VEDDER PRICE

Capital Markets and Securities

A bulletin prepared by the Capital Markets Group at Vedder Price designed to keep corporate executives and investment banking professionals informed of major developments in the securities industry.

Summer 2004

SEC ACCELERATES AND EXPANDS FORM 8-K REPORTING

The SEC's new rules amending the requirements for Current Reports on Form 8-K under the Securities Exchange Act of 1934 go into effect on August 23, 2004. The new rules:

- accelerate the filing deadlines for most required reports on Form 8-K to four business days from the current deadlines of up to fifteen days,
- expand the types of business, financial and management events required to be reported on Form 8-K, and
- adopt a limited safe harbor for failure to file timely certain required Form 8-K reports.

The new Form 8-K requirements are intended to provide investors with important information about public companies on a "real time" basis, furthering the goals of Section 409 of the Sarbanes-Oxley Act of 2002. The changes to Form 8-K do not require immediate disclosure of all material developments, but rather identify certain "presumptively material" categories of events that will now be subject to mandatory current reporting. Notwithstanding the Form 8-K changes, in managing disclosure practices and investor relations, companies should continue to consider the advisability of prompt disclosure of all material developments as contemplated by stock exchange listing standards and consistent with current widespread practices.

Accelerated Filing Deadlines

An issuer will be required to file a Form 8-K within four business days of most events that trigger a Form 8-K filing requirement. The new deadlines do not apply to elective filings on Form 8-K made to comply with Regulation FD (which filings remain subject to the shorter 24-hour or simultaneous public disclosure standards of Regulation FD), to report voluntary disclosures or to file certain exhibits.

Expansion and Reorganization of Form 8-K Disclosure Items

As amended, Form 8-K has eight new categories of required disclosure items and two items formerly required to be included in periodic reports under the Exchange Act. In addition to those items currently reportable on Form 8-K, the new rules require the following specific events to be disclosed on Form 8-K:

- material amendments to or termination of a material agreement,

IN THIS ISSUE

- new financial obligations or obligations under off-balance sheet arrangements, and the occurrence of events triggering an increase or acceleration of such obligations,
- any exit or disposal plan, sale of long-lived assets or termination of employees pursuant to a plan of termination under which an issuer will incur material charges under GAAP,
- determination that a material charge for impairment of assets is required under GAAP,
- non-reliability of previously issued financial statements,
- receipt of notices from a stock exchange regarding delisting or failure to comply with continuing listing rules or standards,
- notification by any issuer to a stock exchange of material noncompliance with continuing listing rules or standards,
- any determination by an issuer to transfer or withdraw its listing,
- unregistered sales of equity securities,
- material modifications to rights of security holders,
- departures of executive officers and directors for any reason,
- appointments and elections of new executive officers and directors, and
- amendments to charter and bylaws.

"As amended, Form 8-K has eight new categories of required disclosure items and two items formerly required to be included in periodic reports under the Exchange Act."

The SEC has reorganized Form 8-K into topical sections to enable investors to more readily identify the content of current reports.

Limited Safe Harbor

The SEC amended rules 13a-11 and 15d-11 under the Exchange Act to provide that the failure to timely file a Form 8-K reporting one or more of the first five events listed above (relating to material agreements, financial obligations, asset dispositions or employee terminations, material charges and nonreliability of financial statements) will not be deemed to violate Section 10(b) and Rule 10b-5 under the Exchange Act. The safe harbor applies only to the failure to timely file the report, and any material misstatements or omissions in a filed report will continue to be subject to Section 10(b) and Rule 10b-5 liability.

If an issuer fails to timely file a Form 8-K for any of these items, the issuer must include the required disclosure in its next periodic report. Forms S-2 and S-3 (and Forms F-2 and F-3) eligibility requirements will now provide that failure to timely file a Form 8-K for such "safe harbor" items will not result in a loss of eligibility to use those forms, so long as the issuer files the disclosure required by such items on or before the date the registration statement is filed.

