Snell & Wilmer L.L.P.

THE CORPORATE communicator

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contents

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SEC Odds & Ends

In this month's issue of Snell & Wilmer's Corporate Communicator, we highlight a handful of SEC actions, some fairly significant, that occurred in the last few weeks of 2006 and first few weeks of 2007 that should be of interest to a variety of readers. These actions relate to:

- The further extension of the SOX 404 deadline for non-accelerated filers;
- A change to the newly issued executive compensation rules regarding how to value equity grants for compensation purposes;
- Guidance issued by the SEC staff on handling restatements of financial statements necessitated by option backdating; and
- Newly issued final rules and companion proposed rules relating to the Internet availability of proxy materials.

We also include in this issue a tombstone page that highlights selected deals that Snell & Wilmer's Business & Finance Group closed during a successful 2006.

New 404 Extension for Non-Accelerated Filers

In December 2006, the SEC approved a fourth extension of the Sarbanes-Oxley Section 404 compliance deadline for non-accelerated filers. Under the adopting release:

- non-accelerated filers (e.g., companies with less than $75 in non-affiliated public float) must provide a management report on internal controls for fiscal years ending on or after December 15, 2007 (an extension of five months from the prior deadline), but, significantly need not provide an auditor attestation until they file their annual reports for fiscal years ending on or after December 15, 2008; and

Experience, Not Just Talk

SELECT 2006 TRANSACTIONS

In 2006, Snell & Wilmer's Business and Finance Group closed transactions valued at more than $2.5 billion.

Credit Agreements and Debt Offerings

- **$250 million** — *Note Offering*
- **$5 million** — *Note & Warrant Purchase*
- **$850 million** — *Unsecured Credit Facility*
- **$40 million** — *Credit Facility*
- **$150 million** — *Note Offering*

Securitizations

- **approx. $249 million** — *2006A Securitization*
- **approx. $304 million** — *2006B Securitization*

Naming Rights Agreements

- **Apollo Group, Inc.** — *Naming Rights to University of Phoenix Stadium (f/k/a Cardinals Stadium)*
- *Naming Rights to Jobing.com Arena (f/k/a Glendale Arena)*

Issuer Repurchases and Recapitalizations

- **$70 million** — *Share Repurchase*
- *Recapitalization and debt/equity financing*

Equity Public Offerings

- **$16 million** — *Registered Direct Offering of Common Stock of Neogen Corporation*
- **$28 million** — *IPO of 2,800,000 shares at $10 per share*
- **$29 million** — *Registered Direct Offering of Common Stock of Collagenex Pharmaceuticals, Inc.*

Mergers and Acquisitions

- **Apollo Group, Inc.** — *Acquisition of Insight Schools, Inc.*
- **$40 million** — *Sale of Nutraceuticals Division*
- *Acquisition of Pacific Designs, Inc.*
- **$185 million** — *Cash Merger with Beckman Coulter, Inc.*
- *Sale of all Membership Interests in Maracay Homes Arizona I, L.L.C.*
- *Acquisition of Sleep Health & Wellness NW, LLC*
- **$34 million** — *Acquisition of Pro-Dentec*

PIPE Transactions

- **$15 million** — *Private Placement of Common Stock of Overhill Farms, Inc.*
- *Private Placement of Promissory Notes and Warrants*
- **$40 million** — *Private Placement of Common Stock, Notes and Warrants*
- **$5 million** — *Private Placement of Common Stock and Warrants of InPlay Technologies, Inc.*
- **$10 million** — *Private Placement of Common Stock and Warrants*

Venture Capital Transactions

- **$2 million** — *Private Placement of Series A Preferred Stock*
- *Private Placement of Series A Preferred Stock*
- **$3 million** — *Investment in LUCA Technologies LLC*
- **$2 million** — *Private Placement of Series A Preferred Stock*
- **$2.2 million** — *Private Placement of Series C Preferred Stock*
- **New Mexico Land Company, LLC** — **$10 million** — *Private Placement of Class A Units*
- **$8 million** — *Investment In Clear Technology's Series C Preferred Stock Financing*
- **$8 million** — *Private Placement of Series B Preferred Stock*
- *Private Placement of Series A Redeemable Preferred Stock and Common Stock*
- *Private Placement of Series A Convertible Preferred Stock*
- **$2 million** — *Private Placement of Series B Preferred Stock*
- **Xthetix, Inc.** — *Private Placement of Series A Convertible Preferred Stock*

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- newly public companies do not need to comply with the Section 404 management report or auditor attestation requirements until the second annual report that they file after becoming public.

