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SEC Rules – The Commission Publishes List of New Regulations for Review

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

The SEC has published its annual list of rules that are scheduled to be reviewed this year and to invite comment from the public as to whether these rules should be continued without change, amended or rescinded. The SEC is required to review rules each year that have a significant impact on small entities.

The current list includes 25 rules that were adopted by the SEC in 2003. I note that many of these rules were enacted as a follow-on to the Sarbanes Oxley Act of 2002 and in response to the then current financial crisis. Persons interested in submitting comments to the SEC regarding these rules can do so through the SEC website. I have ordered the list such that rules that most impact my clients appear first.

Below is a list of rules that will be reviewed this year for potential amendment and a brief summary of the existing rule.

Conditions for Use of Non-GAAP Financial Measures – The SEC requires that when a public company discloses or releases financial information, including in a press release, that is not based on GAAP, it must also include, in that same disclosure or release, a presentation of the most comparable GAAP number and a reconciliation between GAAP and the non-GAAP number. In addition, the same rule requires that when a public company issues earnings releases or similar announcements, they must furnish the release or announcement on a Form 8-K.

Improper Influence on Conduct of Audits – The rules prohibit officers and directors or persons acting under their direction from taking any action to coerce, manipulate, mislead, or fraudulently influence the auditor.

Management’s Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports – The rules require reporting companies to include a report by management on the company’s internal control over financial reporting.

Disclosure in Management’s Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations – The SEC requires that off-balance sheet arrangements be disclosed and discussed under a separate heading in MD&A. Companies, other than smaller reporting companies, must also provide a tabular disclosure of contractual obligations.

Purchases of Certain Equity Securities by the Issuer and Others – The rule provides issuers with a safe harbor from liability for manipulation when they repurchase their common stock in the market in accordance with the rule’s manner, timing, price and volume conditions.

Implementation of Standards of Professional Conduct for Attorneys – The rule requires an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company.

Disclosure Required by Sections 406 and 407 of the Sarbanes Oxley Act of 2002 – The rule requires issuers to disclose whether a financial expert is on the audit committee and to adopt and implement a code of ethics that applies to its principal executive officers.

Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Board of Directors - The rule requires disclosure regarding board of director nominating committees and the means by which shareholders may communicate with directors.

Processing Requirements for Cancelled Security Certificates – The rule requires every transfer agent to establish and implement written procedures for the cancellation, storage, transportation, destruction or other dispositions of securities certificates.

Insider Trading During Pension Fund Blackout Periods – The rule prevents any director or executive officer from acquiring or transferring any equity security of the issuer during a pension plan blackout period if such director or executive officer acquired the securities as a result of their employment. The rule also requires the issuer to provide notice to its directors and executive officers about the imposition of such blackout periods.

Regulation Analyst Certification – Brokers, dealers and persons associated with broker-dealers must include, in research reports, certifications by the research analyst that the views are not the firms' views, and disclose whether the analyst received compensation or other payments in connection with their views or recommendations.

Standards Relating to Listed Company Audit Committees – Companies that are not in compliance with Sarbanes Oxley audit committee requirements are prohibited from being listed on a national exchange.

Retention of Records Relevant to Audits and Reviews – The rule requires audit firms to retain records for seven years.

Record Keeping Requirements for Registered Transfer Agents – The rule allows transfer agents to use electronic microfilm and other electronic mediums to maintain records instead of hard copies.

Certain Research and Development Companies – The rules provides a safe harbor from the definition of an investment company for certain bona fide research and development companies.

Proxy Voting by Investment Advisers – The rule requires that investment advisers that have voting control to ensure that the adviser votes proxies in the best interest of the clients, to disclose to clients the voting procedures and provide clients with voting information.

Customer Identification Programs for Mutual Funds – Mutual funds must implement procedures to verify the identity of any person opening an account and to determine if the person appears on any lists of known or suspected terrorists.

Transactions of Investment Companies with Portfolio and Subadvisor Affiliates – The rule allows investment companies (“funds”) to engage in transactions with its portfolio companies and with subadvisors of affiliated funds.

Custody of Funds or Securities of Clients by Investment Advisers – The rule requires advisers that have custody of client funds or securities to maintain those assets with broker-dealers, banks or other qualified custodians.

Amendments to Investment Company Advertising Rules – The rule requires enhanced disclosure to ensure balanced information with respect to past performance.

Certification of Management Investment Company Shareholder Reports and Designation of Certified Shareholder Reports as Exchange Act Periodic Reporting Forms; Application of Sarbanes Oxley Act Rule 406 and 407 to Investment Companies – Registered investment companies are required to file certified shareholder reports with the SEC. Investment companies must also adopt and implement a code of ethics that applies to its principal executive officers.

Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies – Registered management investment companies must provide disclosure about how they vote proxies in portfolio securities and file with the SEC and provide shareholders with specific votes that they cast.

Custody of Investment Company Assets with a Securities Depository – Expands the types of investment companies that may maintain assets with a depository.

Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Section 3(a)(4) and 3(a)(5) of the Exchange Act – The rule exempts banks and savings and loans from the broker dealer registration requirements for de minimis riskless principal transactions, asset-backed transactions and certain securities lending transactions.

Compliance Programs of Investment Companies and Investment Advisers – Investment companies and investment advisers must adopt and implement written compliance policies and procedures.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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