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CNET and *Office Depot*: Precision Drafting Needed for Advance Notice Bylaws

BY DANIEL S. STERNBERG AND MATTHEW P. SALERNO 2

Two recent Delaware Chancery Court opinions, *Jana Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt Corp. v. Office Depot*, ruled in favor of stockholder activists seeking to nominate directors in order to wage proxy fights and as a result corporations should reconsider their bylaw provisions to ensure that management has sufficient notice and opportunity to respond to shareholder nominations and proposals.

Treasury Proposes Changes to the Regulations Governing Exon-Florio "National Security" Reviews of Foreign Investment in the United States

BY PAUL D. MARQUARDT, W. RICHARD BIDSTRUP AND NATHANIEL F. STANKARD 4

The Foreign Investment and National Security Act of 2007 ("*FINSA*") amended the existing legislation dealing with national security reviews of foreign investment in the United States, commonly known as Exon-Florio. On April 21, 2008, the U.S. Department of the Treasury proposed new regulations to implement FINSA that include significant changes to the current review process, but do not expand the scope of reviews to the extent many predicted.

Wash Sales: Considerations in Grant Practices and Forced Sales to Avoid Causing Delay of Employee Loss Deductions

BY KATHLEEN M. EMBERGER AND CAROLINE F. HAYDAY 7

IRS "wash sales" rules designed to prevent tax manipulation by a taxpayer who attempts to recognize a loss while maintaining an identical or nearly identical investment position demand critical attention in the employment context because an employer may inadvertently subject its employees to the rules, and cause an employee's loss recognition to be delayed, even where the employee has no knowledge of or control over the triggering event.

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CNET and *Office Depot*: Precision Drafting Needed for Advance Notice Bylaws

BY DANIEL S. STERNBERG AND MATTHEW P. SALERNO

Mr. Sternberg is a partner and Mr. Salerno is an associate at Cleary Gottlieb Steen & Hamilton LLP.

Two recent Delaware Chancery Court opinions, favoring stockholder activists seeking to nominate directors in order to wage proxy fights, have corporations turning urgent attention to their bylaw provisions that set out the procedures and advance notice required for shareholder nominations and proposals. At issue in both cases were particular advance notice bylaw provisions with variations from more customary formulations that proved to be fatally flawed.

In *Jana Master Fund, Ltd. v. CNET Networks, Inc.*,[1] the court found that CNET's bylaws required advance notice of only those proposals that a stockholder seeks to include in management's proxy statement pursuant to Exchange Act Rule 14a-8 and did not require advance notice of proposals to be included in a stockholder's independently produced proxy materials.[2] In reaching this conclusion, the court relies on three key facts:

- First, the court focuses on language in the advance notice bylaw that references the bylaw's applicability to occasions when stockholders "may *seek* to transact" business at an annual meeting of stockholders. The court construes this language as limiting the advance notice bylaw to Rule 14a-8 proposals, because only in the context of Rule 14a-8 do shareholders "seek" to include nominations or proposals in management's proxy, in contrast to all other scenarios in which stockholders simply "make" a proposal.
- Second, the court focuses on the deadline for the giving of advance notice, which the CNET bylaw tied to the date of release of its annual proxy statement, rather than to the date of the company's previous or upcoming annual meeting, which is the more customary (although far from universal) formulation.[3] The court explained that the most reasonable explanation for this requirement in CNET's bylaws was to allow management time to include the stockholder proposal in its own proxy materials.
- Finally, and in the court's view, most persuasively, the CNET bylaw required the stockholder's notice to comply "with any applicable federal securities laws establishing the circumstances under which [CNET] would be required to include the proposal in its proxy statement or form of proxy." Ultimately the court found that this sentence was intended to limit the scope of the entire advance bylaw provision.

The CNET opinion was affirmed by the Delaware Supreme Court on May 13, 2008 on the basis of the lower court's opinion.

