

February 11, 2008

SEC Authorizes the Director of Corporation Finance to Grant Exemptions from Audited Financial Statement Requirements for Annual Meeting Proxies

The SEC has approved a final rule that gives the Director of the Division of Corporation Finance the power to grant or deny exemptions from Exchange Act Rules 14a-3 and 14c-3's requirement to furnish audited financial statements in connection with annual meetings resulting from a shareholder demand and subject to certain conditions.

The new rule is not meant to address situations that arise, for example, when a company does not have the audited financials required to be included in a proxy or information statement for a meeting at which a business combination or other extraordinary transaction will be approved. Rather, the new rule is limited to situations where, for instance, shareholders have sued to compel the company to hold an annual meeting under state law. In the business combination context, the Staff has in the past stated that they may provide some very limited relief, which falls short of the full exemption contemplated by the new rule. For our prior memo on this topic, click [here](#) or contact our Practice Development Office.

The new rule, which became effective on February 7, 2008, gives the Director this exemptive power where the applicant demonstrates that it:

- Is required to hold a shareholder meeting as a result of an action taken by the applicant's shareholders pursuant to state law;
- Is unable to comply with Rule 14a-3(b) or Rule 14c-3(a)'s requirements that audited financial statements be included in the annual report to be furnished to shareholders in connection with the shareholder meeting that is required to be held as a result of the shareholder demand under state law;
- Has made a good faith effort to furnish the audited financial statements before holding the shareholder meeting;
- Has determined that it has disclosed to shareholders all available material information necessary for them to make an informed voting decision in accordance with the SEC's proxy rules; and

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- Absent a grant of exemptive relief, would be forced to violate either state law or SEC rules and regulations.

The Director's exemptive power is limited to cases where it appears to him or her that the matter does not present significant new issues or raise questions of fact or policy which in the interests of the public or investors warrants that the Commission consider the matter. In addition, any decision by the Director may be reviewed by the Commission on its own initiative or upon application by an adversely affected party.

For the new rule, see <http://www.sec.gov/rules/final/2008/34-57262.pdf>

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman, 44-20-7367-1601, Raphael M. Russo, 212-373-3309 and Frances F. Mi, 212-373-3185.