



MAY/JUNE 2007

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Armstrong Teasdale was selected as one of the No. 1-ranked corporate law firms in St. Louis, Missouri by directors of U.S. publicly traded corporations. *Corporate Board Member* magazine surveyed more than 800 directors to determine the top 20 corporate law firms in America as well as the top five firms in 25 major cities for its 7th Annual Legal Research Study. The complete metropolitan and national rankings are featured in the July/August issue of *Corporate Board Member* magazine, and are accessible online at www.boardmember.com.

ARMSTRONG TEASDALE RECOGNIZED IN PRESTIGIOUS 2007 CHAMBERS USA GUIDE



Armstrong Teasdale is pleased to announce that the firm is recognized in five practice areas and ten of the firm's lawyers are profiled in the 2007 edition of *Chambers USA: America's Leading Lawyers for Business* guide. *Chambers USA* notes that Armstrong Teasdale "instills clients with great confidence and attracts a loyal following." Additionally, lawyers are acclaimed for "providing exemplary representation and reaching great results."

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The guide, currently in its fourth edition, represents all major practice areas at the national level in addition to specialties within each state. A wide range of clients and lawyers were examined across the country in order to obtain a consistent market view. The rankings assess key qualities in the legal field, which include technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence and commitment as well as other valuable client services.

Armstrong Teasdale and its lawyers were highly recognized in the areas of: Corporate/M&A; Labor and Employment; Real Estate; Environment; Litigation; and Litigation: White-Collar Crime and Governmental Compliance. Additionally, one lawyer is recognized at the national level for his work in franchising. The 2007 edition of *Chambers USA* is available online at www.chambersandpartners.com/usa.

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SECURITIES

SEC Proposes Rules to Modernize and Improve Capital-Raising and Disclosure Requirements for Smaller Companies

Jill R. Newbold

On May 23, 2007, the Securities and Exchange Commission (SEC), in an effort to assist small businesses in obtaining affordable access to new capital, proposed several rule changes to modernize and improve the regulations that apply to capital-raising and public reporting by smaller companies. The proposed rules, summarized below, are primarily aimed at removing or easing growth obstacles that smaller companies face when raising capital and complying with the SEC's reporting requirements.

The proposals would, among other things:

- Create a new regulatory system that increases the number of smaller companies eligible for short-form disclosure and reporting requirements:
- Revise the Form S-3 and Form F-3 eligibility requirements for primary securities offerings:
- Expand and update registration exemptions under Regulation D, including a new offering exemption for sales with limited advertising to specified wealthy individuals and institutions.
- Amend Rules 144 and 145 of the Securities Act of 1933 to shorten the existing holding periods for resales of restricted securities.
- Exempt compensatory employee stock options from the registration requirements under Section 12(g) of the Securities Exchange Act of 1934.

Disclosure and Reporting Standards

The SEC's proposals would combine the current "small business issuer" and "non-accelerated filer" categories of small companies into a new "smaller reporting company" category for most purposes. This would increase the number of companies eligible for the reduced disclosure and reporting requirements for smaller companies under existing rules, therefore reducing the cost of compliance for these companies. Eligibility for scaled reporting and disclosure would be based on public float of less than \$75 million (rather than existing standards of public float and revenue of less than \$25 million). Further, the proposed rules would integrate the new disclosure requirements into Regulation S-K, and therefore eliminate Regulation S-B and the related "SB" forms.

Access to Forms S-3 and F-3

Currently, only companies with more than \$75 million in public float can use the Form S-3 and Form F-3 "short form" registration statements. The proposals, however, would allow companies with less than \$75 million in public float to register a primary offering of securities on these forms, as applicable, if they: (i) have filed their Exchange Act reports on a timely basis for one year and satisfy other form eligibility conditions; (ii) are not shell companies and have not been shell companies for at least one year; and (iii) do not sell more than the equivalent of 20% of their public float in primary offerings registered on these forms over any one-year period.