In the second opinion, *Levitt Corp. v. Office Depot*,[4] a dissident shareholder filed a proxy statement seeking to elect two directors to the board of Office Depot without giving any advance notice of the nominations to the company, although the company's bylaws contained a provision requiring advance notice for a shareholder to bring "business" before the annual meeting. The Vice-Chancellor held that no advance notice was required. He noted that, although earlier versions of Office Depot's bylaws expressly required advance notice of director nominations, Office Depot's current bylaws required advance notice of only "business" to be conducted at an annual meeting. While the court accepted Office Depot's contention that the term "business" should be construed broadly and includes the *election* of directors at an annual meeting, the court held that Office Depot, in its notice of annual meeting, had in fact brought the "business" of electing directors before the meeting. In the absence of specific guidance on the nomination process in either Office Depot's bylaws or the Delaware general corporation law, the court stated that it could not find any compelling reason why the "business" of electing directors should not also include the subsidiary business of nominating directors. As a result, Office Depot, having already brought the business of electing directors (and the subsidiary business of nominating directors) before the meeting, could not prevent Levitt from presenting its nominees for election at the meeting.

Although both opinions involved somewhat unusual advance notice provisions, each indicates that the Chancery Court is wary of interpreting such bylaws so as to limit the right of shareholders to make nominations. In light of this guidance, corporations and their counsel should review the language of their advance notice bylaws to be sure that the language is clear and unambiguous, as any ambiguity risks being subject to a narrow (and possibly

unintended) construction that favors the right of shareholders to nominate directors.

Bylaws should separately and clearly describe the procedures that stockholders must follow in order:

- to nominate directors for office,
- to make shareholder proposals, and
- if desired, to seek inclusion of proposals in management's proxy materials under Rule 14a-8.

These bylaw provisions should be sufficiently separate to avoid any confusion as to which procedure must be followed in any particular circumstance. Advance notice bylaws should also clearly specify that no one may be elected as a director of the corporation and no business may be considered at a meeting of stockholders unless the director was nominated, or the proposal had been submitted, in accordance with the relevant provisions of the corporation's bylaws.

It is not uncommon for advance notice bylaws to require nominating shareholders, as a prerequisite of a valid nomination, to provide the company with specified information about themselves and their nominees, frequently incorporating by reference information called for by the disclosure requirements of the federal proxy rules. One clear lesson from the *CNET* decision is that, when incorporating the federal proxy rules by reference, drafters should be careful to avoid the unintended implication that such incorporation by reference is intended to limit the scope of the bylaw to Rule 14a-8 proposals. Moreover, in addition to fixing the possible flaws pointed out by the *CNET* and *Office Depot* cases, a number of corporations have recently amended their advance notice bylaws to supplement the disclosures required by the federal proxy rules by including a requirement that the proposing or nominating stockholder disclose any derivative, hedge or short positions held by them or their director nominees relating to the company's securities. We expect that this trend toward increasing the information required of nominating shareholders is likely to continue for the foreseeable future.

Advance notice bylaws serve an important role in corporate governance—they permit orderly meetings and election contests and provide a company's management fair warning so that the corporation can appropriately and adequately respond to stockholder proposals and nominations. *CNET* and *Office Depot* serve as a reminder to corporations and their counsel that shareholders considering nominations and the courts will closely scrutinize advance notice bylaws and that, if advance notice bylaws are not crafted with appropriate care and precision to be clear and reasonable, a corporation and its other shareholders may be without the protection of the advance notice bylaw when they need it most.

* * *

1 2008 WL 660556 (Del. Ch. March 13, 2008), aff'd 2008 WL 2031337 (Del. Supr. May 13, 2008).

2 The CNET Bylaw also included a provision limiting the ability to make proposals or nominations to shareholders who had owned at least $1,000 of stock for at least a year (similar to restrictions found in Rule 14a-8). The nature of the court's analysis did not give it an opportunity to consider the validity of such restrictions in an advance notice bylaw.

3 The CNET court noted that it could not find a single example of a "permissible" advance notice bylaw that set the deadline for the required notice by reference to the release of the company's proxy statement. Although such bylaw provisions are not, in fact, uncommon, this bit of dictum may be an indication that they would be considered unreasonable if subjected to judicial scrutiny.

4 2008 WL 1724244 (Del. Ch. April 4, 2008).

Treasury Proposes Changes to the Regulations Governing Exon-Florio "National Security" Reviews of Foreign Investment in the United States

BY PAUL D. MARQUARDT, W. RICHARD BIDSTRUP AND NATHANIEL F. STANKARD

Mr. Marquardt is a partner, Mr. Bidstrup is counsel and Mr. Stankard is an associate at Cleary Gottlieb Steen & Hamilton LLP.

