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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC Adopts Amendments to Existing Rules and Proposes New Rule for Nationally Recognized Statistical Rating Organizations

On November 24, the Securities and Exchange Commission published amendments to existing rules to impose additional disclosure and conflict of interest requirements on Nationally Recognized Statistical Rating Organizations (NRSROs), and additionally proposed rule amendments and a new rule that, if adopted, would impose further disclosure requirements on NRSROs. The adopted rule amendments were originally proposed by the SEC on February 2 and reported in the February 6 edition of *Corporate and Financial Weekly Digest*.

The adopted amendments modify Rules 17g-2 and 17g-5 of the Securities Exchange Act of 1934 and Regulation FD. Rule 17g-2 previously required NRSROs to disclose ratings action histories in the SEC's eXtensible Business Reporting Language (XBRL) format for 10% of the ratings in each class for which the NRSRO has registered and issued 500 or more issuer-paid credit ratings. The amendments to Rule 17g-2 adopt the SEC's February 2 proposal and require NRSROs to disclose ratings action histories in a machine-readable format for all outstanding issuer-paid credit ratings initially determined on or after June 26, 2007, with each new ratings action required to be disclosed no later than 12 months after it is taken. The amendments to Rule 17g-2 also go a step beyond the SEC's original proposal and require all NRSRO credit ratings (including subscriber-paid and unsolicited publicly available ratings) to be disclosed in a machine-readable format no later than 24 months following the taking of an action. Following the SEC's creation of XBRL "tags" for NRSROs, the "machine-readable" requirement referred to herein will convert to an XBRL filing requirement.

The amendments to Rule 17g-5 were substantially identical to those proposed on February 2 and prohibit NRSROs from issuing an issuer-paid rating for a structured finance product unless the information about the product provided to the NRSRO to determine the rating (and thereafter monitor it) is made available to other NRSROs. Finally, the SEC amended Regulation FD to permit the disclosure of material non-public information for credit rating purposes to NRSROs pursuant to the amendments to Rule 17g-5 and to continue to permit issuers to disclose material non-public information for credit rating purposes to any credit ratings agency that makes its credit ratings publicly available.

Click here to view the SEC's release regarding the foregoing Rule amendments.

The SEC's proposals would amend Rule 17g-3 of the Exchange Act to require each NRSRO to furnish an unaudited annual report to the SEC describing compliance reviews undertaken by the NRSRO's compliance officer during the preceding fiscal year, material compliance with matters identified during such reviews, steps implemented to remediate identified compliance issues and identification of the NRSRO employees informed of the results of such reviews.

The SEC also proposed amending Form NRSRO to require credit rating agencies applying to be registered as NRSROs and NRSROs to provide an annual update to Form NRSRO to disclose such entity's percentage of net revenue attributable to the 20 largest users of its credit ratings services and the percentage of such entity's revenue attributable to services and products other than credit rating services.

Finally, the SEC proposed creating a new Rule 17g-7 under the Exchange Act that would require an NRSRO to annually make publicly available on its website a report that indicates, with respect to each person that paid the NRSRO to issue or maintain a credit rating, (i) the percent of net revenue attributable to such person earned by the NRSRO in that fiscal year from providing services and products other than credit rating services; (ii) such person's contribution to the revenue of the NRSRO for that fiscal year as compared to other persons who

contributed to the NRSRO's revenue; and (iii) identification of all outstanding credit ratings paid for by such person.

Click here to view the SEC's release regarding the foregoing Rule proposals.

Please see "SEC and CFTC Issue Joint Orders on Volatility Indices and Security Futures" in **CFTC** below.

BROKER DEALER

SEC Approves Changes to FINRA's BrokerCheck

The Securities and Exchange Commission has approved a Financial Industry Regulatory Authority rule change that will expand public access through FINRA's BrokerCheck to the disciplinary records of former brokers. As of November 30, BrokerCheck provides permanent public access to certain information about former associated persons regarding any final regulatory action that has been reported to the Central Registration Depository via a uniform registration form, regardless of when the former associated persons were associated with a firm and even if they are no longer in the securities industry. Also available is certain administrative information (e.g., employment and registration history) and information about qualification examinations, if available, regarding formerly registered individuals.

Click here to read FINRA Regulatory Notice 09-66.

FINRA Fees to Change January 1, 2010

The Securities and Exchange Commission has approved changes to the Financial Industry Regulatory Authority's regulatory pricing structure. Effective January 1, 2010, FINRA will implement a new Personnel Assessment rate structure and a revised calculation for the Gross Income Assessment. These fees are used to fund FINRA's regulatory activities, including its examination and enforcement programs.

Click here to read FINRA Regulatory Notice 09-68.

