

A Biweekly
Newsletter of
Federal Securities,
Corporate &
Banking Law
Developments

SEC INVESTIGATIONS LEAD TO “WELLS” NOTICES

In the last few weeks, companies have been receiving “Wells” notices from the Securities and Exchange Commission. This is a crucial part of an SEC investigation that can have significant consequences for a public company.

A “Wells” notice is notification by the SEC staff of its decision to recommend that the SEC Commissioners authorize a civil enforcement action against a company and/or its officers. A “Wells” notice usually follows (i) a preliminary investigation by the SEC of possible securities law violations and (ii) a formal SEC investigation that could include subpoenas and interviews of key witnesses. While not required to do so, the SEC staff usually provides such notice outlining the charges that they are recommending to the Commissioners.

Upon receipt of a “Wells” notice, a company may send the SEC a response, also called a “Wells submission,” refuting the charges or arguing for lesser charges or penalties. Among the actions that a company should consider include the following:

- Discuss the “Wells” notice with experienced SEC counsel, especially if the civil investigation could also lead to criminal charges;
- Decide whether to file a “Wells submission” in response to the “Wells” notice. Such a decision may rest upon the seriousness of the charges and the likelihood that the “Wells submission” will persuade the SEC staff;
- Prepare a “Wells submission” tailored to the charges presented in the “Wells” notice; and
- Contact the SEC staff in advance and discuss the contents of the “Wells submission.”

The company should also determine whether to issue a press release publicly disclosing its receipt of the “Wells” notice.

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- Census Data for EEO Compliance Now Available
- Corporate Officer’s Pay Escrowed During SEC Investigation
- **ALERT:** SEC Raises Registration Fees by 57 Percent

If you would like more information on these topics or have any questions, please e-mail us at CorporateNotes@KutakRock.com.

■ CENSUS DATA FOR EEO COMPLIANCE NOW AVAILABLE

Companies that want to actively monitor their compliance with equal employment opportunity laws now have the latest test data available to help in this process.

On December 29, 2003 the United States Census Bureau released the Census 2000 Special Equal Employment Opportunity tabulation, containing key demographic data on the workforce in the United States. It includes information to evaluate whether or not workplaces are reflective of the available labor force in a company’s geographic area.

This information is expected to be used by the Equal Employment Opportunity Commission, the U.S. Justice Department, the Office of Federal Contract Compliance Programs, and the Office of Personnel Management. If these regulatory agencies find that a company is not in compliance, the company could face investigation, possibly leading to regulatory action, or even litigation.

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The Census 2000 Special Equal Employment Opportunity tabulation is available from the Census Bureau in two formats: selected data, available free of charge at <http://www.census.gov/hhes/www/eeoindex.html>, and complete data in ASCII format (for \$235) by calling the Census Bureau's Customer Service Center at (301) 763-INFO (4630).

■ CORPORATE OFFICER'S PAY ESCROWED DURING SEC INVESTIGATION

The SEC recently used its new enforcement powers to prevent a company being investigated for securities fraud from making "extraordinary" severance payments to a former officer also under investigation. (<http://www.sec.gov/litigation/litreleases/lr18373.htm>) Instead, it obtained a court order requiring the company, Vivendi Universal, to hold the funds in escrow.

Under the Sarbanes-Oxley Act of 2002, the SEC can obtain a 45-day freeze order immediately stopping a company being investigated for securities fraud from making extraordinary payments to directors, officers, employees or agents.

The order automatically expires (subject to a one-time 45-day extension) unless securities fraud charges are actually brought against the company and its directors, officers, or affiliates. In that case, the escrow continues until the charges are finally resolved.

This escrow power is designed to prevent corporate executives from making large payments to themselves once their company comes under SEC scrutiny but before charges are formally filed.

■ ALERT: SEC RAISES REGISTRATION FEES BY 57 %

Today, the Securities and Exchange Commission's fee for registering stock increased by 57 percent, from \$80.90 to \$126.70 per \$1.0 million in value of the stock

being offered to the public.

(<http://www.sec.gov/news/press/2004-10.htm>) This fee increase applies immediately to registration of stock with the SEC, including transactions such as:

- initial public offerings;
- tender offers;
- mergers; and
- stock options and other employee benefit plans.

The rate increase was mandated by the federal omnibus appropriations bill signed into law last Friday.

Companies should take this higher fee into account when filing SEC registration statements.

Kutak Rock LLP is a national law firm with 340 attorneys located in 16 offices throughout the United States. Our practice includes corporate, banking and securities law, mergers and acquisitions and stock offerings, federal government contracts, and complex commercial litigation.

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