On April 21, 2008, the Department of the Treasury issued new proposed regulations (the "*Proposed Regulations*") implementing the Exon-Florio amendments to the Defense Production Act of 1950 (50 U.S.C. App. § 2170) ("*Exon-Florio*"), as recently amended by the Foreign Investment and National Security Act of 2007 ("*FINSA*").[1] The good news for foreign acquirors is that the Proposed Regulations – the most significant amendment to the regulations since their initial promulgation in 1991 – do not go as far as many had feared in expanding the review of foreign acquisitions of U.S. businesses by the Committee on Foreign Investment in the United States ("*CFIUS*"). Notification remains voluntary; only acquisitions of "control" are subject to notification, and not every acquisition of control will raise national security issues. Some of the recent alarmist predictions of radically expanded CFIUS reviews have been overblown.

However, while the Proposed Regulations retain the essential structure of current CFIUS reviews, they also expand the scope and nature of such reviews in limited but important ways. The key considerations for parties to foreign investment transactions in the United States are as follows:

- The Proposed Regulations reaffirm in clear terms that CFIUS notification remains voluntary and that acquisitions of influence short of "control" by a foreign entity are not subject to Exon-Florio. However, the Proposed Regulations also stress that "control" remains a flexible concept to be determined in light of all the facts and circumstances (including formal and informal governance arrangements in addition to formal ownership interests) and that there is no bright-line test for whether control exists.
- Furthermore, the Proposed Regulations explicitly expand the definition of "control" in two key ways: first, "control" now includes the power to block key corporate decisions as well as the affirmative power to determine the matters in question; and second, the list of key corporate decisions implicating "control" has been significantly expanded to include a number of matters commonly subject to super-majority voting.[2] As a result, relatively standard shareholders' and joint venture agreements could result in "control" for purposes of Exon-Florio, potentially subjecting the investment (or investments by the "controlled" company) to CFIUS review. In addition, minority investors could be deemed to "control" a company they invest in if they obtain certain market-standard minority rights intended solely to protect their economic interests – *e.g.*, limits on company indebtedness, removal of key personnel or material acquisitions and dispositions.
- The definition of "transactions" subject to Exon-Florio has also been expanded, most notably by including the acquisition of convertible interests that are exercisable by a foreign person without any conditions beyond that person's control other than the passage of time. For example, the acquisition of warrants exercisable in two years (or out-of-the-money options) that, if exercised, would give the holder sufficient votes to block key corporate decisions is an immediate acquisition of "control" for Exon-Florio purposes, no matter how remote the economic terms of the warrants or situation of the issuer might make their exercise. Proxy contests that, if successful, would result in control over a U.S. business and the contribution of an existing U.S. business to a joint venture over which a foreign person can exercise control are also expressly made subject to Exon-Florio.
- The treatment of lending transactions is not entirely clear. The Proposed Regulations clearly state that rights acquired by a lender upon default (for example, a security interest in the shares of a borrower) may be notified only if a default has occurred or is imminent, and the Proposed Regulations give an example in which a requirement in a loan agreement not to dispose of the assets of the borrower (one of the corporate decisions listed in the definition of "control") does not result in "control" by the lender. However, the Proposed Regulations do not explicitly address the treatment of loans that include extensive negative pledge clauses requiring lender approval for a wider range of corporate decisions – *e.g.*, limitations on capital expenditures, changes in control, material acquisitions of assets, changes in

lines of business, the incurrence of additional debt – that may have a fundamental effect on the corporate or capital structure of the borrower. Under the Proposed Regulations, the uncertain treatment of these lender protections – common in merchant banking or private equity transactions – could increase the regulatory risks for foreign lenders seeking routine protections in *bona fide* lending transactions. Furthermore, foreign lenders could face uncertainty as to whether and on what terms they will be permitted to execute upon the assets of a secured borrower that defaults.