FINRA Proposes Rule Governing Payments to Unregistered Persons

The Financial Industry Regulatory Authority is requesting comment on a proposed FINRA rule regarding payments to unregistered persons. New FINRA Rule 2040 (Payments to Unregistered Persons) would replace the current National Association of Securities Dealers and New York Stock Exchange rules, which generally prohibit members from providing commissions or discounts/concessions to non-members. FINRA intends the new rule to be more straightforward and to be more in line with Section 15(a) of the Securities Exchange Act of 1934, as amended, which governs broker-dealer registration. Comments are due to FINRA by February 1, 2010.

Click here to read FINRA Regulatory Notice 09-69.

PRIVATE INVESTMENT FUNDS

Financial Stability Improvement Act of 2009 Would Assess Large Hedge Fund Managers for Systematic Dissolution Fund

The House Financial Services Committee (the Committee) has completed the markup phase of the Financial Stability Improvement Act of 2009 (the Bill), which will now be submitted for a full House vote after incorporating all Committee-approved amendments. If the Bill is enacted in its current form, it will, among other things, establish a Systematic Dissolution Fund (the Fund) in the Treasury, maintained by the Federal Deposit Insurance Corporation (FDIC), to facilitate and provide for the orderly dissolution of failed companies that pose a systematic threat to financial markets. The Fund will be maintained and replenished through assessments on most financial companies with assets over $50 billion, but financial companies that manage hedge funds (a term left to the FDIC to define in consultation with the Securities and Exchange Commission) will be subject to a lower threshold and will be subject to assessments with only $10 billion in assets under management. The assessment amounts will be determined by the FDIC in consultation with the Committee's Oversight Council.

To read the text of the Bill prior to Committee markup click here.

To read the amendments to the Bill that set the assessment threshold and hedge fund carve out threshold click here and here.

CFTC

SEC and CFTC Issue Joint Orders on Volatility Indices and Security Futures

The Commodity Futures Trading Commission and the Securities and Exchange Commission have issued two joint orders relating to security-based futures contracts that clarify each Commission's jurisdiction and allow additional products to underlie security futures.

The first joint order excludes certain foreign and domestic volatility indices that are based on broad-based security indices from the definition of "narrow-based security index." As a result, futures on foreign and domestic volatility indices that satisfy the criteria in the joint order will be treated as "broad-based security indices," subject to the exclusive jurisdiction of the CFTC. By contrast, options on such an index are subject to the federal securities laws and the jurisdiction of the SEC.

The second joint order expands the types of underlying securities for which security futures products may be traded to include any security that may underlie an exchange-listed securities option, which includes certain debt securities that are not registered under Section 12 of the Securities Exchange Act of 1934. Previously, only registered debt securities were eligible to serve as an underlying to a security futures product.

The joint SEC and CFTC press release can be found here.
The first order can be found here.
The second order can be found here.

NFA Modifies Annual Questionnaire to Assess Members' Futures-Related Business

Beginning in early 2010, the annual questionnaire submitted by all National Futures Association (NFA) members will include a new series of questions to more accurately gauge whether members are actively engaged in futures-related business. The new questionnaire adds questions relating to whether or not the member has futures customer accounts, manages accounts, operates pools, is engaged in retail off-exchange foreign currency activities and/or is soliciting customer business.

The NFA is encouraging members to complete the new questionnaire promptly. If no responses are provided, the member will be identified as an inactive member on the NFA's public database.

The NFA notice to members can be found here.

Financial Statement Submission Process Revised

The National Futures Association (NFA) and CME Group Inc. have developed a new, web-based version of WinJammer that will allow users to submit statements to the NFA, exchanges and the Commodity Futures Trading Commission through a single log-in and password. The new process will replace the existing Personal Identification Number agreements governing submissions. All NFA members who currently use WinJammer will be required to submit a new user authorization request through the new online system.

The NFA has requested that members provide it with the name, email address and telephone number for their designated security managers by December 7.

The NFA notice to members can be found here.

BANKING

Office of Comptroller Issues Fee Schedule

On December 1 the Office of the Comptroller of the Currency issued its assessment and fee schedule for calendar year 2010. The OCC's assessment schedule continues to include a surcharge for banks that require increased supervisory resources.

Read more.

FDIC Releases Guidance Regarding Process for High-Rate Area Determinations

On December 4, the Federal Deposit Insurance Corporation (FDIC) issued a Financial Institution Letter detailing the process for determining if an institution subject to interest-rate restrictions under 12 CFR 337.6 is operating in a high-rate area for purposes of conforming with the "national rate" requirements found therein. Interest rate restrictions are imposed pursuant to this provision when an insured depository institution is deemed to be less than well-capitalized. The new requirements will be effective on January 1, 2010.

