole string of useful meanings — "easily detected or seen through" but also "free from pretense or deceit" and "readily understood".² These are admirable, and necessary, goals for good disclosure.

I personally also believe transparency is an important principle for the regulators, as well as for the disclosure that companies provide in response to our regulations. So I thought I would give some meaning to that claim and talk to you about where we are today in the Division of Corporation Finance, and where I see us going in the coming year. This also seemed to be the right time for me to share a look ahead — it being early in a new year for the Division and at the beginning of my second year as Director. I, and others on the staff, have spoken informally, and in small pieces, about our agenda in other forums, but I thought I would try to assemble the

mosaic a bit (and shine some light through it). But as you listen today, please don't forget my disclaimer — I'm speaking only for myself and not for the Commission or the Division or any of my colleagues on the staff. So here goes. I have identified 11 items on the Division's agenda to mention, some more developed than others at this point, as you will see.

1. Foreign Deregistration.

Questions of U.S. competitiveness in our increasingly global markets have become a persistent refrain in various commentaries in the past few years. And these commentaries tend to paint a dark picture, whether condemning the Sarbanes-Oxley Act as overly burdensome or lamenting the asserted loss of U.S. strength in IPO issuances to foreign markets like Hong Kong or the AIM market in London. The Commission remains constantly attentive to the *issues* in this area as well as to the concerns expressed by others. The Commission also remains sensitive to the needs of foreign private *issuers* and their fit in our own capital markets.

On December 13, 2006 the Commission voted to issue a revised proposal concerning amendments to its rules regarding how foreign private issuers may terminate their registration with the Commission.³ Our comment period on this new proposal closed last week, on February 12. We have received a total of 28 comment letters on the revised proposal. Commenters have generally been very supportive of the revision as a significant improvement over the Commission's first proposal, although some have suggested further refinements. The staff is reviewing all of these comments carefully and hopes to return to the Commission with a recommendation for a final rule in the very near future.

As to this timing, please know that we are attuned to the fact that foreign private issuers that are accelerated filers or large accelerated filers will be required to include one or both reports under Section 404 of the Sarbanes-Oxley Act for the first time in the next annual reports they file with the us, which for those with calendar year-ends will be their Reports on Form 20-F due at the end of June. We also anticipate that there will likely be a lag time of more than 60 days between when a final rule is approved by the Commission and when it goes effective. So although June 30 is still over four months away, it is fast approaching and we are working hard.

2. Management Guidance.

I mentioned the timing concern posed for our foreign deregistration proposal by the pendency of Section 404 reporting. There are other concerns with Section 404, of course, and it is often cited as one of the reasons why the U.S. is allegedly losing standing and status in the global markets. I do not agree with those claims, but I do know that the efficiency and effectiveness of Section 404's implementation can and should be improved — for all issuers, including foreign private issuers and domestic public companies of all sizes. And this is something that is clearly a concern and priority of the SEC and something on which both the Commission and the Public Company Accounting Oversight Board ("PCAOB") have been actively working. In fact, the conference organizers were kind enough to allow me to reschedule my remarks today so I could participate in yesterday's meeting in Washington of the PCAOB's Standing Advisory Group at which Section 404 and revisions to the PCAOB's auditing standard for attestations of internal control were a primary topic of discussion.

As you know, Section 404 requires that companies provide two reports on their internal control over financial reporting: one based on their

management's assessment of those controls and another from their independent auditors, attesting to management's assessment. On December 13 of last year, the Commission proposed to provide for the first time guidance to management on performing their required assessment.⁴ The comment period on that proposal ends next week, on February 26. The Commission's proposal sets forth an approach to management's assessment that is "top-down" and "risk-based". It is also designed to be scalable, which should improve its utility for smaller public companies. The proposed interpretive guidance would be available to companies of any size, though, of course, and I will point out that an issuer that is already doing a good job and is satisfied with its processes can stick with its past assessment approach.

I mentioned that the comment period on our management guidance proposal ends next Monday. I would point out as an aside that on that same date the comment period closes on the PCAOB's proposed standard to replace Auditing Standard No. 2 ("AS2") which has governed the auditor attestations performed under Section 404. But that isn't really an aside. The Commission will be examining those revisions very closely, and they are another piece of the comprehensive efforts to improve the implementation of Section 404. I believe both management guidance and a replacement for AS 2 play an important role in improving the implementation of Section 404, and our hope is that both will be available for year-end 2007 reports.

