



## BUSINESS LAW SECTION

### CORPORATIONS COMMITTEE

THE STATE BAR OF CALIFORNIA

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### *ANNUAL CORPORATE DISCLOSURE STATEMENTS*

#### LEGISLATIVE PROPOSAL (BLS-2010-04)

**TO:** Office of Governmental Affairs  
**FROM:** David M. Hernand, Vice-Chair, Legislation, Corporations Committee (the "Committee"),  
Business Law Section (the "Section")  
**DATE:** July 31, 2009  
**RE:** Proposal to Amend Sections 1502.1 and 2117.1 of the California Corporations Code

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#### SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee (the "Executive Committee"): June 5, 2009  
Approval Vote:

For: 15      Against: 0

Date of Approval by Legislative Subcommittee of the Executive Committee: July 31, 2009  
Approval Vote:

For: 6      Against: 0

Date of Approval by the Committee: May 1, 2009  
Approval Vote:

For: 16      Against: 0

Date of Approval by Committee drafting subcommittee: May 1, 2009  
Approval Vote:

For: 3      Against: 0

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## **HISTORY, DIGEST AND PURPOSE**

The mission statement of the Committee provides that it shall study, consider, and take a position on and advocate that position with respect to, among other things, “[n]eeded changes to the California Corporations Code” and “[o]ther statutory changes that would promote efficiency or effectiveness in practice if made.” The Committee has concluded that it is consistent with that mission to propose amendments to Sections 1502.1 and 2117.1 of the California Corporations Code (the “Code”) that, if enacted, would clarify the disclosure requirements contained in such Code sections in a manner intended to (i) promote the consistency and comprehensiveness of the disclosures made by publicly traded corporations under such Code sections and (ii) reduce the burden imposed on publicly traded corporations doing business in California of complying with two different frameworks requiring disclosure of similar information where such reduction does not materially decrease the comprehensiveness of such disclosure.

### **History.**

Sections 1502.1 and 2117.1 of the Code currently require publicly traded corporations doing business in California to file an annual statement disclosing information concerning the corporation’s officers and directors, auditor, compensation, prior bankruptcies and legal proceedings. Section 1502.1 and 2117.1 were added by AB 1000 as an emergency measure, effective September 27, 2004 (See Stats 2004 ch 819 § 3 (AB 1000), effective September 27, 2004). Section 1 of AB 1000 states that the intent of the Legislature in passing the law was “to provide for the timely and accurate disclosure of information to the public regarding key relationships and activities of public corporations doing business in California” and to provide such critical items of information in one centralized location where the information could be located quickly and efficiently and in a manner that is readily searchable and understandable by the average consumer or investor (See Stats 2004 ch 819 § 3 (AB 1000), effective September 27, 2004).

Other than the text of Sections 1502.1 and 2117.1 and the two pages of instructions published by the Secretary of State in conjunction with the Corporate Disclosure Statement on which publicly traded corporations are required to make the disclosures required by Sections 1502.1 and 2117.1, there are no additional guidelines, instructions, rules, regulations or cases relating to either Section 1502.1 or Section 2117.1. Perhaps due to this lack of guidelines, instructions, rules, regulations and cases, no clear pattern of consistent practice has emerged in how corporations satisfy their disclosure obligations under either Section 1502.1 or Section 2117.1.

By contrast, the Federal securities laws, including the Securities Exchange Act of 1934, as amended (the “Exchange Act”), Regulation S-K of the Securities and Exchange Commission (“SEC”) promulgated under the Exchange Act (“Regulation S-K”) and various other rules and regulations promulgated by the SEC under the Exchange Act, including Rule 14a-101 (“Rule 14a-101”), impose a federal level disclosure framework on publicly traded corporations requiring disclosure of substantially all of the matters covered by Sections 1502.1 and 2117.1. Unlike

Sections 1502.1 and 2117.1, the federal framework includes a significant amount of rules, regulations, guidance, instructions and cases that can be used to assist corporations in complying with the disclosure obligations imposed by such framework. Due to the rules, regulations, guidance, instructions and cases that have developed around the federal framework, a pattern of consistent practice has emerged for how corporations can satisfy their disclosure obligations under that framework.