According to the regulation, the "national rate" is defined as a simple average of rates paid by insured depository institutions and branches for which data are available. If an institution subject to these restrictions believes it is operating in an area where the rates paid on deposits are higher than the "national rate", such institution can seek and receive a determination from the FDIC that it is operating in a high-rate area. In reaching its determination, the FDIC will use standardized data, such as average rates by state, metropolitan statistical area, and micropolitan statistical area, to make its determination. Determinations will be effective for the calendar year in which they are granted.

For more information, click here.

ANTITRUST

European Commission Investigation Delays Oracle-Sun Transaction

Frequently, United States firms engaged in mergers and acquisitions must obtain foreign as well as U.S. antitrust clearance. Periodically, U.S. and foreign antitrust regulators disagree on the competitive implications of the deal, and transactions involving two U.S. parties can be delayed or blocked by foreign antitrust enforcers. Such a situation is currently unfolding in connection with Oracle Corporation's proposed acquisition of Sun Microsystems, Inc. Although the U.S. Department of Justice (DOJ) approved the transaction in August, the European Commission has raised concerns of its own related to the transaction and has issued a Statement of Objections (the equivalent of civil complaint in the United States). The Commission's investigation is another example of divergent antitrust investigations between the United States and EU delaying a domestic transaction.

Oracle agreed to buy Sun for $7.4 billion in April. Shareholders approved the merger in July, followed by DOJ approval in August. The European Commission issued its Statement of Objections on November 9. The Commission's Objections led the DOJ to take the unusual step of issuing a statement in response to the Commission's Statement of Objections, reasserting that the transaction was unlikely to be anti-competitive.

On November 24, a group of 59 United States Senators, led by Orrin Hatch (R-Utah) and John Kerry (D-Mass) sent a letter requesting that the Commission complete its investigation as expeditiously as possible. Although the Senators acknowledged the Commission's sovereign right to thoroughly investigate transactions affecting the European markets, the letter noted that the Sun subsidiary in the specific market examined by the Commission only generates €17 million in revenue, while other competitors have capitalizations of tens of billions of Euros. The letter also explained that Sun is in a fragile economic situation and additional delay could impact the company's ability to continue to employ thousands of workers. The Commission's investigation is an example of the dangers facing a domestic transaction when the transaction requires foreign competition approval.

Click here to read the press release.

EXECUTIVE COMPENSATION AND ERISA

Recent Regulations May Require Hasty Amendment of Employee Stock Purchase Plans

Final regulations governing employee stock purchase plans (ESPPs) were issued by the U.S. Department of the Treasury in mid-November. ESPPs grant participating employees of a corporation an option to purchase shares of company stock with a potentially tax-free discount. The final regulations apply to any option issued under an ESPP that is intended to qualify with Section 423 of the Internal Revenue Code on or after January 1, 2010, so swift action is necessary to avoid unintentional violations. If an ESPP is not timely updated to comply with the final regulations, the employees' special tax treatment is lost and adverse tax consequences could result.

The final regulations contain numerous requirements that must be met for an ESPP to be compliant. Some of the more notable requirements include:

- To ensure that the maximum purchase discount is available, each offering under the ESPP should include a maximum number of shares that can be purchased by each employee (established either by formula or a specific number).
- While ESPPs may exclude from participation certain categories of employees (e.g., employees with two or fewer years of service and employees who are regularly scheduled to work 20 or fewer hours per week), virtually all other U.S. employees must be allowed to participate.
- The purchase discount cannot be greater than 15% of market value (determined based on the share price at the time the option is granted or at the time the option is exercised, whichever is lower).
- An ESPP participant cannot be offered an option to purchase more than $25,000 worth of company stock during any calendar year.
- Options granted under an ESPP must provide equal rights and privileges to all participants.

While the foregoing requirements have previously been part of the statutory provisions governing ESPPs, the final regulations provide increased detail regarding how ESPP sponsors must comply with the relevant requirements.

ESPP sponsors should immediately undertake a review of their plans to ensure compliance with the final regulations. In addition, given the procedural steps that may be required to amend an ESPP, sponsors should ensure that necessary board and committee members are available to provide consent during the upcoming holiday travel season so that an updated plan can be in place by January 1, 2010, or, if later, the beginning of the next offering period under the ESPP. If shareholder approval of the updated plan is required, such approval may be obtained during 2010 (up to 12 months after the board approves the updated ESPP).

The final regulations can be found here.

UK DEVELOPMENTS

Walker Review Recommends Major Reforms to Bank Corporate Governance

On November 26, the UK Treasury published the final report and recommendations of Sir David Walker on the reform of corporate governance of the UK banking industry (Walker Review). The Walker Review was commissioned in February 2009 by the UK Government. Its terms of reference were to examine and make recommendations on corporate governance in the UK banking industry.