3. E-Proxy.

Like foreign deregistration, the Commission's rulemaking on the internet availability of proxy materials (or "E-Proxy") is an initiative that began back in the fall of 2005 and on which considerable progress has been made (specifically, the Commission took its most recent action on E-Proxy on that same busy day last December). But we have not yet reached the end of our work in this area either, and it remains another key focus for the Division in the coming months.

Under the rules currently in effect, proxy statements and soliciting materials must be provided to shareholders in hard copy, paper form unless the shareholder has affirmatively consented to electronic receipt. Under the new rules, adopted in December and available beginning this July 1st, the obligation to furnish proxy materials may, at the company's or soliciting person's option, be met through a "notice and access" model.⁵ If a company or other soliciting person elects to follow this model, it must post its proxy materials on the internet (other than on the Commission's EDGAR site) and send shareholders a notice of the proxy materials' electronic availability. Shareholders may always opt out and receive their copies in paper form, by making a request to do so either electronically or on paper. That request only needs to be made once.

So E-Proxy as adopted in December thus far allows companies and other persons soliciting proxies the choice of using the internet for distribution of their materials but shareholders may always opt out. The Commission has also proposed an expansion of this model which would require that electronic proxy materials be available for 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).⁶ Shareholders could still opt out and exercise their choice to receive materials in paper form.

A company or soliciting person would also be permitted to send a full set of paper proxy materials, including the proxy statement, annual report (if applicable), and proxy card with its notice if the company considered that advisable for any reason. So companies and soliciting persons would also continue to have a choice. If they prefer, they may elect to stick with paper, in which case they would only need to provide website access to the proxy materials, a notice of the proxy materials' electronic availability and a mechanism for shareholders to vote (whether by paper proxy card, phone, internet, etc.). Once a company or soliciting person had delivered a full set of paper proxy materials to shareholders, it would not be required to supply additional paper copies to a requesting shareholder.

The comment period for the proposal on this "universal availability model" ends on March 30, 2007. We hope to receive many helpful comments from the entire range of interested parties, and then I anticipate that the Division's staff will be busy analyzing those and making a further recommendation to the Commission in short order.

These three pending proposals that I have been discussing — foreign deregistration, Section 404 management guidance, and the universal availability model under E-Proxy — might be the most obvious projects right now in the Division but of course we have much more at hand and ahead for us in the year to come. I thought I would highlight the ones that seem most important to me for you today.

4. Executive Compensation Disclosure.

Let's now turn briefly to the Division's biggest project from last year — executive compensation disclosure. This historic rulemaking — the first revisions in this critically important area since 1993 — was unanimously adopted by the Commission last July.⁷ The new rules addressed disclosure of stock option granting practices as well. The rules are first applicable for the proxy season we are now entering. From all I read, I believe it is fair to say that investors are waiting to see the results. So are we in the Division. We are developing a plan for targeted reviews of a critical mass of these new disclosures, and we are also planning to prepare a report in some form to assist in conveying our observations to issuers for the next proxy season. We also are in the process of receiving comments on interim final amendments to the new rules adopted in December. These comments, plus our targeted reviews, could result in rulemaking refinements for the next proxy season. So, stay tuned.

5. Proxy Access.

It would probably be misleading or certainly at least contrary to my stated goal here today of promoting transparency if I did not take up the question of shareholder access to corporate proxies as my next topic after discussing these four pending or completed rulemakings. For almost six months, after all, we have been looking at possible rulemaking in this area. I feel as if it is the elephant in the room at every conference at which I speak.

On September 7 of last year, as I assume most of you know, the Commission issued a press release⁸ in response to the Second Circuit's decision in *AFSCME v. AIG*.⁹ That case disagreed with the staff's longstanding interpretation of Rule 14a-8 that companies may exclude shareholder proposals concerning processes for conducting future elections (such as requiring shareholder nominees to be included on the company proxy) under the proxy rules. As described in the Commission's September

press release, the Division has been working on a staff proposal to the Commission to address the issues raised by the *AFSCME* case and shareholder access to proxy statements more generally.

The project was more difficult than initially anticipated. We have issued one Rule 14a-8 letter in this area so far in which the staff told Hewlett Packard (who asserted that it was subject to the jurisdiction of the Ninth Circuit) that due to the uncertainty raised by the Second Circuit's *AFSCME* decision we could not express a view at this time. I don't have much more to say at this point, but understand that our goal, as previewed by Chairman Cox, remains to act in time for the 2008 proxy season.

6. International Financial Reporting Standards.

This is a big one. Last Tuesday (on February 13, 2007), the Commission issued a press release announcing a staff roundtable we have coming up on International Financial Reporting Standards ("IFRS") as promulgated by the International Accounting Standards Board (the "IASB").¹⁰ The roundtable will explore where things stand today with the so-called "roadmap" laid out by then-Chief Accountant Donald Nicolaisen as to how we might eliminate the requirement that companies filing IFRS financial statements reconcile those with US GAAP.¹¹ The roundtable will be held on Tuesday, March 6, at the Commission's headquarters in Washington.