The need to amend Sections 1502.1 and 2117.1 of the Code arises from the following:

- It is clear from the inconsistency of the disclosures made by publicly traded corporations under Sections 1502.1 and 2117.1 that publicly traded corporations have struggled to understand and comply with their disclosure obligations under those Code sections and that this inconsistency clearly frustrates the legislative intent of AB 1000 “to provide for the timely and accurate disclosure of information to the public regarding key relationships and activities of public corporations doing business in California.” The disclosure requirements contained in Sections 1502.1 and 2117.1 should be clarified to ensure consistent and accurate disclosure.
- Since September 27, 2004, there have been numerous material changes to the Federal securities laws, including the overhaul of the executive compensation and related person disclosure rules (See SEC Release Nos. 33-8732A; 34-54302A; IC-27444A; August 29, 2006) and the implementation of the smaller reporting company regulatory relief and simplification rules (See SEC Release Nos. 33-8876; 34-56994; 39-2451; December 19, 2007). The changes to the Federal securities laws since September 27, 2004 have created an even greater divergence between the requirements of Sections 1502.1 and 2117.1 of the Code on the one hand and the disclosure scheme under the Federal securities laws on the other hand. Although the two disclosure schemes were never meant to be identical, there are ways to more closely align the two schemes so as to (i) promote the consistency and comprehensiveness of the disclosures made by publicly traded corporations under Sections 1502.1 and 2117.1 and (ii) reduce the burden imposed on publicly traded corporations doing business in California of complying with two different frameworks requiring disclosure of similar information where such reduction does not materially decrease the comprehensiveness of such disclosure.
- Certain statutory references need to be corrected and certain references need to be updated.

### **Relevant Existing Code Sections.**

***Sections 1502.1(a)(2) and 2117.1(a)(2):*** Sections 1502.1(a)(2) and 2117.1(a)(2) require that a publicly traded corporation disclose a description of “other services” performed for the corporation during its two most recent fiscal years and the period between the end of its most recent fiscal year and the date of the disclosure statement by its named independent auditor or certain of its affiliates.

**Sections 1502.1(a)(4) and 2117.1(a)(4):** Sections 1502.1(a)(4) and 2117.1(a)(4) require that a publicly traded corporation disclose the compensation for the most recent fiscal year of the corporation paid to each member of the board of directors and paid to each of the five most highly compensated executive officers of the corporation who are not members of the board of directors, including the number of any shares issued, options for shares granted, and similar equity-based compensation granted to each of those persons.

**Sections 1502.1(a)(5) and 2117.1(a)(5):** Sections 1502.1(a)(5) and 2117.1(a)(5) require that a publicly traded corporation disclose a description of any loan, including the amount and terms of the loan, made to any member of the board of directors by the corporation during the corporation's two most recent fiscal years at an interest rate lower than the interest rate available from unaffiliated commercial lenders generally to a similarly situated borrower.

**Sections 1502.1(a)(8) and 2117.1(a)(8):** Sections 1502.1(a)(8) and 2117.1(a)(8) require that a publicly traded corporation disclose a description of any material pending legal proceedings "as specified by" Item 103 of Regulation S-K and a description of any material legal proceeding during which the corporation was found legally liable by entry of a final judgment or final order that was not overturned on appeal during the five years preceding the date of the applicable disclosure statement.

**Sections 1502.1(b)(1) and 2117.1(b)(1):** Sections 1502.1(b)(1) and 2117.1(b)(1) define a "publicly traded corporation" (or in the case of Section 2117.1(b)(1), a "publicly traded foreign corporation") as a corporation (or foreign corporation), as defined in Section 162 (or 171) of the Code, that is an issuer as defined in Section 3 of the Exchange Act and has at least one class of securities listed or admitted for trading on a national securities exchange, on the National or Small Cap Markets of the NASDAQ Stock Market, on the OTC-Bulletin Board, or on the electronic service operated by Pink Sheets, LLC.