The Walker Review published a preliminary report on July 16, after which followed a substantial consultation process with industry stakeholders and other interested parties. The final report contains 39 recommendations which are intended to improve the performance of bank boards, increase the transparency of employee remuneration and incentives, and encourage institutional shareholders to become more involved.

Specific recommendations include:

- chairman of the board to be subject to annual re-election, and board to consider transitioning to annual re-election for all directors;
- a minimum working time commitment to be imposed on non-executive directors;
- non-executives to receive dedicated support and advice on business matters;
- non-executives to face tougher scrutiny in the Financial Services Authority's (FSA's) interview process;
- significant deferred element in bonus schemes for all "high-paid" executives (i.e., those earning £1 million or more);
- board level risk committees to have the power to scrutinize large transactions;
- increased public disclosure of certain information with respect to executives earning over £1 million; and
- remuneration committees to scrutinize firm-wide pay, with particular reference to high-paid executives who are not directors.

The final report omits a number of proposals which were in the preliminary report. Proposals that will not now be taken forward include making large investors subject to questioning by the FSA on their motives for selling bank shareholdings, and requiring institutional investors to enter into memoranda of understanding on collective corporate governance action.

The UK Chancellor of the Exchequer, Alistair Darling, said: "The Government strongly supports [the Walker Review] recommendations and will take steps to implement them as soon as possible." It is expected that new regulations to put the Walker Review recommendations into force will be introduced in early 2010.

To read the review in full, click here.

UK Government Publishes Supplementary Market Abuse Regulations

On December 1, the UK Government published additional regulations relating to some of the Market Abuse provisions of the Financial Services and Markets Act 2000 (FSMA). The effect of the regulations is to extend the effect of two provisions of FSMA which relate to "misuse of information" (Section 118(4)) and "behaviour likely to give rise to false or misleading impressions or to distort the market" (Section 118(8)), so that they remain in force until December 31, 2011.

The UK currently has a wider definition of market abuse than many other European countries, reflecting the market abuse regime that existed before the implementation of European market abuse legislation. FSMA contained sunset clauses under which sections 118(4) and 118(8) would expire on December 31, 2009. It was anticipated that a review by the UK Treasury would be carried out before the expiration date based in part on the outcome of the Europe-wide review of the Market Abuse regime. Since the European review has been delayed, the UK Government has extended the sunset date until December 31, 2011.

To read the explanatory memorandum in full, click here.

Corporate Governance Code Changes Proposed

On December 1, the UK Financial Reporting Council (FRC) published a report on the findings of its review of the impact and effectiveness of the Combined Code of Corporate Governance. The Code sets out standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit and relations with shareholders. As a result of the review the FRC is proposing a number of changes which include:

- new Code principles on: the roles of the chairman and non-executive directors, the need for the board to have an appropriate mix of skills, experience and independence, the commitment levels expected of directors, and the board's responsibility for defining the company's risk appetite and tolerance;
- new "comply or explain" provisions including: board evaluation reviews to be externally facilitated at least every three years, the chairman to hold regular development reviews with all directors, and companies to report on their business model and overall financial strategy;
- changes to the section of the Code dealing with remuneration to emphasize the need for performance-related pay to be aligned with the long-term interest of the company and to the company's risk policies and systems and to enable variable components to be reclaimed in certain circumstances;
- the introduction of a Stewardship Code for institutional investors; and
- the Code to be renamed "The UK Corporate Governance Code" to make clearer its status as the UK's recognized corporate governance standard.

Consultation on the draft revised Code ends on March 5, 2010, and it is intended that the revised Code will apply to accounting periods beginning on or after June 29, 2010.

To read the report, click here.

For more information, contact:

SEC/CORPORATE		
Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
David S. Kravitz	212.940.6354	david.kravitz@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Gary N. Distell	212.940.6490	gary.distell@kattenlaw.com
Daren R. Domina	212.940.6517	daren.domina@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com

Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Patricia L. Levy	312.902.5322	patricia.levy@kattenlaw.com
Robert M. McLaughlin	212.940.8510	robert.mclaughlin@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Terra K. Atkinson	704.344.3194	terra.atkinson@kattenlaw.com
Christina J. Grigorian	202.625.3541	christina.grigorian@kattenlaw.com
Adam Bolter	202.625.3665	adam.bolter@kattenlaw.com
ANTITRUST		
James J. Calder	212.940.6460	james.calder@kattenlaw.com
David S. Stoner	212.940.6493	david.stoner@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Kathleen Sheil Scheidt	312.902.5335	kathleen.scheidt@kattenlaw.com
Ann M. Kim	312.902.5589	ann.kim@kattenlaw.com
Daniel B. Lange	312.902.5624	daniel.lange@kattenlaw.com
UK DEVELOPMENTS		
Martin Cornish	44.20.7776.7622	martin.cornish@kattenlaw.co.uk
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WASHINGTON, DC

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