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Speech by SEC Staff:
Corporation Finance in 2008 — A Year of Progress

by

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Thank you Keith [Higgins], and good morning. It's great to be back with the ABA. When I last spoke with the Committee in November in Washington, DC, I gave you an update on our activities during 2007 and a preview of where we expected to be focusing our efforts going into 2008. As you know, I missed your spring meeting in Dallas due to knee surgery — trust me, you were having more fun — but I understand Brian Breheny gave you a good overview of our plans for this year. Today I'd like to update you a bit on the status of this year's initiatives, and talk about how I see us spending our time during the remainder of 2008 in Corporation Finance.

First, however, the usual standard disclaimer — the views I express today are my own, and do not necessarily represent the views of the Commission or any other member of the staff.

A lot has happened over the past year. In terms of bigger picture Commission events, we have three new Commissioners on board, replacing Commissioner Campos, Commissioner Nazareth and Commissioner Atkins. Commissioner Walter joined us last month — she used to be the Deputy Director in Corp Fin, which is a nice development for us. Commissioners Aguilar and Paredes just arrived at the beginning of the month. It's very exciting to have a full Commission in place, particularly in light of all that we hope to accomplish on the rulemaking front this fall. And I know the Chairman has made some recent public remarks on this agenda as well, most recently on August 4, though I don't believe those were published, and also back in June.[1]

We've also have had some significant staffing changes at the senior level in Corporation Finance since I last spoke with you:

- **Brian Breheny has moved to the senior staff as Deputy Director — Brian was previously Chief of the Office of Mergers and Acquisitions;**
- **Wayne Carnall rejoined the staff as the Division's Chief Accountant — Wayne came from the national office of PwC, where he was heavily involved in IFRS (in the 1990's he was a senior member of our accounting staff in the Division); and**
- **Tom Kim has assumed the role of Chief Counsel in the Division —**

prior to that he was in the Chairman's office, and prior to that he was with GE, handling, among other things, shareholder proposals.

We are very fortunate to have Brian, Wayne, and Tom on board, and I'm particularly pleased to note that they each share my, and the rest of the senior staff's, commitment to transparency, responsiveness, and service in our interactions with the public — and that of course includes all of you — as we seek to fulfill our mission of investor protection. This is an important topic of its own, but not necessarily one for this morning. Perhaps we can go into this a bit more when I am next with you at your November meeting.

So, with all of this as background, let me start by updating you on our rulemaking agenda in Corp Fin. As I've noted in a number of different forums, our agenda this year has been driven principally by two major themes: Financial Reporting and International Initiatives. These themes and our rulemaking plans were set out in some detail in two sets of remarks I gave last January, both of which are available on the SEC website if you'd like to take a look.[2] We've progressed quite a bit since January, so allow me to run through what we've done since then and what we are currently working on for the fall.

Financial Reporting

Advisory Committee on Improvements to Financial Reporting (CIFiR): First, in the financial reporting arena, I think it makes sense to start with our Advisory Committee on Improvements to Financial Reporting (CIFiR), as they just issued their final recommendations on August 1.[3] As you are probably aware, last summer the Commission formed the CIFiR to study the causes of financial reporting complexity, and make recommendations to the Commission in a number of financial reporting areas.

Back in February, the Committee issued a Progress Report, which included its interim recommendations (called 'developed proposals').[4] In this way the Committee enabled us at the Commission to get a bit of a head start on our consideration of how best to address the Committee's final recommendations when they arrived. We in Corp Fin have been working closely with the Committee throughout, and Chairman Cox specifically directed the staff to review the interim proposals and provide the Commission with recommendations for possible consideration this year.

The Committee issued 25 recommendations, directed not only at the SEC, but also the FASB and the PCAOB. In line with the Chairman's directive, we are busily studying each of the recommendations that relates to the SEC, many of which (such as rolling out XBRL, and updating our guidance on corporate websites, both of which I'll cover in a moment) are consistent with ongoing areas of interest in Corp Fin. There are also three very interesting recommendations from the Committee concerning:

- materiality,
- correction of accounting errors, and
- a Commission policy statement addressing accounting judgments.

We are studying all three of these with a great deal of care, and considering making recommendations to the Commission. I can't do justice to all three proposals this morning, but I'd like to take you briefly through a few of the key points from one of the three — the Committee's proposal on correction of errors.

First, the Committee believes companies should be required to correct promptly all errors, other than those which are clearly insignificant, and make appropriate disclosures about the correction. By correcting small errors when they are identified, rather than waiting to do so in future financial statements, a company can substantially reduce the likelihood that the continuation and cumulation of errors over a period of time will result in the total amount of errors becoming material to a company's financial statements and requiring correction at that time.

Second, as I have discussed previously and as the Committee reiterated, the current guidance that is out there — SAB 108 — may result in the restatement of prior annual periods for immaterial errors occurring in those periods. This happens when the cumulative effect of individually immaterial prior period errors becomes material to the current annual period if the prior period errors were corrected all at once in the current annual period. The Committee has noted their belief (and I think there is merit to this), that prior annual period financial statements should not be required to be restated for errors that are immaterial to the prior annual periods involved. Rather, the Committee believes that where errors are not material to the prior annual periods in which they occurred, but would be material if corrected in the current annual period, the error could be corrected in the current annual period financial statements. On this last point, the Committee makes clear that regardless of how the errors are corrected (by restatement or in the current period), there should be prominent disclosure showing the impact on the financial statements of the corrections.