**Sections 1502.1(b)(3) and 2117.1(b)(3):** Sections 1502.1(b)(3) and 2117.1(b)(3) define "compensation" as all plan and nonplan compensation awarded to, earned by, or paid to the person for all services rendered in all capacities to the corporation and to its subsidiaries, as the compensation is specified by Item 402 of Regulation S-K.

**Sections 1502.1(b)(4) and 2117.1(b)(4):** Sections 1502.1(b)(4) and 2117.1(b)(4) define "loan" as excluding certain advances of expenses and certain payments.

## **Proposal.**

The proposed revisions to Sections 1502.1(a)(2), 1502.1(a)(4), 1502.1(a)(5), 1502.1(a)(8), 1502.1(b)(1), 1502.1(b)(3), 1502.1(b)(4), 2117.1(a)(2), 2117.1(a)(4), 2117.1(a)(5), 2117.1(a)(8), 2117.1(b)(1), 2117.1(b)(3) and 2117.1(b)(4) of the Code (the "Affected Sections") clarify the disclosure obligations contained in such sections, correct certain statutory and rule

references that need to be updated, and in some instances seek to bring such Affected Sections into closer alignment with the analogous disclosure framework under the Federal securities laws.

### **Reasons for the Proposal.**

The reason for the proposed changes is to (i) promote the consistency and comprehensiveness of the disclosures made by publicly traded corporations under Sections 1502.1 and 2117.1 of the Code and (ii) reduce the burden imposed on publicly traded corporations doing business in California of complying with two different frameworks requiring disclosure of similar information where such reduction does not materially decrease the comprehensiveness of such disclosure. In part, such consistency and comprehensiveness can be achieved simply by clarifying the language of the applicable statutory provisions. However, in several cases such consistency and comprehensiveness can also be promoted by more closely aligning the disclosure framework of Sections 1502.1 and 2117.1 of the Code with the analogous framework under the Federal securities laws.

**Sections 1502.1(a)(2) and 2117.1(a)(2):** Sections 1502.1(a)(2) and 2117.1(a)(2) require that “other services” performed for the corporation by the named independent auditor or its affiliates must be disclosed and described. It is unclear both what “other services” means and what level of description is required. Item 9(e)(1) through (e)(4) of Rule 14a-101, on the other hand, provides detailed guidance as to what type of fees and descriptions of related services must be disclosed by a corporation and how those types of fees and descriptions of related services should be categorized. Therefore, allowing publicly traded corporations to satisfy their disclosure obligations by including the information required to be disclosed under Item 9(e)(1) through (e)(4) of Rule 14a-101, the requirements of which are already familiar to publicly traded corporations, should promote increased consistency in the disclosures of publicly traded corporations under Sections 1502.1(a)(2) and 2117.1(a)(2). In addition, Item 9(e)(1) through (e)(4) of Rule 14a-101 requires greater disclosure than the disclosure currently required by Sections 1502.1(a)(2) and 2117.1(a)(2) in that it requires the amount of fees paid to the independent auditor for all services to be disclosed, which is very relevant in judging the impact that the provision of other services might have on the named auditor’s independence, a material fact for an investor. Therefore, amending Sections 1502.1(a)(2) and 2117.1(a)(2) to allow a publicly traded corporation to comply with its disclosure obligations under such sections by including the information required to be disclosed under Item 9(e)(1) through (e)(4) of Rule 14a-101 would promote both the consistency and comprehensiveness of disclosure under such sections of the Code and would even increase the level of disclosure required. By amending Sections 1502.1(a)(2) and 2117.1(a)(2) to require disclosure only as to the two most recently completed fiscal years, which period matches the disclosure period required by Item 9(e)(1) through (e)(4) of Rule 14a-101, the burden on publicly traded corporations would be reduced without materially changing the information available to the public, as the period between the end of the corporation’s most recent fiscal year and the date of the disclosure statement would be captured in the subsequent disclosure statement filed the following year.