Expansion of Private Offering Exemptions

The SEC proposals would create a new exemption from registration under Regulation D, available to all companies, for unregistered sales of securities to a new category of purchasers—"Rule 507 qualified purchasers"—and allow companies to advertise on a limited basis to such purchasers as part of the offering process. The following persons or institutions would be deemed "Rule 507 qualified purchasers" under the proposals: (i) individuals who own at least \$2.5 million in investments or have annual income of at least \$400,000 individually, or \$600,000 with their spouses; (ii) institutional investors that qualify as "accredited investors" under the existing definition, without having to meet the monetary thresholds; and (iii) directors, executive officers and general partners of the issuer.

The definition of "accredited investor" also would be amended by adding an "investments-owned" standard, making individuals who own at least \$750,000 of investments and entities that own at least \$5 million of investments accredited investors. This standard would be in addition to the total assets, net worth, and income levels standards under the existing definition. In addition, several new types of entities would be added to the list of accredited investors.

Finally, the minimum safe harbor period for integration of Regulation D offerings would be reduced from six months to 90 days. The proposals also contemplate electronic filing of the Form D and public access to information in Form D filings.

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Revisions to Rules 144 and 145

Rules 144 and 145 provide safe harbors for the resale of securities received in a private offering under certain circumstances. The SEC's proposed amendments to these rules would increase liquidity for holders of restricted securities by modifying the conditions for public resale of restricted securities.

Under amended Rule 144, as proposed, non-affiliates holding restricted securities of non-reporting companies would be able to resell their securities after a one-year holding period, rather than the current two-year period, and may do so without any additional conditions imposed under Rule 144. Non-affiliates holding restricted securities of reporting companies could resell the securities after a six-month holding period if current company information is publicly available, also without any additional conditions imposed under Rule 144.

Rule 145, which establishes the safe harbor for resales of securities received in business combination transactions, would provide that securities received by parties to specified business transactions and their affiliates would be transferable without restriction under Rule 145. However, other resale restrictions may apply.

Compensatory Employee Stock Options Exemption

Currently, Section 12(g) of the Exchange Act requires companies with 500 or more holders of record of a class of equity security and assets in excess of \$10 million at the end of its most recently completed fiscal year to register that class of security under the Exchange Act, unless an exemption is available. Under the securities laws, stock options are considered a separate class of equity security from the underlying security, and no

exemption from Exchange Act registration for stock options is currently available.

The proposed rules contain two exemptions that would apply to compensatory employee stock options. The first would be available to non-reporting companies under the following conditions:

- A written plan in place that limits eligible option holders to employees, directors, consultants and advisors.
- The transfer of the shares received upon exercise of the options and other shares of that class of equity security is restricted.
- Financial and risk information provided to option holders and holders of the underlying shares similar to that required by Rule 701 if the securities sold in reliance on the Rule 701 exemption exceed \$5 million in a one-year period.

The second exemption would be available to compensatory employee stock options issued by reporting companies. Among other exemption conditions, Exchange Act Sections 14 (proxy statement requirements) and 16 (beneficial ownership reporting, short-swing profits and prohibitions) would apply to the options and the class of securities underlying the options.

Additional Information

For more information, the SEC's press release announcing the proposed rules is accessible at <http://www.sec.gov/news/press/2007/2007-102.htm>. When available, the full text of the proposals will be posted to the SEC's website at www.sec.gov.

TAX, EMPLOYEE BENEFITS, AND TRUSTS & ESTATES

Reporting of Gross Proceeds Payments to Attorneys

Scott E. Hunt

The Internal Revenue Service recently issued final regulations regarding information reporting for payments of gross proceeds to attorneys described in Code Section 6045(f). These regulations are effective for payments made on or after January 1, 2007.

General Rule

Every payor engaged in a trade or business who makes payments aggregating \$600 or more during a calendar year to an attorney in connection with legal services (whether or not the services are performed for the payor) must file a Form 1099MISC reporting such payments to the attorney recipient.