The third and final point that I will highlight is the Committee's belief that the determination of how errors should be corrected (by restatement or in the current period) should be based on the needs of investors making current investment decisions, taking into account the facts and circumstances of each error. Under the Committee's recommendation, all errors would be corrected not later than in the period in which they are discovered with appropriate disclosure about the error and the periods impacted. As the Committee notes, this approach of not restating for immaterial errors would provide investors making current investment decisions with more timely financial reports and avoid the costs to investors of delaying prompt disclosure of current financial information in order for a company to correct multiple prior filings.

As I noted, we're studying all of the 25 proposals that relate to the SEC, including this one. Personally, I think the Committee has raised some very important points, and we are seriously considering each of these.

As to other recommendations, one last one that I will mention relates to the use of executive summaries in Exchange Act periodic reports. In short, the Committee has recommended that the SEC mandate the inclusion of an executive summary in the forepart of Form 10-Ks, with updates of material changes to the executive summary in the company's Form 10-Qs. The Committee's concern here is addressing the difficulty that some investors may experience in finding and digesting information in companies' annual reports. This recommendation is, at heart, a plain English recommendation, which as you well know is a concept we at the SEC take very seriously. So again, this is an interesting proposal that we are looking at carefully. Responding to this one may tie into the 21st Century Disclosure Initiative, which I'll discuss in a moment. So any staff recommendation is probably more likely to come next year.

There is a lot more in the final report, and I would definitely suggest that you read it closely. We at the SEC certainly are.

Company Websites: Another very topical item that I'd like to go through

is the Commission's recently issued (on August 1) interpretive guidance concerning the use of company websites to disseminate information to investors.[5] As I mentioned, this is another topic that the CIFiR addressed in its recommendations, and also one that we in the Division have been thinking about for some time now. As you likely know, it has been some time since the Commission last gave advice in this area, and a lot has developed in the intervening years.

In brief, the guidance addresses four primary areas:

- **When information posted on a company website can be considered 'public' and how companies can comply with their public disclosure requirements under Regulation FD. Here, the goal is to open up the use of websites. To make clear that disclosure here may be 'good' under certain circumstances for the purposes of Regulation FD.**

- **Liability for certain electronic disclosures, including how companies can provide access to historical or archived data without it being considered reissued or republished every time it is accessed, how companies can link to third party information or websites without having to 'adopt' that content for liability purposes, the appropriate use of summary information in the context of the securities laws' antifraud provisions, and the application of the antifraud provisions to statements made by the company (or by a person acting on behalf of the company) in blogs and electronic shareholder forums.**

- **Whether information posted on company websites would be subject to rules under the Sarbanes-Oxley Act relating to a company's 'disclosure controls and procedures' — generally 'no'.**

- **And finally, whether information on a company website must satisfy a 'printer-friendly' standard — again, 'no', unless other rules explicitly require it.**

As I don't have to tell this group, websites can provide an excellent avenue to communicate with investors and other members of the market. The Commission's interpretive guidance seeks to open up the possibilities for innovation in this area by clarifying some of the legal issues surrounding the use of company websites. It is my hope that you all will now step in, roll up your sleeves, and help companies to take the next steps in this area.

The guidance became effective on August 7. There is also a request for comment, open for 90 days, on issues relating to company use of technology generally in providing information to investors. But not on the interpretation itself, which is final. In response to the comments and as technology develops, the Commission may update this guidance. But that is for the future.

Interactive Data: Next, interactive data, or more specifically XBRL, which has been an important focus for Chairman Cox and for the rest of us at the Commission over the past few years. Though we've been talking about it every chance we get for some time now, this year we have taken an important step toward making it real.

At the end of May the Commission put out proposed new rules that would require public companies to provide their financial statement information in the form of interactive data.[6] The comment period just ended on August 1, with 70 plus comments in to date, and we are gearing up for the next step — which hopefully will be final rules this fall. Right now, as you can imagine, we're studying the comments closely.

So how does 'interactive data' work and what have we proposed? With interactive data, a unique software data tag (like a bar code) is assigned to each element (each number) in a company's financial statements. Then, using computer software, investors and others can easily access, analyze, and manipulate that information in a way you cannot today with static data buried in the company's documents. So this is a pretty powerful tool for investors and other market participants.

Under the Commission's proposal, both domestic and foreign companies using U.S. GAAP would be required to provide, on a phased-in schedule, their financial statements using interactive data (and ultimately the rules would apply as well to foreign private issuers using IFRS). This would be provided in a new electronic exhibit to annual and quarterly reports (and to registration statements). An important note here — the new disclosure in interactive data format would supplement, not replace or change, existing disclosure using traditional electronic filing formats. So a company would continue to make its traditional filings on EDGAR, but would now also include an exhibit containing interactive data files. In addition, companies would be required to post the interactive data file on their corporate website at the same time it is provided to the SEC.

If adopted as proposed, the phase-in would take place over 3 years, starting with domestic and foreign issuers that use U.S. GAAP and have a public float of at least $5 billion — about 500 companies — for periods ending after December 15, 2008. In year two the rules would pick up all large accelerated filers using U.S. GAAP, and in year three, all remaining companies using U.S. GAAP, as well as foreign companies using IFRS.