The SEC also amended the "current public information" requirement of Rule 144 under the Securities Act to provide that the rule will be satisfied even if an issuer has not filed Form 8-K reports related to such items during the 12-month period preceding a Rule 144 sale. Therefore, affiliate resales under Rule 144 will not be jeopardized by an issuer's failure to timely comply with Form 8-K reporting requirements related to such items; however, insiders would be well-advised not to sell securities into the market unless the issuer has in fact filed any required Form 8-K reports in order to avoid potential insider trading concerns.

Disclosure Controls and Procedures

In light of the expanded number of events requiring the filing of a Form 8-K and the accelerated timeframe in which such reports must be filed, issuers should make appropriate refinements to their disclosure controls and procedures. For example, personnel responsible for executing, amending or terminating contracts which might be material should be charged with notifying a designated person with responsibilities for SEC reporting in advance of such events. Personnel responsible for other events triggering a Form 8-K reporting obligation should be similarly advised of their new responsibilities.

Application of Section 906 of the Sarbanes-Oxley Act of 2002

In the adopting release, the SEC clarified its position that Section 906 certifications are not required to accompany Form 8-K reports.

RECENT EFFECTIVENESS OF NASD'S IPO AND UNDERWRITING RULES

Several significant changes in NASD regulation of certain securities offerings went into effect in March 2004. These changes are discussed below.

NEW NASD RULES IN EFFECT FOR IPOS

Effective March 23, 2004, the NASD replaced its previous Free-Riding and Withholding Interpretation with new NASD Conduct Rule 2790. The new rule is designed to protect the integrity of equity IPOs by requiring that:

- underwriters make *bona fide* offerings at the offering price,
- underwriters not withhold securities in public offerings for their own benefit or use such securities to reward persons who are in a position to direct future business, and
- industry insiders, including NASD members, not take advantage of their "insider" status to purchase "new issues" at the expense of public customers.

The new rule applies to all "new issues,"[1] unlike the Interpretation, which applied only to "hot issues" (public offerings of securities that trade at a premium in the secondary market).

General Prohibitions

Rule 2790 contains three general prohibitions:

1. An NASD member or a person associated with a member may not sell a new issue to any account in which a "restricted person"[2] has a beneficial interest.
2. An NASD member or a person associated with a member may not purchase a new issue in any account in which the member or person has a beneficial interest.
3. An NASD member may not continue to hold new issues acquired by the member as an underwriter, selling group member or otherwise.

There are three exceptions to the general prohibitions.

First, sales or purchases from one member of a selling group to another that are incidental to the distribution of a new issue to a non-restricted person at the offering price are not prohibited.

Second, sales or purchases of a new issue by a broker-dealer at the offering price that are part of an accommodation to a non-restricted customer of the broker-dealer are not prohibited.

Third, purchases of new issues at the offering price by broker-dealers (or owners of broker-dealers) which are organized as investment partnerships are not

prohibited, provided that such purchases are credited to the capital accounts of the partners. This provision is meant to allow investment partnerships (*i.e.*, hedge funds) that are registered as broker-dealers, or that have broker-dealer subsidiaries, to purchase new issues on the same terms as other investment partnerships.

Preconditions for Sale of New Issues

Rule 2790 prohibits an NASD member from selling a new issue to any account unless, within the previous twelve months, it has obtained a representation from either (1) the beneficial owners of the account that the account is eligible to purchase new issues in accordance with Rule 2790, or (2) certain "conduits" (such as a bank, foreign bank, broker-dealer or investment advisor) that all purchases of new issues comply with the rule. The rule provides specific guidance regarding the appropriate type of representations required in a fund-of-funds context.

