

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

## Recent Reincorporation Highlights Maryland Advantages

By merely changing its state of incorporation, a company saved tens of thousands of dollars in taxes without sacrificing the anti-takeover and other advantages of state corporate law. On October 30th, PennFed Financial Services Inc. reported that it had changed its state of incorporation from Delaware to Maryland. Unlike Delaware, Maryland does not impose a franchise tax on corporations formed under its laws. Accordingly, the company expects to save more than \$60,000 per year in franchise taxes that it would have paid had it remained a Delaware company.

Since its adoption in 1963 of the first real estate investment trust ("REIT") statute in the nation, Maryland has always been viewed as a favorable state of incorporation for REITs. Now many consider Maryland as an attractive jurisdiction for corporations. For instance, Maryland law provides the following desirable attributes for companies:

- A minimal annual filing fee instead of a franchise tax on authorized shares of stock;
- Favorable anti-takeover provisions;
- No increase in fiduciary duties of directors when considering special issues such as mergers rather than routine matters; and
- Flexibility in paying cash dividends.

Reincorporation of an existing corporation is not as difficult as it may seem. When properly structured, it can be treated as a tax-free merger transaction so that all business activities remain uninterrupted.

**The lower costs following a reincorporation should be weighed against tangible factors, such as the cost of the transaction itself and state tax issues, and intangible factors, such as whether being incorporated in the same**

**state as your corporate headquarters provides you with a marketing advantage.**

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- Is Your Accounting Firms Registered With PCAOB Yet?
- Insider Trading Charges Brought Even For Small Trades

*If you would like more information on these topics or have any questions, please e-mail us at [CorporateNotes@KutakRock.com](mailto:CorporateNotes@KutakRock.com).*

### ■ SEC SETTLES ACTION FOR VIOLATION OF "GOING PRIVATE" RULES

As public companies consider "going private" in response to the increasing costs of being public, especially after Sarbanes-Oxley, a recent SEC enforcement action highlights the dangers of failing to follow carefully all the SEC rules in this area.

The SEC brought a complaint seeking civil penalties and an enforcement action against an individual in connection with alleged violations of the "going private" rules under Section 13(d) and 13(e) of the Securities Exchange Act of 1934. (<http://www.sec.gov/litigation/complaints/comp18427.htm>) According to the complaint, the individual and his wholly-owned corporation engaged in a series of transactions from May to September 2001 that increased their combined holdings in the target company from 19.1% to 56.8%. In December 2001, the individual filed a Schedule 13E-3 with the SEC to commence a "going private" transaction. The SEC alleged that the individual and his wholly-owned corporation

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failed to timely file the Schedule 13E-3 with the SEC because the filing should have been made when the stock purchases began earlier in the year. Additionally, the SEC alleged that the individual and wholly-owned corporation failed to make adequate and timely disclosures of their stock ownership on Schedules 13D.

Without admitting or denying the allegations in the complaint or the enforcement action, the individual and his wholly-owned corporation agreed to pay a fine of \$25,000 and cease and desist from violating the securities laws requiring disclosure of stock ownership and going private. In October 2003, he was finally permitted to complete his required "going private" filings with the SEC.

**While engaging in a "going private" transaction, to avoid substantial and costly delays, companies should be careful to strictly adhere to all SEC rules related to these transactions.**

## ■ PUBLIC ACCOUNTING FIRMS MUST NOW BE REGISTERED WITH PCAOB

The registration deadline recently passed for public accounting firms to register with the Public Company Accounting Oversight Board. This registration, required not later than October 22, 2003, was the first step in the implementation of auditor independence rules mandated by the Sarbanes-Oxley Act.

Some companies are seeking new audit firms in order to avoid prohibited conflicts of interest under Sarbanes-Oxley. For instance, if a company wishes to receive non-audit services from one accounting firm, it may need to obtain independent auditing services from a different firm.

**Those companies wishing to check if their current or potential accounting firm has registered with the PCAOB may check the registration list at [www.pcaobus.org/ApprovedRegistrantsList.pdf](http://www.pcaobus.org/ApprovedRegistrantsList.pdf).**

## ■ SEC BRINGS CHARGES OF INSIDER TRADING FOR SMALL TRADE

Even a small amount of profits in an illegal stock trade can trigger significant insider trading penalties. A Charlotte, NC attorney recently settled charges of trading a client's stock while possessing inside information about an upcoming merger. (<http://www.sec.gov/news/digest/dig092503.txt>) The attorney learned about the merger while assisting his colleague on merger-related employment law issues. He then bought 540 shares of the company's stock and received profits of \$4,272 after selling his shares once the merger was announced. In addition to being fired from his firm, the attorney is subject to a permanent injunction involving securities laws, must pay back \$4,272 in illicit trading profits, and must pay \$71 in prejudgment interest and a 100% civil penalty of \$4,272. **This case illustrates the SEC's willingness to investigate and prosecute any insider trading regardless of the amount of money involved.**

Kutak Rock LLP is a national law firm with more than 325 attorneys located in 16 offices throughout the United States practicing in the areas of corporate, banking and securities law, mergers and acquisitions and stock offerings, and complex commercial litigation matters.

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