Payor is defined to include an insurance company if the insurer pays the settlement amount to an attorney. The regulations do not provide an exception for attorneys' fees paid to a corporation.

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A payor that is required to file Form 1099MISC must solicit a Taxpayer Identification Number from the attorney payee by use of Form W-9.

Special Situations

- If more than one attorney is listed as a payee and the check is delivered to one payee attorney, the Form 1099MISC must be filed with respect to the payee attorney who actually received the check.
- If more than one attorney is listed as a payee and the check is delivered to a nonpayee or a payee who is not an attorney, Form 1099MISC must be filed with respect to firstlisted payee attorney.

Examples

One check – joint payees – taxable to claimant. Attorney A represents Employee C, who sues Employer P for back wages. P settles the suit for \$300,000 that represents taxable wages under existing law and writes a settlement check payable jointly to C and A in the amount of \$200,000, net of income and FICA tax withholding. P delivers the check to Attorney A who retains \$100,000 of the payment and disburses the remaining \$100,000 to C. P must file a Form 1099MISC with respect to A for \$200,000. P must also furnish a Form W2 to C under Code Section 6051 in the amount of \$300,000.

One check – joint payees – excludable to claimant. Attorney A represents C, who sues corporation P for damages on account of personal physical injuries. P settles the suit for a \$300,000 damage payment that is excludable from C's gross income under Code Section 104(a)(2). P writes the \$300,000 settlement check payable jointly to C and A and delivers the check to A. A retains \$120,000 of the payment as A's attorney's fees and remits the remaining \$180,000 to C. P must file a Form 1099MISC with respect to A for \$300,000.

Separate checks – taxable to claimant. Attorney A represents C, a plaintiff in a suit for lost profits against Corporation P. P settles the suit for \$300,000. A requests P to write two checks, one payable to A in the amount of \$100,000 for A's attorney's fees and the other payable to C in the amount of \$200,000. P writes the checks in accordance with A's instructions and delivers both checks to A. P must file a Form 1099MISC with respect to A for \$100,000. P must also file a Form 1099-MISC with respect to C for \$300,000.

Check made payable to claimant, but delivered to nonpayee attorney. Corporation P, a defendant in a suit for damages knows that C, the plaintiff, has been represented by Attorney A throughout the proceeding. P settles the suit for \$500,000. Pursuant to a request by A, P writes the \$500,000 settlement check payable solely to C and delivers it to A at A's office. P is not required to file an information return with respect to A, because there is no payment to an attorney.

Multiple attorneys listed as payees. Corporation P, a defendant, settles a lost profits suit brought by C, for \$1,000,000 by paying a check naming C's attorneys, Y, A, and Z, as payees in that order. Y, A, and Z are not related parties. P delivers the payment to A's office. A deposits the check proceeds into a trust account and makes payment by separate checks to Y of \$100,000 and to Z of \$50,000, for their attorneys' fees. A also makes a payment by check of \$550,000 to C. A must file an information return for this payment to C. P must file a Form 1099MISC for \$1,000,000 with respect to A under the proposed regulations.

A, in turn, must also file information returns with respect to Y of \$100,000 and to Z of \$50,000 under Code Section 6045, as A is not required to file information returns under Code Section 6041 with respect to A's payments to Y and to Z. Generally, Code Section 6041 requires the filing of an information return by a person who makes a payment on behalf of a third person only if the first person exercises management or oversight in connection with or has a significant economic interest in the payment. In this instance, A's role is making payment to Y and Z are merely ministerial and do not give rise to a filing obligation under Code Section 6041, so the Code Section 6045 filing obligation applies to A.

Attorney does not furnish Taxpayer Identification Number (TIN). Corporation P, a defendant, settles a suit brought by C for \$100,000. P will pay damages by a joint check to C and his attorney. A, the attorney for C, does not furnish P with A's TIN. P must withhold income tax from the payment to be made to C and A. Accordingly, P makes a payment of \$72,000 naming C and A on a single check. P must file Form 1099MISC reporting the entire \$100,000 payment as taxable to A. P must also file an information return with respect to C in the amount of \$100,000.