Set forth below is a chart reflecting these new compliance dates:

	Accelerated Filer Status	Revised Compliance Dates and Final Rules Regarding the Internal Control Over Financial Reporting Requirements	
		Management's Report	Auditor's Attestation
U.S. Issuer	Large Accelerated Filer OR Accelerated Filer ($75MM or more)	Already complying (Annual reports for fiscal years ending on or after November 15, 2004)	Already complying (Annual reports for fiscal years ending on or after November 15, 2004)
	Non-accelerated Filer (less than $75MM)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after December 15, 2008
Foreign Issuer	Large Accelerated Filer ($700MM or more)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2006
	Accelerated Filer ($75MM or more and less than $700MM)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2007
	Non-accelerated Filer (less than $75MM)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after December 15, 2008
U.S. or Foreign Issuer	Newly Public Company	Second Annual Report	Second Annual Report

In addition, in mid-December 2006, the SEC issued a proposing release containing interpretative guidance on the manner in which management can most efficiently and effectively complete its Section 404 management report on internal controls. This proposing release is available on the SEC's website at http://www.sec.gov.

New Changes to the New Executive Compensation Rules

One aspect of the new executive compensation rules that had been unfavorably received was the requirement that an executive report as compensation for a given year the full value of an equity award granted during the year, even if the award was subject to vesting over a period of years. This rule had concerned many who had feared that including the full value of grants would skew reported compensation and cause confusion among investors.

In late December 2006, unexpectedly, the SEC reversed course on this topic and adopted interim final rules amending these provisions to align the reporting of equity awards in the Summary Compensation Table and the Director Compensation Table to the amounts that are required to be disclosed in the financial statements under FAS 123R. Under FAS 123R, a company must recognize the costs of an equity award over the period in which the grantee is required to provide service in exchange for the award. Under the amendment:

- The dollar values required to be reported in the Stock Awards and Option Awards columns of the Summary Compensation Table and the Director Compensation Table now must disclose only the compensation cost of those awards, before reflecting forfeitures, over the requisite service period, as described in FAS 123R. Forfeitures are required to be described in accompanying footnotes.
- The Grants of Plan-Based Awards Table must disclose the grant date fair value of each individual equity award, computed in accordance with FAS 123R, and the Director Compensation Table required under Item 402 of Regulation S-K must disclose the same information in footnotes.
- The Grants of Plan-Based Awards Table must disclose any option or stock appreciation right that was repriced or otherwise materially modified during the last completed fiscal year, including the incremental fair value, computed as of the repricing or modification date in accordance with FAS 123R, and the Director Compensation Table required under Item 402 of Regulation S-K must disclose the same incremental fair value information in footnotes.

While this amendment became effective immediately, the SEC is nevertheless soliciting comments for a period of 30 days, so further modifications may be in the future.

Financial Statement Restatements and Option Backdating

Companies ensnared in the option backdating scandal face the possibility of restating their previously issued financial statements. For many of these companies, this can present a significant burden, as the financial statements that require restating may go back many years, thus requiring such companies to amend all previously filed Exchange Act reports that included the misstated financial statements. Large-scale amending of Exchange Act reports may also impact the ability of investors to understand a company's financial statements.

While previously filed Exchange Act reports that contain misleading financial statements generally require amendment, the SEC recently provided a degree of relief to companies facing this predicament. In January 2007, the Division of Corporation Finance issued a statement, in the form of an illustrative letter, in which it stated that it would not raise further comment regarding a company's need to amend prior Exchange Act filings to restate financial statements and related MD&A if the company amends its most recent Form 10-K and includes in the amendment certain prescribed disclosure. As stated in the SEC's letter, this disclosure must include the following:

- An explanatory note at the beginning of the Form 10-K amendment that discusses the reason for the amendment.

