MILLER CANFIELD
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Corporate & Securities Law Update

Essential legal alerts for the business community **Summer 2004**

Revised Form 8-K: New disclosure items and shorter filing deadlines

On March 11, 2004, the Securities and Exchange Commission (SEC) adopted final rules amending Form 8-K. Though originally proposed prior to the passage of the Sarbanes-Oxley Act of 2002 (SOX), the new rules respond to the SOX Section 409 requirement for "real time" disclosure by public companies. Revised Form 8-K becomes effective August 24, 2004, and will pose a significant test to any publicly traded company's reporting controls and procedures.

In conjunction with the adoption of Revised Form 8-K, the SEC announced that it and the Department of Justice had jointly concluded the CEO and CFO certification provisions of SOX Section 906 are not applicable to current reports on Form 8-K. This conclusion clears up a substantial point of confusion regarding the application of Section 906's certification requirements.

The amendments (i) add eight new reporting items to Form 8-K, (ii) transfer two items currently on periodic reports, (iii) expand requisite disclosures under two current Form 8-K items, and (iv) reorganize the form based on topical categories. Additionally, the amendments significantly shorten the filing deadline for virtually all items and provide a limited safe harbor for liability for failure to file Form 8-K in the new shortened time frame.

New Disclosure Items. The following items must now be reported on Form 8-K:

- entry into a definitive material agreement;
- termination of a definitive material agreement;
- creation of a direct financial or contingent obligation or an obligation under an off-balance sheet arrangement;
- acceleration or increase of a direct financial or contingent obligation or an obligation under an off-balance sheet arrangement;
- incurrence of material charges as a result of exit or disposal activities;
- material charges as a result of impairment of assets;
- failure to comply with listing standards, delisting or transfer of listing; and
- non-reliance on previously issued financial statements, audit reports or interim financial statement reviews.

Transferred Disclosures. In addition to the above listed new disclosure items, the following items, currently required in periodic filings, must be reported on Form 8-K:

- unregistered sales of equity securities; and
- material modifications of the rights of security holders.

Expanded Disclosures. The scope of the disclosure required for the items listed below has been expanded:

- departures of directors and departures or appointments of principal officers; election of directors; and
- amendment of articles or bylaws and change in fiscal year.

Shortened Filing Deadlines. Subject to certain limited exceptions, Form 8-K must now be filed within four business days rather than the current five business days to 15 calendar days.

New Safe Harbor. In recognition of the requirement that management rapidly assess the materiality of events in making certain disclosures under revised Form 8-K, the SEC adopted a new limited safe harbor from public and private claims under Exchange Act Section 10(b) and Rule 10(b)-5 based upon the failure to file within the prescribed time frame for certain disclosure items. Additionally, Form S-2 and S-3 and Rule 144 eligibility requirements have been revised to allow their use despite a non-timely Form 8-K for items covered by the new safe harbor provided that, in the case of Form S-2 or S-3 the company has filed the requisite disclosures prior to its filing of Form S-2 or S-3 and, in the case of Rule 144, that the shareholder will still have to represent that he or she does not possess material inside information when filing Form 144.

The full text of the new rules can be found in SEC Release No. 33-8400 available at http://www.sec.gov/rules/final/33-8400.htm.

Jeffrey L. LaBine

For more information about the Corporate & Securities practice at Miller Canfield or to receive future issues of this Update in electronic form, contact:

Richard A. Walawender
Director, Business and Finance Group
Detroit Office
(313) 496-7628
walawender@millercanfield.com

David N. Parsigian
Ann Arbor Office
(734) 668-7117
parsigian@millercanfield.com

Thomas G. Appleman
Troy Office
(248) 267-3241
appleman@millercanfield.com

Eric V. Brown, Jr.
Kalamazoo/Grand Rapids Office
(269) 383-5813
evbrown@millercanfield.com

Inside this issue:

Going Private: The "We Need to Do Something" Syndrome

Over the last year significant interest has arisen in "going private transactions." The watershed event for this increased interest in going private transactions was the Sarbanes-Oxley Act of 2002 ("SOX") and the new burdens facing public companies in connection with their compliance with SOX.