One of the common provisions that often gets negotiated in a venture capital funding transaction is anti-dilution protection for the prospective venture capital investor. The purpose of an anti-dilution provision is to ensure that subsequent investors do not invest at a lower price per share amount and dilute or lower the value of the initial investor's investment.

When the company and investor agree on a per share price, the investor has essentially agreed to invest a certain amount of money to own a certain percentage of the company. From an anti-dilution perspective, the investor will not be concerned if the company later sells shares for a per share price higher than the original investor paid, because such an investment will result in a company with a higher value after the later investment. However, if a subsequent investor pays a lower per share price (which is called a "down round"), that subsequent investor essentially obtains a larger portion of the company relative to the initial investor on a per dollar basis.

The initial investor will want the protection afforded by anti-dilution provisions to make sure that in case of a down round, the harm it suffers due to dilution is as minimal as possible. Anti-dilution provisions adjust the conversion price of the preferred stock so that the investor will obtain a greater number of shares of common stock upon conversion of the preferred stock it holds.

As previously stated, anti-dilution provisions determine how the conversion price is adjusted. The two varieties of anti-dilution provisions are either a "weighted average" or "full ratchet" calculation. A weighted average calculation attempts to

measure the amount of dilution and adjust the conversion price only to the extent of the effect of the dilutive share issuance. Under this type of provision, an issuance of a small number of shares, even if at a very low price, will only have a small effect on the conversion price. In sharp contrast, a full-ratchet provision will adjust the conversion price of preferred shares to equal the price at which the dilutive shares were issued even if only one share was issued.

The following hypothetical set of facts illustrates why an investor wants these protections. Assume the initial value of the company is \$500,000 and the initial investor is willing to invest \$100,000 for 10,000 shares of Series A Preferred Stock at a price of \$10.00 per share. Each share of Series A Preferred Stock is convertible into one share of common stock. Further, assume that the company has 40,000 other shares of stock outstanding. Therefore, the initial investor has a 20% ownership stake in the company after its \$100,000 investment.

If the company is doing well, a subsequent investor might value the company at \$1,000,000 before the investment, or \$20.00 per share. If the new investor invests \$100,000, it is entitled to 5,000 shares. Because the share price is higher, the initial investor has seen the value increase and no dilution occurs. Anti-dilution protections would be triggered, however if the valuation of the company decreases from one investment round to the next (the "down round" referred to above). If the new investor determines the company is only worth \$250,000 and wants to invest \$100,000, then it would be entitled to 20,000 shares (i.e., if the

company is worth \$250,000 and has 50,000 shares outstanding prior to the investment, each share is worth \$5.00). The question, then, is what impact will this issuance have on the conversion price?

The basic formula to determine the number of shares of common stock received upon a conversion of preferred stock is:

(Original Share Price/Conversion Price) * Number of Shares of Preferred Stock to be Converted.

Immediately after the initial investment, the conversion price will equal the original share price (\$10.00 under the above hypothetical) and the investor will receive one share of common stock for each share of preferred stock it holds. However, if the conversion price is reduced, the number of shares of common stock to be received upon a conversion will increase.

If the initial investor had a full-ratchet anti-dilution protection using the facts stated above, the initial investor's conversion price would decrease to the price paid by the subsequent investor (i.e., \$5.00 per share) and the number of shares of common stock the initial investor would receive upon conversion will double.