- Selected Financial Data for the most recent five years as required by Item 301 of Regulation S-K, restated as necessary and with columns labeled "restated".
- A Management's Discussion and Analysis as required by Item 303 of Regulation S-K, based on the restated annual and quarterly financial information, explaining the company's operating results, trends, and liquidity during each interim and annual period presented. Discussions relative to interim periods may be incorporated into the annual-period discussions or presented separately.
- Audited annual financial statements for the most recent three years, restated as necessary and with columns labeled "restated".
- If interim period information for the most recent two fiscal years as required by Item 302 of Regulation S-K is required to be restated, the information presented for the balance sheets and statements of income should be in a level of detail consistent with Regulation S-X Article 10-01 (a)(2) and (3), and appropriate portions of 10-01(b) and with columns labeled "restated". Note that cash flow information is not required by Item 302.
- Footnote disclosure reconciling previously filed annual and quarterly financial information to the restated financial information, on a line-by-line basis and for each material type of error separately, within and for the periods presented in the financial statements (audited), in selected financial data, and in the interim period information (see paragraph 26 of FASB Statement No. 154).
- The disclosure referred to in the Chief Accountant's September 19, 2006 letter that applies to the company's restatement (see http://www.sec.gov/info/accountants/staffletters/fei_aicpa091906.htm).
- Audited financial statement footnote disclosure of the nature and amount of each material type of error separately that is included in the cumulative adjustment to opening retained earnings.
- Audited financial statement footnote disclosure of the restated stock compensation cost in the following manner:
  - For the most recent three years: restated net income and compensation cost and pro forma disclosures, required by paragraph 45.c. of FASB Statement No. 123, Accounting for Stock-Based Compensation, as clarified and amended by FASB Statement No. 148, for each annual period presented in the financial statements for which the intrinsic value method of accounting in APB Opinion 25 was used, with columns labeled "restated" as appropriate.
  - For each annual period preceding the most recent three years: disclosure of the information required by paragraph 45.c.2. of FASB Statement No. 123, the restated stock compensation cost that should have been reported for each fiscal year. The total of the restated stock-based compensation cost should be reconciled to the disclosure of the cumulative adjustment to opening retained earnings. While the disclosure required by paragraph 45.c.2. is net of tax, material tax adjustments related to the accounting for stock-based compensation should also be disclosed by year. Registrants may also elect to voluntarily provide the full restated information previously disclosed pursuant to paragraph 45.c. of FASB Statement No. 123, for each period prior to the most recent three years, either in the audited financial statement footnotes or elsewhere in the filing.

- For companies that adopted (1) FASB Statement No. 123 using the retroactive restatement method specified in FASB Statement No. 148 and/or (2) FASB Statement No. 123R, Accounting for Share-Based Payment, using the modified retrospective application method for all prior years for which FASB Statement No. 123 was effective the disclosure outlined in the preceding two paragraphs should include the restated stock-based compensation pursuant to FASB Statement No. 123 and also the restated stock-based compensation cost that should have been reported under the accounting principle originally used for each period, presumably Accounting Principles Board Opinion No. 25, Accounting for Stock Issued to Employees.

- Appropriate revisions, if necessary, to previous disclosure under Items 9A and 9B:
  - As discussed in "Staff Statement on Management's Report on Internal Control Over Financial Reporting" (May 16, 2005) (available at http://www.sec.gov/spotlight/soxcomp.htm), in disclosing any material weaknesses that were identified as a result of the restatement and/or investigation, a company should consider including in its disclosures: the nature of the material weaknesses, the impact on the financial reporting and the control environment, and management's current plans, if any, for remediating the weakness. While there is no requirement for management to reassess or revise its original conclusion of the effectiveness of internal control over financial reporting, management should consider whether its original disclosures are still appropriate and should supplement its original disclosure to include any other material information that is necessary for such disclosures not to be misleading.
  - In light of the restatement and new facts discovered by management, including identification of any material weaknesses, a company should disclose the certifying officers' conclusion regarding the effectiveness of the company's disclosure controls and procedures as of the end of the period covered by the amended filing. If the certifying officers' conclusion remains the same, that disclosure controls and procedures are effective, the company should consider discussing the basis for that conclusion.

