Paul|Weiss

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SEC Office of M&A Softening Position on Requirement for Audited Target Financials in Certain Cash Mergers

In various recent conversations that we have had with senior staff of the SEC Division of Corporation Finance's Office of M&A, we have been informed that the Office of M&A may be softening its position of requiring current audited financial statements for targets in all merger-related proxy statements, even where such financial statements are unavailable or only available after an unreasonable expenditure of effort, time or expense. Because many companies are facing delays in compiling audited financial statements due to accounting issues, such as stock option backdating, we thought that companies or firms actively participating in the M&A market would be particularly interested in this change in position.

The staff from the Office of M&A indicated that they are now taking a more "nuanced" approach on this issue in cash transactions only and may "not object" to the lack of audited financials for the target depending on the particular facts and circumstances of each company and deal. Among the factors that the staff would consider when deciding whether or not such transactions may proceed are (i) whether shareholders "have everything they need to make an informed decision", including having other means of obtaining material financial information about the target, such as through unaudited financials, and (ii) the nature of the problems with providing audited financials (such as the status of any investigations involving the target). The staff also advised that there should be no asymmetries of information among the parties and shareholders and that shareholders should be afforded appropriate time to digest the import of the absence of current audited financial information. Further, no relief would likely be available if audited financial statements are specifically required by the relevant rules (such as for a stock or going-private transaction).

The staff noted that the "relief" available will most likely be limited to an oral statement that the Division will not object if financial statements are not included, and would not entail actual approval or concurrence from the Division that financial statements are not required. Thus, it remains incumbent upon each company to make its own determination as to whether there is any material information missing from its proxy disclosure as a result of the absence of audited financials and to determine whether there is any resulting Rule 10b-5 or other securities law liability.

Procedurally, the staff suggested that companies contact the Office of M&A on this issue and that the time frame for reaching resolution is at least thirty days.

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100-001, Japan
(81-3) 3597-8101

Unit 3601, Fortune Plaza Office Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
(86-10) 5828-6300

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

Please note that the Office of M&A is still formulating its position in coordination with the Chief Accountant's Office, and has not yet issued (and may not issue) written guidance or formal rules in this regard. Thus, we note the preliminary, and possibly changing, nature of this development.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. If you have any questions about the foregoing or would like to pursue any of the avenues mentioned above, please contact any of the following:

Paul D. Ginsberg	(212) 373-3131	Robert B. Schumer	(212) 373-3097
Jeffrey D. Marell	(212) 373-3105	Frances F. Mi	(212) 373-3185
Toby S. Myerson	(212) 373-3033		