Exemptions for Sales to Specific Purchasers

Rule 2790 contains exemptions that generally involve sales to entities that have numerous beneficial owners. Rule 2790 will not apply to sales to the following persons or accounts:

- an account in which the beneficial interests of restricted persons do not exceed, in the aggregate, 10% of such account (the "*de minimis*" exception),
- certain publicly traded entities (other than broker-dealers or affiliates of broker-dealers, if such broker-dealers are authorized to engage in public offerings of new issues either as selling group members or underwriters) that are listed on a national securities exchange or the Nasdaq National Market[3],
- registered investment companies,
- certain insurance company general, separate or investment accounts,
- certain foreign investment companies, provided that no person owning 5% or more of the investment company is a restricted person, and
- certain common trust funds, ERISA benefits plans not sponsored by a broker-dealer, state or municipal government benefits plans, tax-exempt charitable organizations, and church plans.

Issuer-Directed Securities Exemption

The prohibitions of Rule 2790 do not apply to new issues that are specifically directed by the issuer of the securities to restricted persons. The issuer-directed exemption applies to sales to broker-dealer personnel and finders and fiduciaries, if those persons, or members of their immediate families, are employees or directors of the issuer or its affiliated companies. Issuer-directed securities are no longer subject to a lock-up restriction.

Other Exemptions

There are other exemptions under the rule, all of which are subject to a variety of conditions and limitations, including, in some cases, lock-up restrictions. These include:

- new issues distributed pursuant to a share purchase program sponsored by an issuer or an affiliate of the issuer,
- purchase and sale of new issues by an account in which a restricted person has a beneficial interest in order to maintain the equity ownership position of the restricted person, and
- retention by an underwriter, pursuant to an underwriting agreement, of a portion of a

new issue in its investment account if it is unable to sell that portion to the public. However, Rule 2790 does not permit an NASD member to place unsold shares into an account of another restricted person (other than the investment account of the underwriter).

NASD Amends Underwriting Standards

NASD Conduct Rule 2710, commonly known as the "corporate financing rule," which regulates underwriting compensation arrangements in public offerings, was recently amended to more accurately reflect current investment banking and underwriting practices. In particular, the amended rule, effective March 22, 2004, significantly modifies the NASD's regulation of underwriting compensation in connection with a public offering.

Pre-Offering Period

The amended corporate financing rule contains a more objective standard for NASD members and the NASD to use to determine whether "items of value" must be included in the calculation of underwriting compensation under the rule. "Items of value" received by an underwriter, and arrangements entered into for future receipt of items of value, during the 180 days immediately preceding the filing date of a registration statement until the date of effectiveness of the registration statement (or the commencement of sales) will be deemed to be underwriting compensation, unless received in a transaction that meets one of five exceptions contained in the rule.The amended rule also lists certain securities, fees and expenses that are excluded from the definition of "items of value" and, accordingly, are not deemed underwriting compensation or subject to the rule's lock-up restrictions. Generally, items of value received by an underwriter before the commencement of the 180-day review period and after completion of the public offering will not be included in underwriting compensation.

"The amended corporate financing rule contains a more objective standard for NASD members and the NASD to use to determine whether 'items of value' must be included in the calculation of underwriting compensation under the rule."

The types of items of value that, if received during this period, will constitute underwriting compensation include:

- discounts and commissions,
- reimbursement of expenses on behalf of the underwriter, underwriter's counsel and a qualified independent underwriter,
- finder's fees, wholesaler's fees, financial consulting and advisory fees and special sales incentive items,
- common or preferred stock, options, warrants and other equity securities, including debt securities convertible into or exchangeable for equity securities,
- any right of first refusal provided to any participating member to underwrite or participate in future public offerings, private placements or other financings that will have a compensation value of 1% of the offering proceeds or that dollar amount contractually agreed to by the issuer and underwriter to waive or terminate the right of first refusal,
- compensation to be received by the underwriter or by any person nominated by the underwriter as an advisor to the issuer's board of directors in excess of that received by other members of the board of directors,
- commissions, expense reimbursements or other compensation to be received by the

underwriter as a result of the exercise or conversion within twelve months following the effective date of the offering of warrants, options, convertible securities or similar securities distributed as part of the public offering,

- fees of a qualified independent underwriter, and
- compensation, including expense reimbursements, previously paid to any member in connection with a proposed public offering that was not completed, unless the member does not participate in the revised public offering.