The Division of Corporation Finance has already been extremely busy reviewing filings from foreign private issuers that use IFRS. I detailed that review and where we stand with our growing understanding of IFRS in a speech I gave last month in London, and I do not have the time to go into that much detail here today.¹² Suffice it to say, the recognition and growing use of IFRS is an exciting topic today and something we should all keep in focus. I believe the Commission and the staff will be devoting considerable attention and energy following the March 6 roundtable to developing and announcing next steps, and I believe the time when the staff will recommend the "end of reconciliation" is clearly in sight.

7. Interactive Data.

If you have been an SEC observer at all during the last 18 months, you have noticed that technology, and maximizing its benefits for investors, is very important to our chairman Christopher Cox. Under his leadership, the Commission has developed a steady drum beat for the promotion of so-called "interactive data" which is only getting louder and quicker. EXtensible Business Reporting Language, or XBRL, is the primary interactive data type that the Commission has been focusing on and we have held a series of roundtables as well as promoting a pilot program with voluntary filers using XBRL.¹³ I mentioned the March 6 roundtable on IFRS. We will also be holding another in our series of XBRL roundtables next month, and I look forward to speaking (and providing a demo) at that one myself about the tremendous potential for XBRL to improve the usefulness of corporate disclosure to investors and deal participants alike. The Commission has also devoted resources to the design and completion of the taxonomies, or codes, for XBRL to be used across all industry and business sectors. However while the completion of these tags is underway, there is still an opportunity for companies to begin using interactive data today by participating in our voluntary filing program.

The Division is proud to be a key player in the Commission's work with XBRL. We participate in those taxonomy developments and are also

prepared for rulemaking for XBRL implementation when that is needed and appropriate. Right now, XBRL is being used strictly on a voluntary basis by filers in the pilot program. As mentioned at the SEC Speaks conference two weeks ago, however, the Commission is looking into applying interactive data to certain of the new executive compensation disclosures that it adopted last year. In this case, the "tagging" of some of the data would be done on a demonstration basis by the Commission, rather than by filers, and then would be available to the public in the interactive format. In this way, the first round of disclosures under the new executive compensation disclosure rules would showcase, to some extent, the power and potential of XBRL to improve usefulness and transparency.

8. PIPEs.

Another item of recent staff focus has been disclosure in certain so-called "private investment, public equity" or PIPEs offerings and whether the registered resale offering is, in substance, a primary offering by the issuer. This is an area that has drawn a lot of attention lately, principally because of the staff's concerns with convertible securities where the securities are convertible into a large number of shares of common stock relative to the issuer's outstanding shares and where there is insufficient disclosure about the market impact and cost of these transactions. In these transactions, we are not worried only about disclosure — we also are concerned about the shelf registration system being used in circumstances not intended to be covered by those rules. Our disclosure operations staff has undertaken a screening process to identify potential problematic transactions and will be seeking enhanced disclosure where appropriate. The staff's response to these transactions has also drawn attention due to the mistaken view that we are reconsidering our approach to PIPE transactions. I'll be very clear about this — the staff's view of PIPE transactions has not changed; we have simply addressed the recent development where convertible note transactions are structured in an abusive manner.

If you are a regular observer of Division activities, you may have already noticed that we are focused on these first eight items. There are a number of other projects, of course, and while those tend to be less advanced at this point they are under active consideration and development by the staff. Let me mention just two of those that I believe you will find of interest, and then I will close with what is perhaps my favorite on-going project — one specifically designed to assist disclosure counsel and others who look to the Division for guidance on a regular basis and one which has our principle of transparency at its heart.

9. Restatements and Item 4.02 of Form 8-K.

As many of you know, the Commission's rules for Current Reporting on Form 8K were substantially revised in 2004.¹⁴ Item 4.02 of Form 8-K currently requires that the company file a report within four business days of the triggering event of a decision that its past financial statements should no longer be relied upon. The rule does not specifically mention restatements and some may disagree about how to analyze the issue of relying on past financial statements that are about to be restated. Some issuers also have tucked that disclosure into a periodic report rather than filing an 8K specifically to disclose a determination that investors should no longer rely upon past financial statements. As part of an update to its prior restatement study, the Government Accountability Office looked into the phenomenon of so-called "stealth restatements" last year and issued a recommendation that the Division improve the consistency and transparency of information provided to investors in this area.¹⁵ More

transparency could come by clarifying that a Current Report on Form 8K must be filed — rather than just including that disclosure in a periodic report — any time a determination is made that the public should not rely on previously filed financial statements; alternatively, transparency might be promoted by a rule that required the filing of a Report on Form 8-K any time a company has determined to restate its financial statements. The Division is hard at work on all of this as well, and I am hopeful we will be in a position to make a recommendation to the Commission in this area in the next few months.