In the letter, the staff goes on to note that, while it will not raise further comment regarding a company's need to amend prior Exchange Act filings to restate financial statements and related MD&A if a company follows the above guidance, the staff retains the right to comment on or require changes in a company's Form 10-K amendment or Form 10-K that includes the comprehensive disclosure outlined above. The staff further notes that compliance with the guidance:

- does not mean that the Division of Corporation Finance has concluded that:
  - a company has complied with all applicable financial statement requirements;
  - a company has satisfied all rule and form eligibility standards under the Securities Act and the Exchange Act;
  - a company is current in filing its Exchange Act reports; or
  - the company has complied with the reporting requirements of the Exchange Act; and
- does not foreclose:
  - any action recommended by the Division of Enforcement with respect to a company's disclosure, filings or failures to file under the Exchange Act; or
  - any action recommended by the Division of Enforcement under Section 304 of the

Sarbanes-Oxley Act, Forfeiture of Certain Bonuses and Profits, with respect to the periods that the company's financial statements require restatement, irrespective of whether the company amended the filings to include the restated financial statements.

Internet Availability of Proxy Materials

On January 22, 2006, the SEC released final amendments to the proxy rules that put into effect a "notice and access" model with respect to the Internet availability of proxy materials. Under these final rules:

- An issuer may satisfy its obligations under the proxy rules to furnish proxy materials to shareholders in connection with a proxy solicitation by posting its proxy materials on a publicly accessible Internet website (other than the SEC's EDGAR site) and sending its shareholders a Notice of Internet Availability of Proxy Materials at least 40 calendar days before the shareholder meeting indicating that the proxy materials are available and explaining how to access those materials;
- The issuer must provide its shareholders at least one means of executing a proxy at the time the Notice is sent out;
- The Notice must explain how a shareholder can request a copy of the proxy materials and how a shareholder can indicate a preference to receive a paper or email copy of proxy materials distributed in the future;
- An issuer may not send a proxy card out with the Notice, but may send one out 10 or more calendar days after delivery of the Notice; and
- If the issuer chooses to send out a proxy card without a copy of the proxy materials, then it must include a copy of the Notice with the proxy card so that recipients will be notified again as to the Internet site where the proxy materials are accessible.

Note that, under the final rules, a Notice may not be sent to shareholders prior to July 1, 2007. Accordingly, given the required 40-day period between the Notice and the shareholder meeting, these rules may not be utilized for shareholder meetings that occur prior to August 10, 2007.

While this "notice and access" model is not available for proxy solicitations relating to business combination transactions, it is available to shareholders and other persons conducting proxy solicitations on substantially the same basis. The rules also provide guidelines for how intermediaries must interact with beneficial owners in order to provide them with the benefits of the "notice and access" model and related rules. Finally, the rules do not affect the availability of any existing method of delivering proxy materials.

An issuer's or other soliciting person's election to follow the "notice and access" model is voluntary. The SEC, however, on the same day, issued proposed rules that would require issuer's and other soliciting person's to follow such a model. If adopted, all shareholders would have the ability to elect to receive proxy materials in paper, by email or via the Internet. If adopted, these rules would apply to "large accelerated filers" (e.g., S-3 eligible issuers who maintain an aggregate worldwide non-affiliate market capitalization of $700 million or more as of the last business day of their most recently completed second quarter) as of January 1, 2008, and to all issuers as of January 1, 2009.

The final rules allowing for the Internet availability of proxy materials, and the proposed rules to require the same, are available on the SEC's website at http://www.sec.gov.

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As always, the members of Snell & Wilmer's Business & Finance Group are available to advise you on any of the foregoing or other issues.

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