What is a going private transaction?

A company "goes private" when it reduces the number of its shareholders to fewer than 300 and is no longer required to file reports with the SEC. Typically, this is a transaction in which a controlling shareholder, an executive management group, or other person seeks to take a company private by acquiring all of the company's outstanding public shares.

Reasons for engaging in a going private transaction.

Situations arise where the advantages of public ownership are no longer practical, and are outweighed by the disadvantages of public ownership. Public companies, particularly those with a small market capitalization, may, even after years of public ownership, face situations where they are no longer able to realize the advantages of being a public company. Reasons for engaging in a going private transaction may include:

- Volume of trading in the company's stock is very thin;
- Lack of institutional shareholders;
- Significant monetary costs of being public (including SOX and listing exchange compliance);
- Increased burden, risk and exposure for independent directors (in particular those serving on the audit and compensation committees);
- The increased cost of independent audits;
- Proactive means to reduce the threat of a hostile takeover;
- Block a competitor's access to confidential information;
- The increased expenses associated with preparing for and implementing internal controls requirements of SOX; and
- Reduce exposure to SOX and other shareholder related litigation.

How do you take a company private?

Going private transactions take a variety of forms and there is no "one size fits all." Among the more common are the following:

- A ***cash-out merger*** in which the minority shareholders of the target company receive cash and the acquiror ends up owning, directly or indirectly, all of the stock of the target company.
- A ***tender offer*** by the acquiror, which may be followed by a short form merger.
- A ***charter amendment*** that effects a reverse stock split that leaves the minority shareholders of the target company with only fractional shares that are then cashed out.

Conflicts of Interest

Paramount in the nature of going private transactions is the concern that minority shareholders are treated fairly. Rule 13e-3 of the Securities Exchange Act of 1934 ("Rule 13e-3") was promulgated to ensure such fairness by prohibiting fraudulent, deceptive or manipulative acts or practices by an issuer in a going private transaction.

The conflict of interest between management on the one hand, and shareholders and creditors of the company on the other hand, requires that careful consideration be given to the threat of litigation. Shareholder lawsuits, alleging a breach of fiduciary

New Tax Credit for Small Businesses

Public Act 126 of 2004 amends the Single Business Tax (SBT) to provide a "qualified startup business" a credit against the SBT equal to its tax liability if the business does not have business income for two consecutive years; however, the credit would only be claimed starting in the second year. The credit would be available for tax years beginning after December 31, 2004, and may not be claimed for more than five tax years. The reality is that the credit may only be claimed for a maximum of four years because the SBT is being phased out and is scheduled for elimination at the end of 2009. The credit could only be claimed in 2006 and each tax year thereafter.

duty and/or a duty of disclosure, are common following the announcement of a going private transaction. However, with a properly constituted and functioning special committee of independent directors who will not be part of the company after the consummation of the going private transaction, it is possible to shift the burden of proof to the plaintiff. The special committee's primary responsibility should be to negotiate the best deal for the shareholders of the company that are not affiliated with the group initiating the going private transaction ("unaffiliated shareholders"). It may also be appropriate, in certain circumstances, to solicit the interest of other bidders prior to any going private transaction and for the special committee to retain its own financial and legal advisors and obtain a fairness opinion. There should be a clear, written record of the actions taken by the special committee in this regard.

Disclosure Requirements

Going private transactions are subject to the disclosure rules of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The disclosure requirements of Rule 13e-3 under the Exchange Act apply when management, directors or other affiliates of the public company will retain an interest in the resulting private company. Rule 13e-3 and the related Schedule 13E-3 require disclosure of information, in addition to the background and structure of the transaction required to be disclosed by the proxy and tender offer rules, including information about the fairness of the transaction to unaffiliated shareholders. Copies of all valuation materials and reports used to demonstrate the fairness of the transaction must be filed with the SEC. The purposes, alternatives, reasons and effects of the transaction on the company and the unaffiliated shareholders must also be included in the filing.