What all this means, practically speaking, is that if all goes as planned, you could be seeing the first disclosures using interactive data in filings next year. So this is really one to pay attention to and become familiar with, if you haven't already.

Oil and Gas Reporting: Moving on to the updating of our reporting requirements for oil and gas reserves. This is one that I've wanted to do since arriving in 2006, and accordingly one that we've been working on since shortly after my arrival. I've been talking about it for the last year, and the Commission issued a concept release in December.[7] And as of the end of June, we have a proposal out.[8] Some of the key proposals address:

- **Use of new technologies to determine proved reserves where those technologies have been demonstrated empirically to lead to reliable conclusions about reserves volumes.**
- **Disclosure of probable and possible reserves.**
- **Classification of previously excluded resources, such as oil sands, as oil and gas reserves.**
- **Reporting on the independence and qualifications of a preparer or auditor, based on current Society of Petroleum Engineers criteria.**
- **Filing of reports for companies that rely on a third party to prepare reserves estimates or conduct a reserves audit.**
- **Reporting of oil and gas reserves using an average price based upon the prior 12-month period — rather than year-end prices, to maximize the comparability of reserve estimates among companies and mitigate the distortion of the estimates that arises when using a single pricing date.**

Though for those who don't work with these reporting requirements regularly, this may seem like somewhat dry stuff, these are actually very important, and at least to me, exciting proposals. There have obviously been significant changes in the oil and gas industry in the 25 years since adoption of our current reporting requirements, and the proposals should bring the requirements in line with current practice and technology.

The comment period on this one ends September 8, and I encourage any of you with an interest to share your thoughts on the proposals. We are excited to hear what commenters think, and are prepped and ready to move quickly to the next step once the comment period closes and we've had a chance to absorb the input received. No promises, as always, but the fall is certainly the target for making a recommendation to the Commission.

Management Guidance and Auditing Standard No. 5: And very quickly before moving on to IFRS, management guidance and Auditing Standard No. 5 — two improvements to the implementation of SOX 404 which focused on making SOX 404 more top down, risk-based, and efficient in its application. As I've said before, these were some of our most significant rulemakings of the past couple years, and I don't have much that is new to report here.

Still remaining in this area is effectiveness of the audit requirement for non-accelerated filers. After multiple extensions, smaller companies were required to comply with the management assessment requirement for the first time at the end of 2007. In June, the Commission finalized an additional extension of the Section 404(b) audit requirement for smaller companies, such that they must first comply for years ending after December 15, 2009.[9] In announcing the extension, the Commission also announced that we have received approval from OMB to proceed with data collection for a study of the costs and benefits of Section 404 implementation.[10] The study is focusing on whether management guidance and AS 5 are having the intended effect of facilitating more cost-effective internal control evaluations and audits of smaller reporting companies, and the results are expected to become available during the extension period. So it should be interesting to see what we find here. Other than the study, however, I think this is really it for this mammoth, and very important, rulemaking.

International Financial Reporting Standards (IFRS): Finally, I'll close out my update on financial reporting with a quick update on IFRS, which of course relates to our second initiative for the year — international matters — as well. For more on this, I direct you to remarks I gave in New York before the FEI at the beginning of June, available on the SEC website.[11] But for now, let me just tell you where I think we are on this one at the moment.

As any of you who have heard me speak before, or read my remarks, know, I view IFRS as one of the most significant projects we are engaged in at the Commission right now, the implications of which are far-reaching. We spent a great deal of time on the topic last year, culminating in final rules that ended the requirement for foreign private issuers using IFRS to reconcile their financial statements to U.S. GAAP.[12] That was only the beginning, however. The project for this year has been to examine the much more significant topic of the possible use of IFRS by U.S. issuers.

We put out a concept release on this last August,[13] and held two roundtables in December, at which we received a great deal of very thoughtful input.[14] Back in February, Chairman Cox asked that Corp Fin and the Office of the Chief Accountant formally propose to the Commission a 'roadmap' laying out a schedule, with appropriate milestones on which the

schedule will be conditioned, for continuing the U.S.'s progress in moving to accept IFRS in this country. We have a large team actively working on this project, and even held another roundtable on the topic last Monday, August 4, at which we received yet more helpful information from members of the public. So hopefully we will be prepared to make a recommendation soon. But as always, remember my disclaimer.

In anticipating all of this, I would suggest that you keep the following in mind:

- **We are headed toward a single set of high quality, globally accepted accounting standards — there is general agreement that having a single set of high quality, globally accepted accounting standards will benefit the capital markets generally including investors, as financial statements of global issuers become more comparable on a cross-border basis.**
- **The choices are U.S. GAAP and IFRS.**
- **Over 100 countries require or accept IFRS.**
- **So, IFRS is where the future is (not U.S. GAAP).**

The question of course is, how and when do we get there? And the task of answering that is exactly what we at the Commission are working on right now.

International Initiatives

Moving on to the balance of our international rulemaking efforts — which focus on updating and modernizing our rules that apply to foreign private issuers. Though much lower profile than some of our efforts last year — namely elimination of the reconciliation and deregistration, these are nonetheless very important proposals. As background, I went to our rulemaking teams last fall as we were completing the release eliminating reconciliation for foreign private issuers using IFRS (as issued by the IASB), and basically told them that the time appeared right to update our rules related to foreign issuers generally. We formed three teams, which produced the three proposals put out by the Commission in February and May of this year.