10. Small Business Capital Raising and Private Offering Reform.

I mentioned earlier the shareholder access elephant that is in every room at every conference at which I speak these days. The last Division agenda item that I would like to mention briefly is perhaps more like a well-known family member. If securities offering reform in 2005 was the granddaddy of progress under the Securities Act of 1933,¹⁶ private offering reform (and related smaller public company relief) is perhaps a well-known uncle. Or perhaps a long-lost uncle who is in the course of being found again.

The Division has before it the benefit of extensive input in this area from a number of sources. The Commission's Advisory Committee on Smaller Public Companies published its final report last year.¹⁷ That report's recommendations included a number of items which we have been actively reviewing and analyzing. We know that others also have views in this area. The Division is also fortunate to have on the staff many with long memories of what is needed in this area, who were there when the incomparable Linda Quinn, rightfully legendary as a former director of the Division, started the ball rolling with her 1995 remarks at an ABA meeting in Chicago when she addressed a number of possible responses to the challenges that are presented by the general solicitation limitation in the private offering arena.¹⁸ In recent years, the Division has been keeping its own list of what remained to be done in this area in the wake of public securities offering reform.

We are now actively studying all of this, trying to identify what makes sense and what can be accomplished in an expeditious way. Some things appear fairly easy — electronic Form D for example. Others look doable — such as the Advisory Committee's first recommendation in capital raising, to extend many of the benefits of the small business forms to any issuer eligible for Form S-1. We could then simplify things by eliminating the special Regulation S B forms. Perhaps some of the benefits of Form S-3 could be extended, alleviating some of the pressures on PIPE transactions (and eligibility for Form S 3) that I mentioned earlier. Perhaps a new Regulation D exemption for larger investors, with some form of general solicitation available, would make sense. Maybe changes to Rule 144 to ease the liquidity side of the private offering equation. In the general area of reporting, we are also examining how our rules apply to so-called "voluntary filers" and whether further rulemaking or guidance in this area might be advisable.

It's too early to get specific here — we are still studying. But we would certainly like to get you a proposal for your summer vacation reading. After all, during the last two summers we gave you Securities Offering Reform and then Executive Compensation Disclosure rules to read at the beach. We would hate to disappoint you this year. But I am of course speaking only for myself and I've learned not to make promises like that one.

11. Corporation Finance Website.

So that is a tour of sorts of where some of the key projects in Corporation Finance currently stand. Hopefully it has helped you "see through" into some of the goals and priorities of the Division's staff. In wrapping up my remarks today, there is one last project I would like to share with you — an initiative I announced on February 10 at the "SEC Speaks" conference and which the Division had kicked off the night before — the redesign and reinvigoration of the Corporation Finance web pages within the Commission's www.sec.gov site.

If you haven't already gone to the Division's home page, I would encourage you to do so.¹⁹ Just go to the SEC home page and look for Corporation Finance on the right hand side of the page. Our upgrade to the site has been described initially as merely organizational, and while we have adopted a new organizational structure for our web page to be sure, that description misses the major point and promise of our project.

I spoke at the beginning of my remarks about the value and meaning of transparency. In my opinion, the redesign of the Corporation Finance webpage has enhanced our efforts in that regard significantly and the site can be a tremendous resource for public companies, their counsel and accountants, investors and others. We are aiming, in the words of one web-savvy commentator, for something that is "intuitively navigable".

The website now lays out all of our staff guidance and interpretations along subject matter lines. But more importantly, we are also in the process of updating all of our guidance (some of which has been around for years and has aged a bit) on a subject matter-by-subject matter basis. You should be able to see and find that guidance (and whether it's been updated) quickly and easily based on our new organizational structure. As for updating subject matters, we not surprisingly tackled executive compensation first. Next up is our Rule 144 guidance, and I expect that all of the subjects will be updated in the next six months, hopefully sooner. We also intend that users will be able to find updates more easily and confidently in the future as new guidance is posted to the website. The new format allows us to make updates in smaller increments and on a more current basis.

Finally, there is one further specific item about our website that I want to highlight. The Division's homepage now has a section called "Division Speeches and Public Statements." My remarks today will appear there shortly. Equally importantly — perhaps more importantly — you will find the Division's opening statement from every public meeting at which Corporation Finance has made a recommendation to the Commission during my tenure. This has been a key point for me.