Additionally, a company needs to be aware of other reporting and disclosure requirements with the SEC, such as amendments required to a going private transaction participant's Schedule 13D. Schedule 13D is designed to give management of the issuer information concerning potential tender offerors. Under Section 13(d) of the Exchange Act, an amendment to Schedule 13D must be filed promptly upon the occurrence of any material change in the disclosed information. A member of the executive group engaging in a going private transaction may trigger this requirement to amend Schedule 13D (particularly item 4) early in the transaction process and should consult with counsel on a regular basis to ensure compliance with these requirements.

Finally, a company should be mindful of the rules and regulations relating to going private transactions so that a large stock buyback is properly calibrated to ensure that such buyback does not unintentionally trip the provisions of Rule 13e-3.

Conclusion

Experienced and knowledgeable advisors are an essential part of the going private process necessary for public companies to reap the benefits of the transaction without becoming the subject of litigation.

Phillip D. Torrence

Update on Steel: Response from the Bush Administration

The Bush Administration recently outlined actions taken in response to the surging steel prices in a memo addressed to the Motor Equipment Manufacturers Association (MEMA).

The memo states that the U.S. voiced its concerns on these restrictions with Chinese officials on three separate occasions: U.S. Trade Representative Bob Zoellick raised it at the U.S.-China Joint Commission on Commerce and Trade meeting in Washington, D.C. in April; Ambassador Josette Shiner, Deputy USTR, discussed the issue with the Chinese government in China in May; and USTR Zoellick raised it again at the Asia-Pacific Economic Cooperation meetings in Chile in June.

At this time, the Bush Administration is conducting a fact-finding report on future consumption of steel—the contract bid was published two weeks ago and the report is being coordinated by the Department of Commerce.

MILLER CANFIELD
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

MICHIGAN • FLORIDA • NEW YORK • WASHINGTON, D.C. • CANADA • POLAND

150 West Jefferson Avenue
Suite 2500
Detroit, Michigan 48226

www.millercanfield.com

RETURN SERVICE REQUESTED

Corporate & Securities Law
Principal Attorneys

Timothy L. Andersson
(313) 496-7528
andersson@millercanfield.com

Thomas G. Appleman
(248) 267-3241
appleman@millercanfield.com

Brad B. Arbuckle
(248) 267-3283
arbuckle@millercanfield.com

Bruce D. Birgbauer
(313) 496-7577
birgbauer@millercanfield.com

Eric V. Brown, Jr.
(269) 383-5813
evbrown@millercanfield.com

John R. Cook
(269) 383-5832
cookj@millercanfield.com

Terrence M. Crawford
(313) 496-7566
crawford@millercanfield.com

Joseph D. Gustavus
(313) 496-7659
gustavus@millercanfield.com

Sally A. Hamby
(248) 267-3229
hamby@millercanfield.com

David D. Joswick
(248) 267-3252
joswick@millercanfield.com

Rocque E. Lipford
(734) 243-2000
lipford@millercanfield.com

David N. Parsigian
(734) 668-7117
parsigian@millercanfield.com

Lisa D. Pick
(248) 267-3232
pick@millercanfield.com

J. David Reck
(517) 546-7600
reck@millercanfield.com

Ronald H. Riback
(248) 267-3233
riback@millercanfield.com

Erik H. Serr
(734) 668-7615
serr@millercanfield.com

Kent E. Shafer
(313) 496-7570
shafer@millercanfield.com

Jeffrey M. Slopen
(519) 561-7400
slopen@millercanfield.com

Steven M. Stankewicz
(269) 383-5872
stankewicz@millercanfield.com

Richard A. Walawender
(313) 496-7628
walawender@millercanfield.com