The first of these, *Rule 12g3-2(b)*, addresses our 40-year old entrance rules for foreign issuers and the workings of the Rule 12g3-2(b) exemption.[15] The exemption permits a foreign private issuer to exceed the shareholder thresholds for registration under Exchange Act Section 12(g) and effectively have its equity securities traded on a limited basis in the over-the-counter market in the United States. Under the proposed amendments, the current paper submission requirements would be eliminated by automatically granting the Rule 12g3-2(b) exemption to a foreign private issuer that meets specified conditions. To maintain the exemption, the foreign private issuer would have to continue to satisfy these conditions. By being automatic, issuers that have previously failed to apply for their exemption following the year they crossed the U.S. shareholder thresholds will now be able to claim the exemption, so will no longer be in limbo. The comment period ended April 25, and the proposal was generally well-received, though many commenters expressed concern about the proposed condition that the exemption would no longer be available if, at the end of a subsequent year, an issuer exceeds a proposed average U.S. daily trading volume test of 20% or more compared to worldwide volume. Our rulemaking team is currently very busy working through this one, as well as a few other issues, as we draft recommendations for the Commission.

The second of the three international rule proposals is the *Foreign Issuer Reporting Enhancements* release, which includes proposals (in nine areas) to update the reporting requirements for foreign private issuers reporting in the U.S.[16] Included is a proposal concerning the definition of foreign private issuer itself and when it is measured, as well as a proposal to shorten of the 6-month filing requirement for Form 20-Fs (recognizing that 10-Ks are due in 60 to 90 days, as you well know). The comment period closed May 12, and we are very busy going through everything we heard and developing our recommendations to the Commission. Here, the area of most interest to commenters was the due date for Form 20-Fs — with the primary concern being that the shortened filing period may not be workable for some companies. Again, this is something we are evaluating carefully as we draft our recommendations.

The third proposal is the *Cross-Border Tender Offers* release — which addresses our rules governing cross-border tender offers, initially adopted in 1999.[17] The theme on this last one is facilitating the ability of U.S. investors in foreign companies to exercise their rights in connection with cross-border mergers and acquisitions. In this regard, we are aware that in some instances U.S. investors in foreign companies are excluded from tender offers and related transactions because of provisions in our rules, and we are seeking to fix this. Many of the proposed changes would codify staff positions and eliminate the need for companies to get their own exemptive orders for common situations. The comment period closed June 23, and we are busy reviewing all the comments.

So, as you can see, we've got a lot on our plate with these three international initiatives, and we are moving forward quickly. Our goal is to present our recommendations on the three releases as a package, and soon — hopefully later this summer.

Mutual Recognition: Finally, on the international front, we continue our examination of a possible mutual recognition arrangement with certain jurisdictions. As you may have heard, last Monday the Chairman announced that we were moving forward in our efforts to finalize a pilot arrangement with Australia.

More generally, there are four areas in which we may take action to further implementation of mutual recognition arrangements.[18] First, the Commission may explore initial agreements with one or more foreign regulatory counterparts. As I noted, the Commission currently is engaged in this process with the Australian Securities and Investment Commission.[19] Second, the Commission may develop a framework for mutual recognition discussions with jurisdictions comprising multiple securities regulators tied together by a common legal framework. The Commission is currently engaged in this process with Canada, which has no national securities regulator, but rather several provincial regulators.[20] Third, the Commission may consider adoption of a formal process for engaging other national regulators on the subject of mutual recognition. This process could be accomplished through rulemaking or other appropriate mechanisms, possibly informed by our discussions with other regulators, such as our current discussions with Australian and Canadian regulators. Fourth, and finally, the Commission is considering reforms to Rule 15a-6 in order to improve the process by which foreign broker-dealers can do business with U.S. investors without registering as broker-dealers under the Exchange Act. The Commission proposed amendments to Rule 15a-6 in June and the proposing release is available on our website.[21]

For more on this topic, take a look at the materials on our website in the Spotlight: 'Roundtable Discussion Regarding Mutual Recognition,'[22] as well as, for the Corp Fin perspective, my January 14 speech in London.[23]

In terms of other rulemaking projects that may not fit neatly into the financial reporting or international themes, I'll mention five briefly, starting with our pending proposal concerning Regulation D.

Revisions of Limited Offering Exemptions in Regulation D: [24] **This one has been outstanding since last August, and I'm very hopeful that you'll be seeing final action in the near future. As you will recall, the Commission proposed a new exemption from the Securities Act registration provisions for offers and sales of securities to 'large accredited investors,' under which the issuer could engage in limited advertising. In addition, the proposals would address the standards for qualifying as 'accredited' investors under Regulation D, shorten the timing required by the integration safe harbor in Regulation D, and apply uniform disqualification provisions to all offerings seeking to rely on Regulation D. The Commission also provided in the proposing release guidance regarding integration of concurrent public and private offerings.**

NRSROs: Another important rulemaking, and one that I would be remiss in not mentioning, is the Commission's current, and quite significant, rulemaking efforts concerning nationally recognized statistical rating organizations, or NRSROs. Due to the scope of this rulemaking, it is happening in three parts. The first addresses concerns about the integrity of NRSROs' procedures and methodologies, while the second addresses the rating symbols used for structured finance products. [25] **Though I'm not going to go into these in any detail, I will say that in going through the comments, it is clear that there are some strong feelings on at least one aspect of the proposals — the proposed requirement for rating agencies to disclose all information that was provided to them and that they relied on to formulate a rating — including from the ABA's Section on Business Law. We appreciate your comments, and we are looking closely at the issue.**