- The Proposed Regulations retain the safe harbor for purely passive investments of less than 10 percent of the voting interest in a U.S. entity, but they stress two features of the existing safe harbor that are often misunderstood. First, the safe harbor does not apply when any governance rights (*e.g.*, a directorship) are obtained with the equity stake or when the acquiror intends to acquire control at a later time. Second (and equally important), the fact that an investment falls outside the safe harbor does not automatically mean that it is subject to Exon-Florio. An acquisition of "control" is still required.
- The definition of "foreign person" has been expanded to include any entity organized under the laws of a foreign jurisdiction that is more than 50 percent beneficially owned by foreign persons. Although this provision was intended to more clearly capture publicly held foreign companies not "controlled" by any foreign individual, it has the perhaps unintended effect of making acquisitions by offshore investment vehicles (such as limited partnerships) that are fully controlled by U.S. entities, but more than 50 percent beneficially owned by foreign persons, subject to Exon-Florio. Even with lower levels of beneficial ownership by foreign persons, the typical minority protections afforded such persons in investment vehicles (even those organized in the United States) may be viewed as creating "control" under Exon-Florio.
- Consistent with the requirements of FINSA, an extended 45-day investigation of acquisitions by entities controlled by foreign governments is <u>not</u> made mandatory; however, a decision that no such investigation is required must be approved at the Deputy Secretary level by the Treasury Department and the lead agency or agencies reviewing a notification.
- The Proposed Regulations clarify the concepts of "critical infrastructure" and "critical technologies" that are the subject of increased CFIUS scrutiny under FINSA. A transaction involves "critical infrastructure" if the incapacity or destruction of the particular assets involved in the transaction would have a debilitating impact on national security – a much narrower definition than many had assumed. "Critical technologies" are defined by reference to certain technologies with military applications regulated under the export control, arms control or nuclear regulatory laws.
- The information required to be provided in an Exon-Florio notification has been expanded significantly and the timetable for review has become less certain. Notifications now must include details such as market shares and downstream users of the products in question. Consistent with recent CFIUS practice, detailed information on the chain of ownership of the foreign acquiror and personal identifying information of officers and directors of acquiring entities is also required. CFIUS's ability to reject a filing and re-start the 30-day review period has been significantly expanded, most notably by enabling CFIUS to reject a filing at any time if the parties do not respond within two business days to any request for additional information from CFIUS (though CFIUS may agree to extend that deadline). CFIUS now also formally encourages the practice of submitting a draft notification one week in advance of the anticipated official notification date.
- Enforcement of mitigation agreements with CFIUS has been clarified, providing that any material violation of an agreement voids CFIUS approval, may result in civil penalties, and may (if provided in the relevant agreement) require the payment of significant liquidated damages to the government.

The Proposed Regulations retain the basic structure of CFIUS notifications, codifying and clarifying practices that have developed over the years. Moreover, by largely implementing the current practice – and, more importantly, by conspicuously failing to adopt some of the more sweeping requirements that some have suggested could or would be implemented – the Proposed Regulations will not fundamentally change the nature of the CFIUS review process or the basic calculus of the decision as to whether to submit a voluntary notification. Although in recent years it has become clear that national security reviews extend well beyond the defense industry to sectors such as energy, telecommunications, and transportation, the Proposed Regulations have not further expanded that scope.

Nevertheless, while the Proposed Regulations' updating and clarification of CFIUS's jurisdictional analysis is welcome, it also

remains the case that there are few bright lines and little detailed guidance on whether particular transactions should be notified, and balancing the political and administrative risks of notification in particular cases will remain a challenge for foreign acquirors in a broad range of industries outside the defense sector. Although outright prohibitions of transactions appear destined to remain rare, the Proposed Regulations signal that the recent evolution of more stringent reviews (particularly of acquisitions by foreign government-controlled entities), more burdensome mitigation agreements, and CFIUS involvement in a variety of "national infrastructure" industries such as telecommunications, energy, and transportation will likely remain in place (although not to continue expanding to the extremes predicted by some). Certain provisions in the Proposed Regulations, particularly the treatment of minority protection rights, lender consents and new filing requirements, could also impose significant practical burdens on parties to cross-border acquisitions if not refined in the final rules.