**Sections 1502.1(a)(4) and 2117.1(a)(4):** Sections 1502.1(a)(4) and 2117.1(a)(4) currently require disclosure of compensation for the most recent fiscal year, *including* the number of any shares issued, options for shares granted, and similar equity-based compensation. The use of the word “including” is confusing to publicly traded corporations. The “compensation” to be reported is in the form of a dollar amount, while the number of shares, options or similar equity-based compensation is a non-dollar amount. This may lead to confusion as to what dollar amount should be used for reporting “compensation” (see Sections 1502.1(b)(4) and 2117.1(b)(4) below). Therefore, the proposed amendments to Sections 1502.1(a)(4) and 2117.1(a)(4) replace the word “including” with “and,” such that it is clarified that publicly traded corporations should disclose the amount of “compensation” and the number of any shares issued, options for shares granted, and similar equity-based compensation separately.

The proposed amendments would also replace the words “compensation” with “total compensation,” which along with clarifications to Sections 1502.1(b)(3) and 2117.1(b)(3), will make it clear as to what is meant by “compensation”.

In addition, with respect to the identification of executive officers for whom disclosure of compensation is required, Sections 1502.1(a)(4) and 2117.1(a)(4) may require disclosure as to executive officers for whom disclosure is not required under Federal securities laws. However, such sections may also not require disclosure as to executive officers for whom disclosure is required under Federal securities laws. A large part of this mismatch is explained by the 2006 rule changes to reform executive compensation disclosures under the Federal securities laws. As Sections 1502.1 and 2117.1 were enacted prior to such rule changes and never updated to account for such rule changes, the two disclosure frameworks have diverged further apart. As the Federal securities laws contain much more guidance and instruction in identifying the executive officers for whom compensation disclosure is required, for instance with respect to executive officers who cease to be or first become executive officers during a given fiscal year, it would bring more clarity to Section 1502.1(a)(4) and 2117.1(a)(4) and thus promote more consistency of disclosure by publicly traded corporations under these sections to align the process for identifying executive officers for whom compensation disclosure is required with the process set forth under the Federal securities laws. These proposed amendments would also reduce the burden on publicly traded corporations who currently have to identify, calculate and disclose compensation for one set of executive officers under the Federal securities laws and a potentially different set of executive officers under Sections 1502.1(a)(4) and 2117.1(a)(4).

**Sections 1502.1(a)(5) and 2117.1(a)(5):** Sections 1502.1(a)(5) and 2117.1(a)(5) require that a publicly traded corporation disclose a description of any loan, including the amount and terms of the loan, made to any member of the board of directors by the corporation during the corporation’s two most recent fiscal years at an interest rate lower than the interest rate available from unaffiliated commercial lenders generally to a similarly situated borrower. There is no additional guidance or instructions as to what constitutes a “loan” (other than the definition of “loan” contained in Sections 1502.1(b)(4) and 2117.1(b)(4)), how a publicly traded corporation determines whether an interest rate is lower than the interest rate available from unaffiliated commercial lenders generally to a similarly situated borrower, and what information about any

such loan the corporation should describe in its disclosure statement. By contrast, Item 404(a) (or 404(d)(1) for smaller reporting companies) of Regulation S-K contains specific instructions and guidance as to when and how certain loans to directors must be disclosed. Publicly traded corporations and their advisers are quite well versed in complying with the disclosure obligations under Item 404(a) (or 404(d)(1)) of Regulation S-K, so amending Sections 1502.1(a)(5) and 2117.1(a)(5) to require the same descriptions as required by such Items should create greater consistency and comprehensiveness in disclosure.