Also important from a Corp Fin perspective, of course, is the third set of proposals, which the Commission published on July 1. [26] **The intent of this portion of the rulemaking is to assure that the role the SEC has assigned to ratings in its rules is consistent with having investors make an independent judgment of risks. To this end, the Commission proposed changing a number of rules where references to ratings and NRSROs appear. These rules affect many different program areas in the Commission, but with respect to the ones we administer in Corp Fin, the proposals, for example, replace the current eligibility requirements for the use of Forms S-3 and F-3 with entirely new requirements that do not rely on NRSRO ratings. More specifically, the proposed new criteria for debt securities would mirror the existing requirements for WKSIs ($1 billion of publicly offered securities within 3 years).**

The comment period closes September 5, and as always, we look forward to hearing your thoughts on the proposals. In light of the subject matter of the proposals, I think it is likely that the Commission will act on all three this year.

Inflation: This is one that I haven't spoken about yet, though it has been in the works internally for over a year now. Since it looks like we are getting closer to making some recommendations on this one, let me just preview the project for you a bit. In short, we have been taking a look, Commission-wide, at all of our rules to determine whether any of the dollar amounts in our rules should be adjusted now, or in the future, to take into account inflation. As you can imagine, this is a huge undertaking. And it is one that we are being very careful in working through.

21st Century Disclosure Project: Though this is perhaps a more long-term project, I'd like to spend a minute or so on a new Commission study,

announced at the end of June — the '21st Century Disclosure Initiative.' The study is being led by Dr. William D. Lutz of Rutgers University, who some of you may be familiar with for his work with plain English, and is intended to produce, by the end of the year, a blueprint for future Commission action to improve the usefulness and timeliness of disclosure, and streamline and modernize the collection of disclosure. This would then be followed by formation of an Advisory Committee (this is a long term endeavor — 3 to 5 years to implement). The initial study is intended to be very broad, spanning all Divisions and Offices in the Agency. For us in Corp Fin, one of the most important parts of the study will likely be the planned review of all existing forms and reporting requirements, as well as the manner in which information is provided to the Commission.

This project is driven in large part by the Chairman's focus on technology, and I think will be a really interesting and important initiative. And the issues relating to Corp Fin are not new ones for us. As some of you may know, we've been thinking about these issues for some time now (internally we've called this Project Alpha), and the project has now expanded beyond the Division.

Beneficial Ownership Reporting: This is another project that is new enough that I haven't been out there talking about it yet, and it definitely falls into the category of longer-term projects. Right now we're in the early stages of evaluating beneficial ownership reporting on Schedules 13D and 13G and considering what, if any, recommendations to make to the Commission concerning changes in the disclosure obligations relating to the use of equity swaps, other derivative instruments, and short positions. I'm not sure at this point what, if anything, we will recommend to the Commission as a course forward, but it could include soliciting public input, possibly followed by proposals, depending on the public input we receive. As I noted, this is certainly a longer term project and we are just getting started — so this may be another one for 2009.

Proxy Matters

This is always an important topic, and with the 2007-2008 proxy season behind us, it is a particularly good time to be talking about it. So let me take a bit of time to go through what we saw last season, both in the use of e-proxy, and in the area of shareholder proposals.

E-Proxy: As you likely know, the voluntary model went into effect last summer, with the revised model going into effect for some on January 1 of this year and for everyone else next January 1. Recent statistics released by Broadridge indicate that as of June 30, 653 companies have used voluntary e-proxy, with a great deal of variety present in the types and sizes of companies doing so.[27] We've been monitoring how things have worked in the first season of use and have received some very helpful insights. So let me mention a few things we have heard:

- **First, companies that are using e-proxy have seen significant savings, which was something we anticipated, but it is always gratifying to hear about the reality.**

- **Second, and something we are looking at particularly closely — there has been a decline in the retail vote. Broadridge reports over a 73% drop in the number of retail accounts voting, and a 52% drop in the number of retail shares voting. This is obviously an important issue, and one that both we and the market will have to consider. It is certainly my hope that we will see this improve as more companies use e-proxy, and learn how to adjust its features, as investors become more familiar with electronic voting, and as more investors**

desiring paper copies make their one-time election. I know those who are concerned about a drop in the retail vote having been looking at a 'mix and match' approach as to who gets notices versus paper. Please keep experimenting and refining your approach. We want this to be successful.

- **Third, we have heard from some companies and intermediaries that they would like to include educational material about e-proxy in the notice. This area is a little tricky, in particular in determining what is and is not truly educational material, and what goes beyond that goal, but again, this is something we are aware of and will continue to look at.**

- **Fourth, we have heard that the requirement to send the notice 40 days prior to the meeting has been tough to meet. As many of you know, the thinking in adopting the 40-day requirement was that you could then follow up 10 days later with a second mailing that includes the proxy card as well. We are definitely open to hearing your experiences here and determining if there is something that can be done to address this. So please give us more information about how this year has worked, especially if you did a second mailing.**

- **Fifth and finally, we heard that some shareholders found the notices to be confusing — I understand that there were even instances where shareholders attempted to 'vote' the notices.**

Overall, we're encouraged by the discussion that has already gone on here, including with Broadridge and their efforts to improve their notices, so hopefully this will not continue to be the issue that it has been this season. But again, we will continue to watch this. Looking forward, we are focusing on making improvements in the process. The notices should be better this year, but we are also looking at whether recommendations for rulemaking refinements are needed. It is my hope that this could happen sooner rather than later — perhaps as early as this fall or early next year.