The issues raised in the public comment period (which ended June 9) and any changes made in the final regulations, which will not be issued for an indeterminate time, may clarify or mitigate some of these issues or shed additional light on the current state of CFIUS practice. In the meantime, the Proposed Regulations serve as a useful guide to CFIUS's current views and practices under the existing regulations.

* * *

1 *See M&A and Corporate Governance Report*, March 2007, for a summary of the CFIUS process and FINSA. For a detailed discussion of FINSA, see Cleary Gottlieb's alert memo "Congress Tightens Exon-Florio 'National Security' Reviews of Foreign Investment in the United States," July 12, 2007.

2 As set forth in Section 800.203(a) of the Proposed Regulations, the list now includes: (i) the sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of an entity, whether or not in the ordinary course of business; (ii) the reorganization, merger, or dissolution of an entity; (iii) the closing, relocation, or substantial alteration of the production, operational, or research and development facilities of an entity; (iv) major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of an entity; (v) the selection of new business lines or ventures that an entity will pursue; (vi) the entry into, termination, or non-fulfillment by an entity of significant contracts; (vii) the policies or procedures of an entity governing the treatment of nonpublic technical, financial, or other proprietary information of the entity; (viii) the appointment or dismissal of officers or senior managers; (ix) the appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or (x) the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in items (i) through (ix).

Wash Sales: Considerations in Grant Practices and Forced Sales to Avoid Causing Delay of Employee Loss Deductions

BY KATHLEEN M. EMBERGER AND CAROLINE F. HAYDAY

Ms. Emberger is counsel and Ms. Hayday is an associate at Cleary Gottlieb Steen & Hamilton LLP.

Pursuant to Section 1091 of the Internal Revenue Code of 1986, as amended (the "*Code*"), taxpayers are prohibited from deducting a loss sustained upon the sale or other disposition of stock or securities if, within the 61-day period beginning thirty days prior to, and ending thirty days following, the date of such sale or disposition, the taxpayer acquires, or enters into a contract or option to acquire, stock or securities substantially identical to those sold or otherwise disposed of.[1] These rules, referred to more commonly as the "wash sale" rules, are "designed to prevent tax manipulation by a taxpayer who attempts to recognize a loss while maintaining an identical or nearly identical investment position."[2] In the employment context, these rules may create unexpected consequences for employees.

If the wash sale rules apply to a purchase and sale of securities, the loss is deferred and the basis of the newly acquired securities is the basis of the sold securities, plus the difference (positive or negative) between the cost of the newly acquired securities and the amount realized from the sale of the sold securities.[3] Furthermore, the holding period of the sold securities is tacked on to the holding period of the newly acquired securities. Although in theory the rules operate to defer (*i.e.*, to prohibit only the immediate use of) the loss, in reality, the taxpayer, who will likely be unaware of the disallowance until a subsequent year, may find the loss is either no longer valuable to him or no longer exists because the shares have appreciated in value.

In theory, the rules may seem straightforward: to determine whether a wash sale has occurred, the taxpayer must determine whether the taxpayer has, within the proscribed period, (1) acquired or (2) entered into a contract or option to acquire, (3) stock or securities (4) substantially identical to those sold or otherwise disposed of. In practice, as a result of the sophisticated instruments available on the market today, and the lack of guidance applying the wash sale rules to these instruments, these questions are not always easily answered.

There may be an additional complicating factor in the application of the wash sale rules in the employment context; in particular, the employer's grant of certain equity-based awards to an employee, often without any knowledge or volitional act by the employee, may trigger the provisions of Section 1091 and result in the employee being denied the loss deduction for the employee's sale of stock of the employer. For example, Section 1091 applies if, within the proscribed period surrounding a loss transaction, the seller acquires or *enters into a contract or option to acquire* securities substantially identical to those sold, which presumably would include a compensatory option to purchase employer stock. For purposes of triggering the disallowance of the loss deduction under the wash sale rules, there appears to be no reprieve, and an acquisition or option or contract to acquire may occur, even if (i) the employer is not aware of the employee's sale, (ii) the employee had no knowledge of an impending grant of equity-based awards or (iii) the grant does not require any act of the employee as a condition to its effectiveness.[4] The fact that the option may be subject to vesting does not appear to change the result.[5] Furthermore, pursuant to Section 1091(f), the wash sale rules "shall not fail to apply to a contract or option to acquire or sell stock or securities solely by reason of the fact that the contract or option settles in (or could be settled in) cash or property other than such stock or securities," and thus phantom stock awards and stock appreciation rights do not seem to avoid application of the rules either.