**Sections 1502.1(a)(8) and 2117.1(a)(8):** Sections 1502.1(a)(8) and 2117.1(a)(8) require that a publicly traded corporation disclose any material pending legal proceedings as specified in Item 103 of Regulation S-K and a description of any material legal proceeding during which the corporation was found legally liable by entry of a final judgment or final order that was not overturned on appeal during the five years preceding the date of the applicable disclosure statement. The proposed amendments would clarify that the reference to “as specified by” Item 103 of Regulation S-K means “of a type that would be required to be disclosed under” Item 103 of Regulation S-K. This would make clear to publicly traded corporations that they are required to disclose any material legal proceedings that are required to be disclosed under Item 103 of Regulation S-K, including the instructions and guidance related thereto. Additionally, the proposed amendments fix a statutory reference to Title 12 of the Code of Federal Regulations which should be to Title 17 of the Code of Federal Regulations. Last, in order to decrease the administrative burden of these Code sections, the proposed amendments would require disclosure of material legal proceedings during which the corporation was found legally liable and that were not overturned on appeal “during the fiscal year covered by the statement” rather than the “five years preceding the date of the statement.” The proposed formulation would conform the disclosure period in Sections 1502.1(a)(8) and 2117.1(a)(8) with the disclosure requirements of Federal securities laws. Moreover, while a five year disclosure period may have been useful disclosure when Sections 1502.1 and 2117.1 were first enacted, the prior five years of disclosure statements are now readily available to members of the public for their review via the searchable database on the Secretary of State’s website. Therefore, this proposed amendment would not frustrate the legislative intent behind AB 1000 to provide certain critical items of information in one centralized location where the information can be located quickly and efficiently.

**Sections 1502.1(b)(1) and 2117.1(b)(1):** The proposed amendments to Section 1502.1(b)(1) and 2117.1(b)(1) are meant to update and correct references to Pink Sheets, LLC and National or Small Cap Markets of the NASDAQ Stock Market which are no longer correct. On August 9, 2007, the Commissioner of Corporations for the State of California (the “Commissioner”) promulgated Commissioner’s Release 87-C, pursuant to which the Commissioner certified the NASDAQ Global Market (successor to the National Market) of the NASDAQ Stock Market LLC as a national securities exchange pursuant to subdivision (o) of California Corporations Code Section 25100. Therefore, the references to National or Small Cap Markets of the NASDAQ Stock Market in Sections 1502.1(b)(1) and 2117.1(b)(1) are redundant with the reference to “national securities exchange” and can be removed. Additionally, Pink Sheets, LLC is now known as Pink OTC Markets, Inc.

**Sections 1502.1(b)(3) and 2117.1(b)(3):** The definition of “compensation” in Sections 1502.1(b)(3) and 2117.1(b)(3) provides that “compensation” to be disclosed should be all plan and nonplan compensation awarded to, earned by, or paid to the person for all services rendered in all capacities to the corporation and to its subsidiaries, “as specified by” Item 402 of Regulation S-K. The ambiguity of the current statutory language is illustrated by the wide and varied practice of publicly traded corporations in making disclosures under these sections of the Code. It would promote greater consistency in such practice by clarifying the definition of “compensation” to be “total compensation” as required to be disclosed under Item 402(c)(2)(x) (for executive officers) and Item 402(k)(2)(viii) (for directors), or Item 402(n)(2)(x) and Item 402(r)(2)(viii) in the case of smaller reporting companies. Publicly traded corporations would then understand that they are required to report the “total compensation” as determined in accordance with the foregoing Items.

**Sections 1502.1(b)(4) and 2117.1(b)(4):** Sections 1502.1(b)(4) and 2117.1(b)(4) define “loan” as excluding certain advances of expenses. There is no guidance in the Code or otherwise as to what constitutes a “loan” other than the definition which indicates that it excludes certain advances of expenses and payments. The proposed amendments would promote the consistency of disclosure by defining “loan” as indebtedness required to be disclosed under Item 404(a) (or 404(d)(1) in the case of smaller reporting companies) of Regulation S-K. While in some ways this may narrow the disclosure obligations of publicly traded corporations, for instance by incorporating the \$120,000 immateriality threshold contained in Item 404(a), use of the term “indebtedness” could broaden the disclosure obligations in other respects. Nonetheless, it is likely that the consistency and comprehensiveness of disclosure would be greatly increased by more closely aligning the definition of “loan” with the definition of “indebtedness” under the Federal securities laws.

#### **APPLICATION**

If adopted, the proposed amendments to the Affected Sections described above would become effective January 1, 2011.

#### **PENDING LITIGATION**

None to our knowledge.

#### **LIKELY SUPPORT AND OPPOSITION**

We anticipate that the proposed amendments to the Affected Sections described above would receive unanimous support of California corporations, foreign corporations operating in California, investors and corporate law practitioners, while also satisfying concerns of persons and groups seeking to promote investor protection.

