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Advisory

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SECURITIES LAW

Michael R. McAlevey, Deputy Director of the Division of Corporation Finance of the Securities and Exchange Commission Speaks on "Recent Developments at the Division of Corporation Finance of the SEC"

On October 26, 2001, Michael R. McAlevey, Deputy Director of the Division of Corporation Finance of the SEC, spoke on recent developments at the SEC at the 19th Annual New England Business & Securities Law Conference. Although the views he expressed were his own and not those of the SEC or its staff, his comments provide insight into current thinking at the SEC.

Mr. McAlevey first discussed the SEC's response to the terrorist attacks of September 11, 2001 and the following three specific steps the SEC has taken to give relief to the capital markets:

- preventing the free fall of stock prices through a number of measures, including temporarily relaxing restrictions on stock buy-backs by companies under Rule 10b-18, providing relief relating to the effect of issuer repurchases on the availability of pooling-of-interests accounting treatment and easing the rules on short swing liability by insiders;
- allowing investors to ignore the week of September 11, 2001 in calculating the volume limitations of Rule 144; and
- permitting officers and directors to terminate 10b5-1 plans without the termination of the plans, by itself, indicating the plans were not entered into in good faith.

Mr. McAlevey also discussed industry-specific relief the SEC provided the airline and insurance industries. For those industries *only*:

- the SEC has revised its interpretation of Rule 462 such that the number of shares or principal amount registered on a shelf registration statement may be increased by 20% of the original filing, rather than 20% of what was remaining on the shelf prior to the last takedown;
- companies may use Form S-3 despite the fact that they are delinquent in their '34 Act filings provided that such companies bring themselves current by the time of the filing of the Form S-3;
- the SEC will look at any time period between July 1, 2001 and December 31, 2001 to determine whether a company satisfies the public float test for registering shares in a primary offering on Form S-3, as opposed to the usual 60-day lookback from the date of filing for eligibility under that test;

- the SEC will process all capital raising registration statements in five business days; and
- Internet and telephone hotlines have been established for questions regarding these relief measures.

In addition to the industry-specific relief referenced above, Mr. McAlevey noted two significant policy changes regarding IPOs that affect *all* industries:

- the size of the price range for an IPO may now be the greater of \$2 or 20% of the lower price, compared to the previous range of the greater of \$2 or 10% of the lower price; and
- the SEC will now continue to review registration statements past the first amendment even if a price range has not been submitted.

The events of September 11, 2001 have caused the SEC to recognize that the capital markets are vulnerable, according to Mr. McAlevey, and this has caused the SEC to reexamine how it balances the need for investor protection against the sometimes conflicting goal of capital formation. Mr. McAlevey believes that in the future the SEC may adjust its thinking in a number of ways. The SEC:

- will likely become more receptive to the use of electronic communications in filings and communications to shareholders;
- may accept the idea that access to information is tantamount to delivery of information, permitting companies to electronically post documents that currently must be delivered in hard copy or by electronic means only with the explicit consent of the investor;
- may increase the amount of information companies are required to disclose so that the market has access to the information it needs;
- would like companies to release more forward-looking information; and
- may review the current financial reporting model, which members of the staff contend is confusing and which may become subject to a plain-English treatment.

Mr. McAlevey noted that any reform of the current system must take into account the following factors:

- The market does not react well to major changes in the securities laws. Accordingly, the SEC must implement bold reform incrementally.
- The SEC realizes that not all companies are the same, and rules that apply to one company may not be appropriate for others. Reform may therefore have to be compartmentalized, with changes affecting some companies and not others.
- Similarly, because debt and equity transactions are different, reform may apply in different ways and to different degrees to debt and equity transactions.
- The investing public is gaining increased access to the Internet. As a result, the idea that electronic communications only benefit a select few is falling into disfavor at the SEC.

In response to questions from the audience, Mr. McAlevey also made the following points:

- Given the relatively low transactional deal flow, the SEC is attempting to realize its goal of reviewing 10-Ks for any given company every three years, a goal that was not achievable during the late 1990s.
- Mr. McAlevey believes the SEC does some of its best work in the accounting area and accounting comments will continue to be a focus for the SEC.
- Given the limited resources available to the SEC, self-policing by companies is appreciated by the SEC, as evidenced by its recent grant of relief to a company for financial reporting lapses where the company “came clean.” Mr. McAlevey stated, however, that this approach does not represent an “amnesty.”
- Mr. McAlevey stated that he does not anticipate that the SEC will promulgate any further rulemaking on fees charged by auditors, despite the fact that recent studies indicate that accounting firms are generating large revenues from non-audit fees.
- Mr. McAlevey has been encouraged by the business community’s response to Regulation FD. As a matter of enforcement of Regulation FD, the SEC is currently focused on “gross” violations.

We hope this information is helpful to you. If you would like further information regarding the SEC’s policies, please contact the Mintz Levin attorney who ordinarily handles your legal affairs.