The following items will not be considered underwriting compensation under the amended rule:

- listed securities purchased in public market transactions,
- nonconvertible or nonexchangeable debt securities and derivative instruments if acquired or entered into for a "fair price," in the ordinary course of business and in transactions unrelated to the public offering,
- securities acquired through stock bonus, pension or profit-sharing plans that qualify under Section 410 of the Internal Revenue Code and shares of an investment company registered under the Investment Company Act of 1940,
- cash compensation for acting as placement agent for a private placement offering or for providing a loan or credit facility or for services in connection with mergers and acquisitions, and
- expenses normally borne by the issuer (*e.g.*, printing costs, SEC and NASD filing fees, "blue sky" registration fees) even if an underwriter pays those expenses and is subsequently reimbursed by the issuer.
- securities received in *bona fide* capital-raising transactions, including:
  - securities received as consideration for certain investments and loans by entities that are affiliates of the underwriter,
  - the acquisition of securities of issuers that have significant institutional investor involvement in their corporate governance,
  - venture capital investments or securities received as compensation for acting as a placement agent in transactions that include significant institutional investor participation,
  - acquisitions of securities that are acquired as the result of (i) a qualifying right of preemption or a stock split or a pro rata rights or similar offering, or (ii) the conversion of securities that have not been deemed by the NASD to be underwriting compensation, or
  - acquisitions made in private placements during the review period in order to prevent dilution of a long-standing equity interest in the issuer.

Lock-up Restrictions

The rule amendments narrow the application of the lock-up restriction to public equity offerings. Subject to certain exceptions, any common or preferred stock, options, warrants and other equity securities of the issuer that are unregistered and acquired by an underwriter or related person within 180 days before the filing of the registration

statement, acquired after the filing of the registration statement and deemed to be compensation by the NASD, or acquired in transactions that meet the requirements of the five exceptions for *bona fide* capital-raising transactions discussed above, are subject to a 180-day lock-up restriction. For 180 calendar days following effectiveness or commencement of the public offering, these securities may not be disposed of in any manner, unless covered by one of the rule's exceptions to the lock-up restrictions.

Other Amendments

The rule amendments eliminate the requirement to file information of the NASD affiliation or association of every shareholder of the issuer with the NASD. Instead, the amended rule requires NASD members to file with the NASD only information on the NASD affiliation of any: (i) officer or director of the issuer; (ii) beneficial owner of 5% or more of any class of the issuer's securities; and (iii) beneficial owner of the issuer's unregistered equity securities purchased during the 180-day period immediately preceding the filing date of the public offering (except purchases through an issuer's employee stock purchase plan).

GUIDANCE ON ISSUER STOCK REPURCHASES SAFE HARBOR

On May 18, 2004, the staff of the SEC's Division of Market Regulation provided answers to frequently asked questions ("FAQs") concerning recently-amended Exchange Act Rule 10b-18, the "safe harbor" for issuer repurchases. The FAQs are available at http://www.sec.gov/divisions/marketreg/r10b18faq0504.htm. For additional information regarding amended Rule 10b-18, please refer to the article entitled "SEC Amends Stock Repurchase Safe Harbor" contained in our Winter 2004 Capital Markets and Securities Bulletin, which is available at http://www.vedderprice.com/docs/pub/84f35d79-0c42-4431-b9e7-39c0620de80e_document.pdf.

[1] A "new issue" is any initial public offering of equity securities. The definition excludes all debt securities, most privately placed equity securities, offerings of preferred or convertible securities, securities offered by commodity pool operators, rights offerings, exchange offerings, offerings made pursuant to a merger or acquisition, investment grade asset-backed securities and offerings by registered investment companies. The rule does not apply to secondary offerings.