## FISCAL IMPACT

No negative fiscal impact is expected. The proposed amendments would potentially require minor changes to the form and instructions distributed by the Secretary of State for use by publicly traded corporations in fulfilling their disclosure obligations under Sections 1502.1 and 2117.1.

## GERMANENESS

The subject matter of the proposed amendments of the Affected Sections are ones in which the members of the Section (and, in particular, the members of the Committee) have special expertise because they are called upon to interpret provisions of the Code and provide guidance on California securities law matters. The subject matter requires the special knowledge, training, experience and technical expertise of the Section.

## TEXT OF PROPOSAL

SECTION 1. Section 1502.1 of the Corporations Code is amended to read:

(a) In addition to the statement required pursuant to Section 1502, every publicly traded corporation shall file annually, within 150 days after the end of its fiscal year, a statement, on a form prescribed by the Secretary of State, that includes all of the following information:

(1) The name of the independent auditor that prepared the most recent auditor's report on the corporation's annual financial statements.

(2) A description of other services, if any, performed for the corporation during its two most recently *completed* fiscal years ~~and the period between the end of its most recent fiscal year and the date of the statement~~ by the foregoing independent auditor, by its parent corporation, or by a subsidiary or corporate affiliate of the independent auditor or its parent corporation. *A publicly traded corporation will be deemed to satisfy the requirements of this paragraph (2) if it includes the information required to be disclosed pursuant to Item 9(e)(1) through (e)(4) of Rule 14a-101 (Section 240.14a-101 of Title 17 of the Code of Federal Regulations) promulgated under the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), as that rule may be amended from time to time.*

(3) The name of the independent auditor employed by the corporation on the date of the statement, if different from the independent auditor listed pursuant to paragraph (1).

(4) The *total* compensation for the most recent fiscal year of the corporation paid to each member of the board of directors and paid to each of the five most highly compensated executive officers of the corporation who are not members of the board of directors, ~~including and~~ the number of any shares issued, options for shares granted, and similar equity-based compensation granted to each of those persons. If the chief executive officer is not among the five most highly

compensated executive officers of the corporation, the compensation paid to the chief executive officer shall also be included. *A publicly traded corporation will be deemed to satisfy the requirements of this paragraph (4) with respect to executive officers if it includes the total compensation for the most recent fiscal year of the corporation paid to each of the executive officers for whom the publicly traded corporation reports compensation for the most recent fiscal year pursuant to Items 402(a)(3) or 402(m)(2), as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.402 of Title 17 of the Code of Federal Regulations), as that regulation may be amended from time to time, and the number of any shares issued, options for shares granted, and similar equity-based compensation granted to each of those persons.*

(5) A description of any loan, ~~including the amount and terms of the loan,~~ made to any member of the board of directors by the corporation during the corporation's two most recent fiscal years. ~~at an interest rate lower than the interest rate available from unaffiliated commercial lenders generally to a similarly-situated borrower.~~ *A publicly traded corporation will be deemed to satisfy the requirements of this paragraph (5) if it includes the information with respect to any loan required to be disclosed under Items 404(a) or 404(d)(1), as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.404 of Title 17 of the Code of Federal Regulations), as that regulation may be amended from time to time.*

(6) A statement indicating whether an order for relief has been entered in a bankruptcy case with respect to the corporation, its executive officers, or members of the board of directors of the corporation during the 10 years preceding the date of the statement.

(7) A statement indicating whether any member of the board of directors or executive officer of the corporation was convicted of fraud during the 10 years preceding the date of the statement, if the conviction has not been overturned or expunged.

(8) A description of any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the corporation or any of its subsidiaries is a party or of which any of their property is the subject, ~~as specified by~~ *of a type that would be required to be disclosed under* Item 103 of Regulation S-K of the Securities Exchange Commission (Section 229.103 of Title ~~12-17~~ of the Code of Federal Regulations), *as that regulation may be amended from time to time.* A description of any material legal proceeding during which the corporation was found legally liable by entry of a final judgment or final order that was not overturned on appeal during the ~~five fiscal years preceding the date of~~ *covered by* the statement.