Shareholder Proposals: Moving on to shareholder proposals. Though I know I've moved quickly through a number of topics so far, I'd like to take a bit more time to go through this topic in a bit more detail. And I'll start by giving you some background on our process in this area.

As you all know, each year the Division puts together a team of attorneys — which we call the Shareholder Proposal Task Force — to review and respond to all the no-action requests submitted by companies seeking to exclude shareholder proposals from their proxy statements. Each year, the task force processes anywhere from 300 to 450 no-action requests. And as you likely know well, by and large the subject matters of these proposals remain similar each year, ranging from corporate governance issues such as majority vote, annual election of directors, poison pills, and board independence; to social issues such as global warming, nuclear energy, and more recently, predatory lending and subprime lending.

Our shareholder proposal rule, Rule 14a-8, generally requires a company to include a shareholder's proposal in its proxy materials unless the shareholder has failed to comply with the rule's procedural requirements or the proposal falls within one of the 13 substantive bases for exclusion. If a company intends to exclude a proposal from its proxy materials, it must submit its reasons for doing so to the Commission and it must provide a copy to the shareholder — this submission is commonly referred to as a no-action request. The staff's role in the process begins when we receive a no-action request from a company.

A company submitting a no-action request may assert that a proposal may be excluded under one or more parts of Rule 14a-8. The staff analyzes each of the bases for exclusion that a company asserts, as well as any arguments that the shareholder chooses to make in response, and determines whether we concur in the company's view. The staff also conducts independent research, including reviewing prior no-action letters and Commission releases. Importantly, the staff does not judge the substantive merits of the proposal's subject matter. One thing you may not know about the staff's process is that each no-action request is subject to multiple levels of review. In fact, many no-action requests are reviewed by four attorneys. After the review is complete, the staff sends a response letter to the company and the shareholder stating that we concur, or decline to concur, with the company's view that the proposal may be excluded.

The process may or may not end there. A company or a shareholder may submit what is known as a reconsideration request, where it asks the staff to reconsider its response. These requests are usually based on additional facts, or make an argument not previously asserted, which can include an argument made under a different basis for exclusion. Reconsideration requests are reviewed by a designated member of the Division's senior staff. In some cases, a company or shareholder may ask the Division to seek the Commission's views. The Division will review the request, and if it presents novel or complex issues, may recommend that the Commission consider the matter. Now that I have told you about the process, let me get back to discussing this proxy season.

This year's task force received and processed over 400 no-action requests — a higher number than in recent years. And these are now available, for the first time, on the SEC website.[28] Two of the bases asserted by companies that I'd like to discuss are Rule 14a-8(i)(7) — the ordinary business exclusion, and Rule 14a-8(i)(8) — the election exclusion. With regard to the election exclusion, as you likely know, last November the Commission clarified (i)(8) to reaffirm the agency's longstanding position that so-called 'proxy access' proposals may be excluded pursuant to the election exclusion.[29] We received a number of no-action requests to exclude these proposals this year, and we permitted exclusion in each case.

The second basis I'll highlight, which we saw companies relying on in significant numbers this proxy season (as is always the case), was ordinary business. While it's true that (i)(7) provides an exclusion for proposals relating to ordinary business matters, the fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials.

In 1998, the Commission put out a release on how to interpret the 'ordinary business' exclusion.[30] In that release, the Commission explained that the policy underlying the exclusion rests on two considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they cannot, as a practical matter, be subject to direct shareholder oversight. However, proposals relating to such matters, but focusing on sufficiently significant social policy issues generally are not considered to be excludable, because the proposals would transcend day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.

An example of a significant social policy issue is executive compensation. Thus, the staff decided some time ago that so-called 'say on pay' proposals generally could not be excluded as relating to ordinary business. Of particular interest this year were shareholder proposals relating to universal

healthcare reform. So let me give you a bit more detail on these.

During this past season, we were asked to make no-action determinations on a proposal of first impression — a non-binding proposal that urged companies to adopt principles for comprehensive healthcare reform. The staff has taken no-action positions on various healthcare proposals in the past. For example, the staff has permitted exclusion under 'ordinary business' of proposals asking a company to adopt more affordable and continuous healthcare for employees and retirees because such proposals relate to employee benefits. Similarly, proposals asking a company to lobby on employee benefit matters are excludable. This year's proposal was different — it urged companies to 'adopt principles for comprehensive healthcare reform.' Unlike prior proposals, it did not ask the companies to change their own healthcare coverage, or ask them to directly lobby anyone in support of healthcare change. No further action was contemplated by the proposal other than the adoption of principles.

The staff received 14 of these no-action requests. Of these, four were withdrawn (after each company posted principles on its website, we are told), three were ultimately granted, and seven were denied.