As soon as an employee has notice of the grant, avoiding deferral of the loss deduction is fairly straightforward, assuming that the employee is aware of the rules in the first place, because the employee can simply refrain from selling shares at a loss. It is not always possible to construct a meaningful framework to aid the employee in avoiding the wash sale rules for sales by the employee occurring prior to the grant, however. After all, the employer may not be keen on pre-announcing a decision to make equity awards so far in advance, and it is not always practical to require that grants be made on a certain schedule. Nonetheless, for various reasons likely having nothing to do with Section 1091 of the Code, many companies have moved to a practice of making grants on a fixed date or pursuant to a fixed schedule; a practice that, if adhered to, aids the employee in determining when he can dispose of shares at a loss without triggering the wash sale rules.[6]

These issues can also arise in the context of the acquisition of the employer. For example, in a merger or acquisition in which the target's shares are cashed out, an executive may well sell shares at a loss in the transaction. This loss may be disallowed if, when the employee receives a grant of new equity awards[7] in the successor entity within the proscribed period, the securities of the going-forward entity are deemed substantially identical to the securities of the acquired employer.

The term "substantially identical" is not defined either in the statute or the regulations, and thus whether the securities are substantially identical is a factual question. When considered by the Internal Revenue Service or the courts, the meaning of "substantially identical" has been fairly narrowly construed. In general, common stock of one issuer is not substantially identical to the common stock of another.[8] At least one case has held that the securities of a holding company are not substantially identical to the securities of the operating company, even if the operating company is 100% owned by the holding company and constitutes the holding company's sole asset.[9] However, the mere lack of voting rights is insufficient to treat securities as substantially different.[10] Preferred stock of an issuer may be substantially similar to common stock of the issuer if it is convertible and its value tracks the value of common stock.[11] And options[12] with a different exercise price are not substantially different if the term of the option is the same.[13] Accordingly, in certain instances, it may make sense to delay the grant to employees of equity awards in the surviving entity so that any such awards would not be matched against any sales made at a loss by the same employees in the transaction.

In the current economic climate, where the potential for *bona fide* sales of securities by employees at a loss is greatly enhanced, employers, acquirors and employees alike may wish to be mindful of the wash sale rules. With careful planning, the employee's loss deduction may be preservable, and inadvertent violations of the wash sale rules avoidable.

* * *

1 Section 1091 of the Code and the regulations promulgated thereunder.

2 GCM 38285 (Feb. 22, 1980).

3 For example, assume the stockholder sells 100 shares that he purchased for $100 for $75, and then repurchases 100 shares ten days after the sale for $85. His basis in the newly acquired shares is now $110. If he purchased the shares for $65, his basis in the newly acquired shares would be $90.

4 There does not appear to be any guidance suggesting that, if the effectiveness of the grant is conditioned upon acceptance by the employee, by delaying acceptance until the proscribed period has run, the employee can avoid application of the wash sale rules.

5 Awards of stock subject to vesting conditions that rise to a substantial risk of forfeiture, and the subsequent vesting of the shares, are deemed not to be an acquisition by the employee and thus will not result in a disallowance of the deduction even if the award is granted within the 61-day proscribed period. Priv. Ltr. Rul. 6908080140A (Aug. 8, 1969). Compare this to the treatment of options, in which both the grant and the exercise of the option is each an acquisition event. It is not clear how other equity-based awards, like stock appreciation rights and phantom shares, would be treated.

6 Note that employees may be more motivated to sell shares at a loss at year-end, in order to offset gains from that year, and thus employers may want to consider avoiding January in establishing a fixed grant date or schedule because of the 30-day look-back in the wash sale rules.

7 It is unlikely that, within the 30-day period prior to the consummation of a pending acquisition, the employee would have acquired shares, although for obvious reasons it generally makes sense to educate employees about the mechanics of the wash sale rules to avoid any inadvertent triggering of the prohibition of the loss deduction.