(b) For purposes of this section, the following definitions apply:

(1) "Publicly traded corporation" means a corporation, as defined in Section 162, that is an issuer as defined in Section 3 of the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), and has at least one class of securities listed ~~or admitted for trading~~ on a national securities exchange, ~~on the National or Small Cap Markets of the NASDAQ Stock Market,~~

~~on~~ *or that is quoted on* the OTC-Bulletin Board, or on the electronic *quotation* service operated by ~~Pink Sheets, LLC Pink OTC Markets, Inc.~~

(2) "Executive officer" means the chief executive officer, president, any vice president in charge of a principal business unit, division, or function, any other officer of the corporation who performs a policymaking function, or any other person who performs similar policymaking functions for the corporation.

(3) "*Total Compensation*" as used in paragraph (4) of subdivision (a) means all plan and nonplan compensation awarded to, earned by, or paid to the person for all services rendered in all capacities to the corporation and to its subsidiaries, as ~~the compensation is specified by would be required to be disclosed under~~ Items 402(c)(2)(x) or 402(n)(2)(x), as applicable, in the case of executive officers of the corporation, and Items 402(k)(2)(viii) or 402(r)(2)(viii), as applicable, in the case of members of the board of directors of the corporation, of Regulation S-K of the Securities and Exchange Commission (Section 229.402 of Title 17 of the Code of Federal Regulations), *as that regulation may be amended from time to time.*

(4) "Loan" as used in paragraph (5) of subdivision (a) ~~excludes an advance for expenses permitted under subdivision (d) of Section 315, the corporation's payment of life insurance premiums permitted under subdivision (e) of Section 315, and an advance of expenses permitted under Section 317 means indebtedness that would be required to be disclosed under~~ Items 404(a) or 404(d)(1), as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.404 of Title 17 of the Code of Federal Regulations), *as that regulation may be amended from time to time.*

(c) This statement shall be available and open to the public for inspection. The Secretary of State, not later than December 31, 2004, shall provide access to all information contained in this statement by means of an online database.

(d) A corporation shall certify that the information it provides pursuant to this section is true and correct. No claim may be made against the state for inaccurate information contained in statements filed under this section with the Secretary of State.

SECTION 2. Section 2117.1 of the Corporations Code is amended to read:

(a) In addition to the statement required pursuant to Section 2117, every publicly traded foreign corporation shall file annually, within 150 days after the end of its fiscal year, on a form prescribed by the Secretary of State, a statement that includes all of the following information:

(1) The name of the independent auditor that prepared the most recent auditor's report on the publicly traded foreign corporation's annual financial statements.

(2) A description of other services, if any, performed for the publicly traded foreign corporation during its two most recently *completed* fiscal years ~~and the period between the end of its most recent fiscal year and the date of the statement~~ by the foregoing independent auditor, by its parent corporation, or by a subsidiary or corporate affiliate of the independent auditor or its parent corporation. *A publicly traded foreign corporation will be deemed to satisfy the requirements of this paragraph (2) if it includes the information required to be disclosed pursuant to Item 9(e)(1) through (e)(4) of Rule 14a-101 (Section 240.14a-101 of Title 17 of the Code of Federal Regulations) promulgated under the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), as that rule may be amended from time to time.*

(3) The name of the independent auditor employed by the foreign corporation on the date of the statement, if different from the independent auditor listed pursuant to paragraph (1).

(4) The *total* compensation for the most recent fiscal year of the publicly traded foreign corporation paid to each member of the board of directors and paid to each of the five most highly compensated executive officers of the foreign corporation who are not members of the board of directors, ~~including and~~ the number of any shares issued, options for shares granted, and similar equity-based compensation granted to each of those persons. If the chief executive officer is not among the five most highly compensated executive officers of the corporation, the compensation paid to the chief executive officer shall also be included. *A publicly traded foreign corporation will be deemed to satisfy the requirements of this paragraph (4) with respect to executive officers if it includes the total compensation for the most recent fiscal year of the foreign corporation paid to each of the executive officers for whom the foreign corporation reports compensation for the most recent fiscal year pursuant to Items 402(a)(3) or 402(m)(2), as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.402 of Title 17 of the Code of Federal Regulations), as that regulation may be amended from time to time, and the number of any shares issued, options for shares granted, and similar equity-based compensation granted to each of those persons.*