In analyzing these no-action requests, the staff used the framework it always does — including applying the Commission's guidance that I just recited on how to interpret the ordinary business exclusion (and the sufficiently significant social policy overlay). In seven cases, the staff was unable to concur in the companies' views.[31]

Something that I would like to note is that the staff's determinations were not a reversal of prior no-action positions, and they were not a determination made by the Commission. Rather, this was the staff's application of Commission statements (and prior staff positions) to a proposal of first impression. I should also point out that exclusion was permitted under (i)(7) in the two cases where the proposal not only asked the company to adopt 'principles for comprehensive healthcare reform,' but also asked the company to report to shareholders on how the company was 'implementing such principles.' Exclusion was also permitted where the company had substantially implemented the policy by posting the principles on its website.

In leaving this topic, let me assure you that the staff continues to respect the fact that certain tasks are fundamental to management's ability to run a company. But, we will also continue to respect the Commission's view that certain significant social policy issues that have a sufficient nexus to the particular company may transcend day-to-day business matters and are appropriate for shareholder consideration.

With that, I'd also like to take a minute to mention more generally the Shareholder Task Force's top five wish list for those who submit no-action letter requests:

1. **Submit your requests promptly — we use a FIFO approach. For example, this year, we received 100 requests (25% of the total number of requests we received) when we opened the mail on Wednesday, December 26. At maximum capacity, we can close out about 35 requests a week, so if you had submitted your request just a few days before the holiday onslaught, our response to you could easily have arrived 3 weeks earlier.**

2. **Send us all the correspondence, from all the proponents — don't wait for us to ask. Not only do we need to review it all, we also really need the proponent's mailing address, which often appears only on the**

cover page of their letter to the company. Perhaps mundane, but very important nonetheless.

3. **Don't assume your Rule 14a-8(b) notice of defect (related to ownership) is 'good' just because you've had no-action relief granted in the past. If a proponent's procedural violation isn't connected to the problem with your notice, then we may provide the no-action relief requested, even where the notice isn't perfect. So keep this in mind when considering whether your '(b)' notices of defect need updating for the next proxy season.**

4. **Please don't throw in the kitchen sink when arguing bases for exclusion. If you have a real argument, by all means make it, but don't throw in extras that don't provide a solid basis for exclusion. Even if the company does not fully research and analyze these, we will have to — and it obviously absorbs resources and delays responses to you (and the other people sitting around you in this room). On this one I will note in particular (i)(3). I can't think of an example in the past year where we granted a request to delete a specific portion of a supporting statement as materially false or misleading.**

5. **Finally, let us know as soon as possible if a request is withdrawn, so our team can move on to the next proposal sooner. It makes a real difference.**

And finally, I'd like to highlight one last item in the area of shareholder proposals. As you likely are aware, there is a new procedure available to the Commission, which was established through an amendment to the Delaware constitution authorizing the Delaware Supreme Court to hear questions of law certified to it by the SEC. As you can imagine, this is a very useful tool to have available to the Corp Fin staff as we review the hundreds of no-action requests we receive each year on shareholder proposals. Today, proposals can be excluded if the proposal is not a proper subject for shareholder action under state law, or it violates state law if implemented. If the staff receives dueling opinions of counsel on state law, we have traditionally deferred to the proponent, but we can now, in appropriate circumstances, go to the source — Delaware — for the answer.

At the end of June, for the first time, the Commission availed itself of this new procedure. On June 27 the Commission referred to the Delaware Supreme Court the issue of whether a bylaw that would require a company's board of directors to reimburse the reasonable fees of any stockholder that sought to elect less than 50% of the board (a short slate) and succeeded in electing at least one director was 1) a proper subject for stockholder action, and 2) would violate state law. Last month, on July 17, the Delaware Supreme Court answered both questions, holding that the bylaw was a proper subject for stockholder action, but that if adopted the bylaw would violate state law.[32] The result being that the proposal could be excluded from the company's proxy statement under SEC Rule 14a-8(i)(2).

This was obviously an important decision substantively, but it also was very important to us in terms of process, as it was the first time we had certified a question under the new procedure. We're very excited to have this tool at our disposal, and look forward to using it further, as appropriate, in coming years.

So, with that, let me thank you all for being here, and for your attention and participation over the past hour and a half. It is always a pleasure and an honor to be with your Committee, and this is certainly one of the speaking opportunities I most look forward to.

Endnotes

[1] 'Disclosure from the User's Perspective,' Christopher Cox, Chairman, U.S. Securities and Exchange Commission, June 12, 2008, available at http://www.sec.gov/news/speech/2008/spch061208cc.htm.

[2] 'Corporation Finance in 2008 — International Initiatives,' John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, January 14, 2008, available at http://www.sec.gov/news/speech/2008/spch011408jww.htm; and 'Corporation Finance in 2008 — A Focus on Financial Reporting,' John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, January 23, 2008, available at http://www.sec.gov/news/speech/2008/spch012308jww.htm.

[3] 'Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission,' August 1, 2008, available at http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf. *See also*, SEC Spotlight on: Advisory Committee on Improvements to Financial Reporting, available at http://www.sec.gov/about/offices/oca/acifr.shtml.

[4] 'Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting,' February 14, 2008, available at http://www.sec.gov/rules/other/2008/33-8896.pdf.

[5] SEC Release No. 34-58288, 'Commission Guidance on the Use of Company Web Sites,' August 1, 2008, available at http://www.sec.gov/rules/interp/2008/34-58288.pdf.