A weighted average calculation, however, would not have such a dramatic effect. Under a weighted average regime, the following formula is used to determine the new conversion price:

$CP_2 = CP_1 * (A+B) / (A+C)$, where:

CP_2 = New Series A Conversion Price

CP_1 = Series A Conversion Price in effect immediately prior to new issue

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A = Number of shares of Common Stock deemed to be outstanding immediately prior to new issue (includes all shares of outstanding common stock, all shares of outstanding preferred stock on an as-converted basis; and does not include any convertible securities converting into this round of financing)

B = Aggregate consideration received by the Corporation with respect to the new issue divided by CP_1

C = Number of shares of stock issued in the subject transaction

Using our fact pattern, $CP_1 = \$10.00$, $A = 500,000$, $B = 10,000$; and

$C = 20,000$. Therefore, $CP_2 = \$10.00 * (500,000 + 10,000) / (500,000 + 20,000) = \9.81 . Therefore, the weighted average anti-dilution formula would result in the initial investor being entitled to an additional 194 shares ($\$10.00 / \$9.81 * 10,000 = 10.194$) upon a conversion rather than an additional 10,000 shares ($\$10.00 / \$5.00 * 10,000 = 20,000$) if the full ratchet mechanism was in place.

Why does the number of shares an investor receive upon conversion of preferred stock into common stock matter? Upon a liquidity event (e.g., a sale of the company) in which the holders of preferred stock convert

such shares into common stock, the more shares to which they are entitled means that the other holders of common stock (e.g., the founders, employees who have options and angel investors who received common stock) will end up with less of the sale proceeds.

While which type of provision a company ends up with depends in large part on the negotiating power of the investors relative to the company, more transactions in today's environment will have weighted average anti-dilution protections due to the harsh result imposed by a full-ratchet provision.

CORPORATE GOVERNANCE

Preventing Plaintiffs From Casting a *Stone*: Director Oversight Liability Under Delaware Law

Nick H. Varsam

Given the wealth and complexity of corporate jurisprudence that has emanated from the Delaware courts over the past 25 years, the diverse fact patterns that judges are challenged to review and evolving legal standards they must apply, directors and their legal advisors occasionally benefit from decisions outside the realm of corporate takeovers and conflicts of interest. On November 6, 2006, the Delaware Supreme Court, in *Stone v. Ritter*¹, served up a reminder to directors of one of their most fundamental responsibilities: the management or direction of the business and affairs of the corporation.

Background of *Stone v. Ritter*

The case involved a derivative suit brought by stockholders of AmSouth Bancorporation (“AmSouth”) against AmSouth and its directors, after AmSouth and its banking subsidiary, AmSouth Bank, which operated about 600 commercial banking branches throughout the southeastern U.S., paid \$40 million in fines and \$10 million in civil penalties to resolve government and regulatory investigations. The investigations were conducted by the U.S. Attorney and various federal and state banking agencies and pertained principally to the failure by AmSouth Bank employees to file “Suspicious Activity Reports” as required by the Bank Secrecy Act and various anti-money-laundering regulations.²

Plaintiffs appealed the dismissal of their complaint by the Chancery Court, which decided that plaintiffs’ failure to demand that the AmSouth directors pursue their corporate claim was not excused under Delaware’s demand futility standard.³ Specifically, the lower court found that the plaintiffs failed to establish that the defendant directors faced a “substantial likelihood of liability” that prevented them from being disinterested and independent.⁴ The Supreme Court affirmed the lower court’s decision, finding that a reasonable reporting system actually existed and was designed to permit directors to monitor compliance with the relevant banking laws and regulations and noting plaintiffs’ own acknowledgment that there were no “red flags” to suggest that the directors either knew or should have known that violations of law were occurring.⁵

The Delaware Supreme Court’s Standard for Director Oversight Liability

The Supreme Court approved the application of the standard for oversight liability set forth in *In re Caremark Int’l Deriv. Litig.*⁶, which “draws heavily upon the concept of director failure to act in good faith,”⁷ as recently defined in *In re Walt Disney Co. Deriv. Litig.*⁸ The Court explained that the *Caremark* standard required a finding of a “sustained or systematic failure of the board to exercise oversight – such as an utter failure to

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attempt to assure a reasonable information and reporting system exists” that establishes a lack of good faith on the part of the board.⁹