[2] In very general terms, a "restricted person" is:

- any NASD member,
- any officer, director, general partner, associated person, employee or agent that is engaged in the investment banking business or securities business of an NASD member,
- a finder or any person acting in a fiduciary capacity to the managing underwriter, including attorneys, accountants and financial consultants, with respect to a managing underwriter,
- any person who has authority to buy or sell securities for a bank, savings and loan, insurance company, investment company, investment advisor or collective investment account (*i.e.*, portfolio manager), and any person who owns 10% or more of the broker-dealer.

A "restricted person" is also any immediate family member of each of the foregoing who receives material support from the restricted person.

[3] For example, a parent company that is publicly traded and has a broker-dealer subsidiary that engages in public offerings would not qualify for the exemption. By contrast, a publicly traded parent company whose broker-dealer subsidiary does not engage in public offerings of new issues would qualify for the exemption.

Capital Markets and Securities bulletin is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and other interested parties informed of developments in corporate finance and securities matters. It is not a substitute for professional advice.

If you have any questions regarding material in this issue of *Capital Markets and Securities*, or suggestions for a specific topic you would like addressed in a future issue, please contact the executive editor, Steven J. Gray, at 312/609-7528 or at sgray@vedderprice.com.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York City and Roseland, New Jersey. The attorneys in the firm's Capital Markets Group regularly represent corporations and investment bankers, both foreign and domestic, in a wide variety of matters, including:

- debt and equity offerings, including initial public offerings, structured debt financings, aircraft securitizations, dual-class equity structures, and sophisticated preferred stock instruments;
- capital formation for initial capitalization, financing ongoing operations, and acquisitions;
- corporate disclosure, periodic reporting, proxy solicitations, and insider trading and beneficial ownership compliance matters;
- private placement of securities, including Rule 144A and Regulation S transactions;
- tender offers, mergers and acquisitions, and recapitalizations and restructurings;
- international offerings of securities and compliance by foreign issuers with U.S. securities laws;
- litigation and administrative and arbitration proceedings involving various securities fraud claims, disclosure issues, and regulatory enforcement matters; and
- municipal bond financings.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Robert J. Stucker

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Neal I. Korval

New Jersey
Five Becker Farm Road
Roseland, New Jersey 07068
973/597-1100
Fax: 973/597-9607
John E. Bradley

Principal Members of the Capital Markets Group:

Steven J. Gray *(Chair)* 312/609-7528
John T. Blatchford 312/609-7605
Thomas P. Desmond 312/609-7647
Christopher R. Elston 312/609-7595
Robyn B. Goldman 312/609-7662
Jennifer Durham King 312/609-7835
James W. Morrissey 312/609-7717
Meeghan O'Donnell 312/609-7529
Richard L. Williams III 312/609-7588
Jason K. Zachary 312/609-7757
Steven R. Berger *(New York)* 212/407-7714

Participating Members of the Capital Markets Group:

Dana S. Armagno 312/609-7543
James A. Arpaia 312/609-7618
William J. Bettman 312/609-7776
David C. Blum 312/609-7811
Deborah B. Eades 312/609-7661
Karin Jagel Flynn 312/609-7805
Dean N. Gerber 312/609-7638
Douglas M. Hambleton 312/609-7684
Paul R. Hoffman 312/609-7733
John T. McEnroe 312/609-7885
Daniel C. McKay II 312/609-7762
Maureen A. Miller 312/609-7699
Robert J. Moran 312/609-7517
Lane R. Moyer 312/609-7586
Michael A. Nemeroff 312/609-7858
Timothy W. O'Donnell 312/609-7683
Cathy G. O'Kelly 312/609-7657
Daniel O'Rourke 312/609-7669
John R. Obiala 312/609-7522
Thomas E. Schnur 312/609-7715
Daniel T. Sherlock 312/609-7551
Guy E. Snyder 312/609-7656
Robert J. Stucker 312/609-7606
David A. Sturms 312/609-7589
Dalius F. Vasys 312/609-7623
Issa O. Yesufu 312/609-7591
Dan L. Goldwasser *(New York)* 212/407-7710
Ronald Scheinberg *(New York)* 212/407-7730
Donald A. Wassall *(New York)* 212/407-7707