8 Reg. Sec. 1.1233-1(d)(1).

9 S.H. Knox, 33 BTA 972 (Jan. 24, 1936).

10 M.E. Kidder, 30 BTA 59 (Mar. 13, 1934).

11 Rev. Rul. 77-201, 1977-1 C.B. 250; GCM 37004 (Feb. 15, 1977).

12 As a result of a 1988 amendment to Section 1091 of the Code, contracts and options to acquire stock or securities are themselves considered securities, and thus are relevant to application of the wash sale rules both as securities that are acquired and as securities that may be sold at a loss.

13 GCM 38285 (Feb. 22, 1980), addressing specifically exchange traded call options and declining to consider the effect, if any, of an option with a different term.

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CG is representing Hewlett-Packard in its $13.9 billion acquisition of EDS.

Cleary Gottlieb is representing Hewlett-Packard, the computer industry giant, in its approximately $13.9 billion acquisition of Electronic Data Systems Corporation, a provider of business and technology solutions, including information technology, applications and business process services, as well as information technology transformation services.

CG is representing TPG Capital and GS Capital Partners in their $28.1 billion sale of Alltel to Verizon Wireless.

Cleary Gottlieb is representing TPG Capital and GS Capital Partners in their $28.1 billion sale of Alltel Corporation to Verizon Wireless. Alltel delivers voice and advanced data services to more than 13 million customers in the United States.

CG is representing GlaxoSmithKline in its all-cash acquisition of Sirtris Pharmaceuticals.

Cleary Gottlieb is representing GlaxoSmithKline, one of the world's leading research-based pharmaceutical companies, in connection with its all-cash acquisition of Sirtris Pharmaceuticals. The acquisition is valued at approximately $720 million.

CG is representing LS Cable in its acquisition of Superior Essex.

Cleary Gottlieb is representing LS Cable Ltd., a leading wire and cable manufacturer based in Korea, in its $900 million acquisition of Superior Essex Inc. This transaction represents the largest cross-border tender offer by a Korean company to date.

CG is representing The Stanley Works in both its acquisition of Xmark and its sale of CST/berger.

Cleary Gottlieb is representing The Stanley Works in its acquisition of Xmark, the primary operating unit of VeriChip Corporation. Holders of 56% of VeriChip's common stock have entered into voting agreements with Stanley. Cleary Gottlieb is also representing The Stanley Works in the sale of its CST/berger laser leveling and measuring business to Robert Bosch Tool Corporation for $205 million.

CG is representing Lighthouse Holdings in its acquisition of American Beacon Advisers.

Cleary Gottlieb is representing Lighthouse Holdings, Inc. in its acquisition of American Beacon Advisers, Inc. from AMR Corporation (the parent company of American Airlines) for $450 million in cash, and AMR Corporation will retain an approximate 10% interest in American Beacon following the transaction. American Beacon is an investment management company that serves as the investment adviser to the American Beacon Funds.

CG is representing Istithmar in its acquisition of a majority stake in a U.S.-based asset management company.

Cleary Gottlieb is representing Istithmar World Capital LLC in its acquisition of a majority interest in Gulf Stream Asset Management. Istithmar World Capital, which is based in Dubai, United Arab Emirates, is the private equity and alternative investment arm of Istithmar World.

CG is representing Evraz in its third North American steel deal in a year.

Cleary Gottlieb is representing Evraz Group S.A., in its acquisition of Sweden's SSAB Svenskt Stål AB's North American plate and pipe business and tube operations on a debt- and cash-free basis for approximately $4.03 billion.

CG represented Citigroup Venture Capital International in its investment in Ness Technologies.

Cleary Gottlieb represented Citigroup Venture Capital International in its acquisition of a 9.3% stake in Ness Technologies, from two of Ness's largest shareholders, Warburg Pincus and Morris Wolfson (and members of his immediate family).

CG represented affiliates of TPG Capital in their $2 billion investment in Washington Mutual.

Cleary Gottlieb represented affiliates of TPG Capital in their $2 billion investment in newly issued common stock, contingently convertible preferred stock and warrants of Washington Mutual, Inc. Existing WaMu institutional investors concurrently invested $5 billion in the bank. The structure of the WaMu capital infusion was widely reported as representing a potential model for future financial institution recapitalizations.

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