[6] SEC Release No. 33-8924, 'Interactive Data to Improve Financial Reporting,' May 30, 2008, available at http://www.sec.gov/rules/proposed/2008/33-8924.pdf.

[7] SEC Release No. 33-8870, 'Concept Release on Possible Revisions to the Disclosure Requirements Relating to Oil and Gas Reserves,' December 12, 2007, available at http://www.sec.gov/rules/concept/2007/33-8870.pdf.

[8] SEC Release No. 33-8935, 'Modernization of the Oil and Gas Reporting Requirements,' June 26, 2008, available at http://www.sec.gov/rules/proposed/2008/33-8935.pdf.

[9] SEC Release No. 33-8934, 'Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers,' June 26, 2008, available at http://www.sec.gov/rules/final/2008/33-8934.pdf.

[10] *See* SEC Press Release 2008-116, 'SEC Approves One-Year Extension for Small Businesses From Auditor Attestation Requirement in Sarbanes-Oxley Act — SEC Staff Gains OMB Approval to Proceed With Data Collection for Cost-Benefit Study of SOX 404 Implementation,' June 20, 2008, available at http://www.sec.gov/news/press/2008/2008-116.htm.

[11] 'IFRS and U.S. Companies: A Look Ahead,' John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, June 5, 2008, available at http://www.sec.gov/news/speech/2008/spch060508jww.htm.

[12] SEC Release No. 33-8879, 'Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP,' December 21, 2007, available at http://www.sec.gov/rules/final/2007/33-8879.pdf.

[13] SEC Release No. 33-8831, 'Concept Release On Allowing U.S. Issuers To Prepare Financial Statements In Accordance With International Financial Reporting Standards (Corrected),' August 7, 2007, available at http://www.sec.gov/rules/concept/2007/33-8831.pdf.

[14] *See* SEC Spotlight on: International Financial Reporting Standards 'Roadmap,' available at http://www.sec.gov/spotlight/ifrsroadmap.htm for archived webcasts, unofficial roundtable transcripts, and other materials.

[15] SEC Release No. 34-57350, 'Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers,' February 19, 2008, available at http://www.sec.gov/rules/proposed/2008/34-57350.pdf.

[16] SEC Release No. 33-8900, 'Foreign Issuer Reporting Enhancements,' February 29, 2008, available at http://www.sec.gov/rules/proposed/2008/33-8900.pdf.

[17] SEC Release No. 33-8917, 'Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions,' May 6, 2008, available at http://www.sec.gov/rules/proposed/2008/33-8917.pdf.

[18] *See* SEC Press Release 2008-49, 'SEC Announces Next Steps for Implementation of Mutual Recognition Concept,' March 24, 2008, available at http://www.sec.gov/news/press/2008/2008-49.htm.

[19] *See* SEC Press Release 2008-52, 'SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Australia Mutual Recognition Talks,' March 29, 2008, available at http://www.sec.gov/news/press/2008/2008-52.htm.

[20] *See* SEC Press Release 2008-98, 'Schedule Announced for Completion of U.S.–Canadian Mutual Recognition Process Agreement,' May 29, 2008, available at http://www.sec.gov/news/press/2008/2008-98.htm.

[21] SEC Release No. 34-58047, 'Exemption of Certain Foreign Brokers or Dealers [Corrected],' June 27, 2008, available at http://www.sec.gov/rules/proposed/2008/34-58047.pdf.

[22] SEC Spotlight on: Roundtable Discussion Regarding Mutual Recognition, available at http://www.sec.gov/spotlight/mutualrecognition.htm.

[23] 'Corporation Finance in 2008 — International Initiatives,' John W. White, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, January 14, 2008, available at http://www.sec.gov/news/speech/2008/spch011408jww.htm.

[24] SEC Release No. 33-8828, 'Revisions of Limited Offering Exemptions in Regulation D,' August 3, 2007, available at http://www.sec.gov/rules/proposed/2007/33-8828.pdf.

[25] SEC Release No. 34-57967, 'Proposed Rules for Nationally Recognized Statistical Rating Organizations,' June 16, 2008, available at http://www.sec.gov/rules/proposed/2008/34-57967.pdf.

[26] SEC Release No. 33-8940, 'Security Ratings,' July 1, 2008, available at http://www.sec.gov/rules/proposed/2008/33-8940.pdf.

[27] *See* 'Notice & Access — Statistical Overview of Use with Beneficial Shareholders as of June 30, 2008,' Broadridge.

[28] Division of Corporation Finance 2008 No-Action Letters Issued Under Exchange Act Rule 14a-8, available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml.

[29] SEC Release No. 34-56914, 'Shareholder Proposals Relating to the Election of Directors,' available at http://www.sec.gov/rules/final/2007/34-56914.pdf.

[30] SEC Release No. 34-40018, 'Amendments to Rules on Shareholder Proposals,' May 21, 1998.

[31] In an additional instance, the company, UnitedHealth, initially requested relief under Rule 14a-8(i)(7), and after the staff declined to grant relief on that basis, requested reconsideration. As one of its bases for reconsideration, the company asserted Rule 14a-8(i)(10), under which the staff granted relief. UnitedHealth is included among the three no-action requests that ultimately were granted.

[32] *CA, Inc. v. AFSCME Employees Pension Plan*, No. 329, 2008 (Del. July 17, 2008).

http://www.sec.gov/news/speech/2008/spch081108jww.htm