(5) A description of any loan, ~~including the amount and terms of the loans,~~ made to any member of the board of directors by the publicly traded foreign corporation during the foreign corporation's two most recent fiscal years. ~~at an interest rate lower than the interest rate available from unaffiliated commercial lenders generally to a similarly situated borrower.~~ *A publicly traded foreign corporation will be deemed to satisfy the requirements of this paragraph (5) if it includes the information with respect to any loan required to be disclosed under Items 404(a) or 404(d)(1), as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.404 of Title 17 of the Code of Federal Regulations), as that regulation may be amended from time to time.*

(6) A statement indicating whether an order for relief has been entered in a bankruptcy case with respect to the foreign corporation, its executive officers, or members of the board of directors of the foreign corporation during the 10 years preceding the date of the statement.

(7) A statement indicating whether any member of the board of directors or executive officer of the publicly traded foreign corporation was convicted of fraud during the 10 years preceding the date of the statement, which conviction has not been overturned or expunged.

(8) A description of any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the corporation or any of its subsidiaries is a party or of which any of their property is the subject, ~~as specified by~~ *of a type that would be required to be disclosed under* Item 103 of Regulation S-K of the Securities Exchange Commission (Section 229.103 of Title ~~12-17~~ of the Code of Federal Regulations), *as that regulation may be amended from time to time*. A description of any material legal proceeding during which the corporation was found legally liable by entry of a final judgment or final order that was not overturned on appeal during the ~~five fiscal years preceding the date of~~ *covered by* the statement.

(b) For purposes of this section, the following definitions apply:

(1) "Publicly traded foreign corporation" means a foreign corporation, as defined in Section 171, that is an issuer as defined in Section 3 of the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), and has at least one class of securities listed ~~or admitted for trading~~ on a national securities exchange, ~~on the National or Small Cap Markets of the NASDAQ Stock Market, on or that is quoted on~~ the OTC-Bulletin Board, or on the electronic *quotation* service operated by ~~Pink Sheets, LLC~~ *Pink OTC Markets, Inc.*

(2) "Executive officer" means the chief executive officer, president, any vice president in charge of a principal business unit, division, or function, any other officer of the corporation who performs a policymaking function, or any other person who performs similar policymaking functions for the corporation.

(3) "*Total Compensation*" as used in paragraph (4) of subdivision (a) means all plan and nonplan compensation awarded to, earned by, or paid to the person for all services rendered in all capacities to the corporation and to its subsidiaries, as ~~the compensation is specified by~~ *would be required to be disclosed under* Items 402(c)(2)(x) or 402(n)(2)(x), *as applicable, in the case of executive officers of the corporation, and* Items 402(k)(2)(viii) or 402(r)(2)(viii), *as applicable, in the case of members of the board of directors of the corporation,* of Regulation S-K of the Securities and Exchange Commission (Section 229.402 of Title 17 of the Code of Federal Regulations), *as that regulation may be amended from time to time.*

(4) "Loan" as used in paragraph (5) of subdivision (a) ~~excludes an advance for expenses, the foreign corporation's payment of life insurance premiums, and an advance of litigation expenses, in each instance as permitted according to the applicable law of the state or place of incorporation or organization of the foreign corporation~~ *means indebtedness that would be required to be disclosed under* Items 404(a) or 404(d)(1), *as applicable, of Regulation S-K of the Securities and Exchange Commission (Section 229.404 of Title 17 of the Code of Federal Regulations), as that regulation may be amended from time to time.*

(c) This statement shall be available and open to the public for inspection. The Secretary of State, not later than December 31, 2004, shall provide access to all information contained in this statement by means of an online database.

(d) A foreign corporation shall certify that the information it provides pursuant to this section is true and correct. No claim may be made against the state for inaccurate information contained in statements filed under this section with the Secretary of State.