

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

SEC FINES LUCENT \$25 MILLION AND CHARGES 10 WITH SECURITIES FRAUD

On May 17, 2004 Lucent Technologies, Inc. settled charges of securities fraud and also paid a \$25 million fine for its failure to cooperate with the SEC's investigation. The investigation found that Lucent improperly recognized approximately \$1.1 billion in revenue and \$470 million in pre-tax income during fiscal year 2000. The SEC also charged nine current and former Lucent executives and one other person with securities fraud and aiding and abetting the company's violations.

Actions by Lucent that triggered the fine included:

- Its tardy or incomplete delivery of documents requested by subpoenas, and failing to preserve a key document;
- Violating an agreement with the SEC not to admit or deny guilt by later stating, in an interview with a business magazine, that a \$125 million fraudulent booking of software revenue was just a "failure of communication;" and
- Failing to provide timely and full disclosure to the SEC on a key matter after being requested to do so.

Three of the persons charged have since settled with the SEC, in each case being required to pay penalties in excess of \$100,000, and the SEC expects to pursue lawsuits against the remaining persons.

The fine against Lucent for impeding the investigation, not for the fraudulent activity itself, highlights the SEC's recent policy to punish companies severely just for failing to cooperate.

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- Agencies Issue Joint Statement Concerning "Complex Structured Finance Activities"
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If you would like more information on these topics or have any questions, please e-mail us at CorporateNotes@KutakRock.com.

■ DELAWARE COURT ALLOWS BOARD TO PROMOTE MERGER BY DELAYING VOTE

In a recent court ruling, a board of directors of a Delaware company about to be acquired was allowed to postpone a stockholder meeting on the merger, and then extend the record date to accommodate a new meeting date, for the specific purpose of counting favorable votes from persons who had just recently acquired the stock. Also, the board was allowed to count favorable proxy votes that had been turned in for the earlier meeting and not revoked, even though the record date had changed. (*In re: MONY Group, Inc. Shareholder Litigation*, 4/9/04)

These are the first decisions on these two issues and significantly alter the playing field in mergers and proxy battles. In reaching the decisions, the Delaware Court of Chancery found that the directors were entitled to the protection of the "business judgment rule" (i.e., courts will not second-guess the business decisions of directors) because the directors had acted in accordance with their fiduciary duties. The board had determined that the

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merger was in the best interests of the company and its shareholders and was supported by a majority of the company's shareholders. According to the court, extending the record date was reasonable because it allowed those persons who were equity owners to vote in the merger.

The merger was subsequently approved by the shareholders on May 18 and is expected to close July 1, 2004.

Delaware courts continue to provide boards of directors with significant discretion in handling mergers and proxy fights, provided the directors can demonstrate compliance with their fiduciary duties and that their actions are in the best interests of the shareholders.

■ AGENCIES ISSUE JOINT STATEMENT CONCERNING "COMPLEX STRUCTURED FINANCE ACTIVITIES"

On May 14, five federal agencies - the OCC, the OTS, the FDIC, the SEC and the Fed - jointly issued a proposed policy statement requiring financial institutions to use sound practices when considering and engaging in complex structured finance activities. This statement was in response to the significant involvement of financial institutions in the now-notorious Enron financing deals.

Examples of financial activities that would require additional scrutiny include transactions with:

- Terms inconsistent with market norms (e.g., deep "in the money" options, non-standard settlement dates, non-standard forward-rate rolls);
- Unusually short time horizons or potentially circular transfers of risk;
- Unusual profits, losses, or transactions that give rise to compensation disproportionate for the services provided or risks assumed; and
- Multiple obligors or otherwise lacking transparency (e.g., use of SPEs or limited partnerships).

The proposed statement outlines internal controls and risk management procedures that financial institutions broker-dealers and investment advisors should use to identify and address the reputational, legal, and other risks associated with these transactions. The proposal can be found at <http://www.sec.gov/rules/policy/34-49695.htm>. Comments are due by June 18, 2004.

This new policy, while initially affecting only the larger banks and investment houses, provides an overall framework for risk management that is useful for all boards of directors.

REMINDER: ELECTRONIC FILERS MUST RENEW EDGAR PASSWORDS

Electronic filers should take steps to renew their EDGAR passwords which expire after 12 months. EDGAR passwords may be renewed through the SEC's web-based filing system using a filer's CIK number and password.

Kutak Rock LLP is a national law firm with 325 attorneys located in 15 offices throughout the United States. Our practice includes corporate, banking and federal securities law, mergers and acquisitions, bankruptcy and creditors' rights, executive compensation, and complex commercial litigation.

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