In adopting the *Caremark* standard, the Supreme Court identified the following conditions for establishing director oversight liability:

- a) “the directors utterly failed to implement any reporting or information systems or controls; or
- b) having implemented such a system or controls, [the directors] consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention.”¹⁰

In either case, according to the Court, to establish liability a plaintiff must show that the directors “knew that they were not discharging their fiduciary obligations.”¹¹ Proving such conduct would, in effect, establish a breach of the directors’ duty of loyalty by failing to perform their fiduciary obligations in good faith.¹²

Critical to the Supreme Court’s decision was that oversight liability is premised on a finding that the directors failed to act in good faith. The Court took great care to recognize that the obligation to act in good faith is not an independent fiduciary duty that may directly lead to liability. Instead, the obligation to act in good faith is a “subsidiary element” of a director’s fundamental duty of loyalty to the corporation.¹³

Lessons Learned from the *Stone* Decision

In light of the overwhelming attention given to internal controls under Sarbanes-Oxley, one might wonder under what circumstances the *Caremark* standard for director oversight liability may be applied successfully against a board of directors. Certainly, there is much room for the development of the standard as applied to different fact situations. For example, what might constitute the minimum level of reporting or information system controls, particularly for a privately held corporation not subject to the same stringent governance laws and regulations that apply to public companies? Can the consequences of a corporation’s failure to comply with a governing law or regulation be so devastating as to

create a presumption that such an outcome could only have resulted from a conscious failure of directors to oversee the operations of a corporation’s controls?

In light of the Supreme Court’s decision in *Stone* that oversight liability is premised on a breach of the duty of loyalty, directors should be mindful of the impact of a finding of such liability. A successful claim is neither exculpable under Section 102(b)(7)¹⁴ nor indemnifiable under Section 145¹⁵ of the General Corporation Law of Delaware.

While the standard for establishing liability for directors’ failure to oversee the business and affairs of the corporation may seem extremely difficult to meet, the implications of a successful claim are significant. The *Stone* decision should serve as a reminder to boards of directors to take the seemingly common sense steps of implementing and monitoring the proper reporting and information systems and tools to establish that the directors have acted in good faith and satisfied their duty of loyalty to the corporation.

¹ 911 A.2d 362 (Del. 2006).

² *Id.* at pp. 5-9.

³ *Id.* at pp. 3-4.

⁴ *Id.* at p. 18.

⁵ *Id.* at pp. 4, 19-24.

⁶ 698 A.2d 959 (Del. Ch. 1996).

⁷ 911 A.2d at 14.

⁸ 906 A.2d 27 (Del. 2006).

⁹ 911 A.2d at 13-14 (quoting *Caremark*).

¹⁰ *Id.* at 17.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 16.

¹⁴ Section 102(b)(7) exculpates directors from money damages for breach of the duty of due care but not for conduct that is not in good faith or a breach of the duty of loyalty, among other exceptions.

¹⁵ Section 145 provides for indemnification of directors, officers, employees and agents of a corporation but only if the person “acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.”

IN-HOUSE MONTHLY CLE PROGRAMS

Upcoming Presentations and Programs

Armstrong Teasdale CLE programs are held on the fourth Thursday of each month at 11:45 a.m. in the training room on the 8th floor.

July 26, 2007

Jay Summerville, "New Conflicts Rules"

August 23, 2007

Frank Pellegrini, "OSHA Overview"

Recent Presentations and Programs

May 24, 2007

Amelia Frankel, "Contracts: Building Blocks in Detail and Miscellaneous Provisions"

June 28, 2007

Jarrold Sharp and Mary Machon, "Contracts: Reviewing Contracts and Drafting Amendments, Waivers & Consents"

To view the PowerPoint slides from past CLE presentations, go to the training and development section on the Intranet.

If you have any questions regarding this material, please do not hesitate to call your regular Armstrong Teasdale contact or any of the Practice Area Leaders noted on the first page.

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