The Commission, of course, makes its open meetings at which rulemakings are proposed or adopted available to the public free of charge on the web. The audio archive is also freely available on the Commission's website shortly after the meeting is over. They're perfectly transparent, but it may not be easy to find quickly any particular piece of information given the audio format. Press releases of varying detail are also typically released after the Commission votes to propose or adopt a rulemaking. But there is one other resource that I want you all to have in mind, which hopefully is available to you the same day of a meeting: the printed version of the Division statement read by the staff in making its recommendation to the Commission. You can find these on the Commission's page with staff speeches and statements; they are also culled out and posted on the Corp Fin web page. Of course, this is the Division's statement in making its

recommendation only, and the Commission may at times change what it ultimately approves of course. But hopefully this can be a useful start for you in understanding and synthesizing the Commission's action.

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I hope all of this gives you some insight into our plans (and aspirations) in Corporation Finance this year. Thank you for inviting me to speak with you today.

Endnotes

¹ Actually what Justice Brandeis said was, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, 1914.

² See, e.g., "transparent" in Merriam-Webster's Collegiate Dictionary, Tenth Edition, at p.1251 (2001).

³ SEC Release No. 34-55005, "Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(G) and Duty to File Reports Under Section 13(A) or 15(D) of the Securities Exchange Act of 1934," December 20, 2006, available at <http://www.sec.gov/rules/proposed/2006/34-55005.pdf>.

⁴ SEC Release No. 33-8762, "Management's Report on Internal Control Over Financial Reporting," December 20, 2006, available at <http://www.sec.gov/rules/proposed/2006/33-8762.pdf>.

⁵ See SEC Release No. 34-55146, "Internet Availability of Proxy Materials," January 22, 2007, available at <http://www.sec.gov/rules/final/2007/34-55146.pdf>.

⁶ SEC Release No. 34-55147, "Universal Internet Availability of Proxy Materials," January 22, 2007, available at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>.

⁷ SEC Release No. 34-8732A, "Executive Compensation and Related Person Disclosure (conforming amendments)," August 29, 2006, available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

⁸ SEC Press Release 2006-150, "Commission Calendars Proposed Amendment to Rule 14a-8 Governing Director Nominations by Shareholders," September 7, 2006, available at <http://www.sec.gov/news/press/2006/2006-150.htm>.

⁹ *AFSCME v. AIG*, 2006 WL 2557941 (2d Cir. Sept. 5, 2006).

¹⁰ SEC Press Release 2007-19, "SEC Staff Roundtable on International Financial Reporting Standards "Roadmap" Set for March 6," February 13, 2007, available at <http://www.sec.gov/news/press/2007/2007-19.htm>.

¹¹ "A Securities Regulator Looks at Convergence," Donald T. Nicolaisen, Chief Accountant, Office of the Chief Accountant, U.S. Securities and Exchange Commission, April 2005, available at

<http://www.sec.gov/news/speech/spch040605dtn.htm>.

¹² "Remarks before the Practising Law Institute Sixth Annual Institute on Securities Regulation in Europe," John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, January 15, 2007, available at <http://www.sec.gov/news/speech/2007/spch011507jww.htm>.

¹³ See SEC Press Release 2006-34, "Commission Announces Roundtable Series on Giving Investors and Analysts Better Financial Data via Internet," March 9, 2006, available at <http://www.sec.gov/news/press/2006-34.htm>.

¹⁴ See SEC Release No. 33-8400, "Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date," March 16, 2004, available at <http://www.sec.gov/rules/final/33-8400.htm>.

¹⁵ "FINANCIAL RESTATEMENTS: Update of Public Company Trends, Market Impacts, and Regulatory Enforcement Activities," United States Government Accountability Office, Report to the Ranking Minority Member, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, July 2006, available at <http://www.gao.gov/new.items/d06678.pdf>.

¹⁶ See SEC Release No. 33-8591, "Securities Offering Reform," July 19, 2005, available at <http://www.sec.gov/rules/final/33-8591.pdf>.

¹⁷ Final Report of the Advisory Committee on Smaller Public Companies to the United States Securities and Exchange Commission, April 23, 2006, available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

¹⁸ L. Quinn, "Reforming the Securities Act of 1933 - A Conceptual Framework," INSIGHTS, vol. 10, pp. 25-29 (1995).

¹⁹ See <http://www.sec.gov/divisions/corpfin.shtml>.

<http://www.sec.gov/news/speech/2007/spch022307jww.htm>

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