Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

Business/Financial News in Brief
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SEC/Corporate

SEC to Propose New Executive Compensation Disclosure Rules

The Securities and Exchange Commission staff plans to propose extensive revisions to the current executive compensation disclosure regime at the Commission's January 17 open meeting. As reported by *The Wall Street Journal*, the revisions would include the following changes to proxy statement disclosure:

- A column in the summary compensation table with a total annual compensation figure for each named executive officer, with more specific information about the value of all benefits;
- Monetary valuations of stock option grants given to top executives would be placed side-by-side with salary and bonus information;
- Disclosure of perquisites that aggregate $10,000 or more, rather than the current $50,000;
- Disclosure of dollar amounts payable in the event of a change of control or change in responsibilities;
- A new disclosure table describing the details of retirement plans, including annual payments and benefits to named executive officers; and
- A new disclosure table describing annual director compensation.

The new proposal would also require that all disclosure in proxy statements be in plain English. The SEC reportedly hopes to have the final rules in effect in time for the 2007 proxy season.
(*The Wall Street Journal*, 1/10/16, p. A1; 1/11/06, p. C1)

SEC Offers Expedited Reviews of Registration Statements and Annual Reports to Volunteer Participants in Interactive Data Initiative

Chairman Cox announced on January 11 that the staff of the Securities and Exchange Commission will offer expedited reviews of registration statements and annual reports to companies that volunteer for a test group as part of the SEC's interactive data initiative. Interactive data is a technical initiative that seeks to change the static, text-only documents companies file with the SEC into dynamic financial reports that can be quickly and easily accessed and analyzed.
In April 2005, the SEC began a voluntary program for receiving financial information using eXtensible Business Reporting Language (XBRL), a computer language that makes financial

data interactive. This program allows for the voluntary submission of XBRL documents as exhibits to periodic reports from corporate issuers and Investment Company Act reports.

Companies that participate in the voluntary program's new test group will furnish financial data contained in their periodic and investment company reports in XBRL format for at least one year and provide feedback on their experiences. Because of the efficiencies staff anticipates in reviewing their filings prepared in XBRL and to encourage participation in the test group, the SEC staff will offer volunteers expedited reviews of registration statements under the Securities Act of 1933 that the staff has selected for review. For well-known seasoned issuers, the staff will offer to inform volunteers whether or not the staff will select their annual reports on Form 10-K for review.

The SEC staff is seeking test group participants that will use the commercial and industrial, banking, insurance, or investment management industry classifications in XBRL. Companies interested in participating in the test group should contact Jeffrey Naumann in the Office of the Chief Accountant (naumannj@sec.gov) or Brigitte Lippmann in the Division of Corporation Finance (lippmannb@sec.gov) by Feb. 10, 2006, for more information. The staff expects to have the group set by some time in February. (*Securities Mosaic*, 1/11/06)

Allan Beller, Director of Division of Corporation Finance, to Leave SEC

The Securities and Exchange Commission announced on January 11 that Alan L. Beller, Director of the Division of Corporation Finance for the past four years of unprecedented activities at the SEC, will leave the SEC to return to the private sector. No replacement has been announced. http://www.sec.gov/news/press/2006-6.htm

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Banking

FinCEN Publishes Final Regulations Related to Foreign Correspondent Accounts

On January 4, the Financial Crimes Enforcement Network (FinCEN), a division of the U.S. Treasury Department responsible for the enforcement of certain anti-money laundering provisions of the U.S. PATRIOT ACT, issued final regulations requiring U.S. financial institutions to apply certain due diligence measures to the correspondent banking accounts they hold for certain foreign financial institutions, including (a) foreign banks; (b) foreign branches of U.S. banks; (c) foreign businesses that perform activities substantially similar to U.S. securities broker-dealers, futures commission merchants, introducing brokers in commodities, or a mutual fund; and (d) money transmitters or currency exchangers organized under foreign law. U.S. financial institutions required to comply with the regulation include: (a) banking institutions; (b) securities broker-dealers; (c) futures commission merchants and introducing brokers in commodities; and (d) mutual funds.

Covered U.S. financial institutions must now establish a due diligence program that "includes appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls that are reasonably designed to detect and report known or suspected money laundering activity conducted through or involving any correspondent account established, maintained, administered, or managed in the United States." According to the final regulation, such a due diligence program must: "(1) determine whether the

account is subject to enhanced due diligence under section 312; (2) assess the money laundering risk posed, based on a consideration of relevant risk factors; and (3) apply risk-based policies, procedures, and controls to each such correspondent account reasonably designed to detect and report known or suspected money laundering activity, including a periodic review of the correspondent account activity."

Moreover, pursuant to the regulation, U.S. financial institutions must apply "enhanced due diligence" when establishing or maintaining a correspondent account for a foreign bank that is operating: (1) under an offshore license; (2) in a jurisdiction found to be non-cooperative with international anti-money laundering principles; or (3) in a jurisdiction found to be of primary money laundering concern under section 311 of the USA PATRIOT ACT.

All accounts opened after April 4, 2006 will be subject to the new regulation. For accounts that existed before the regulation's publication or new accounts that were opened prior to April 4, the effective date is October 2, 2006.

The final regulation is found at http://www.fincen.gov/finalrule01042006.pdf.

Federal Bank and Thrift Agencies Propose Guidance on Commercial Real Estate Lending

All the federal bank and thrift regulatory agencies on January 10, 2006 issued for comment, proposed guidance on risk management practices for concentrations in commercial real estate lending. The agencies have been worried that some institutions have high and increasing concentrations of commercial real estate loans, where repayment primarily is dependent on rental income or from the proceeds of the sale, refinancing, or permanent financing of the property. The agencies believe that such concentrations may expose institutions to unanticipated earnings and capital volatility in the event of adverse changes in the general commercial real estate market.

The proposed guidance — from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision — provides criteria for identifying institutions with commercial real estate loan concentrations that may warrant greater supervisory scrutiny. As provided in the guidance, such institutions should have robust risk-management systems in place and capital levels higher than the regulatory minimums and appropriate to the risk associated with these concentrations.

Comments are requested on all aspects of the guidance and are due 60 days after publication in the Federal Register, expected shortly.
http://www.ots.treas.gov/docs/7/73294.pdf

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Broker Dealer

NYSE Proposes Restructuring

As part of the merger of the New York Stock Exchange, Inc. with Archipelago Holdings, Inc. that will produce the NYSE Group, Inc. (NYSE Group), the New York Stock Exchange, Inc. has filed rule proposals with the Securities and Exchange Commission to restructure into three new companies. They will be New York Stock Exchange LLC (NYSE), a wholly owned subsidiary of NYSE Group, NYSE Market, Inc. (Market), and NYSE Regulation, Inc. (Regulation), both of which will be wholly owned by

NYSE. Regulation will be a New York not-for profit corporation. NYSE will be the SEC registered national securities exchange, but it will have no assets other than the exchange registration and the ownership interests in Market and Regulation. Market will hold all of the assets of what is now the New York Stock Exchange, Inc. other than those going to Regulation. NYSE will have an 11 member board of directors all of whom, other than the chief executive officer, will be independent of NYSE, any member organization of the NYSE or the Pacific Exchange, and any companies listed on either of those exchanges. The board will have an audit committee, a human resources and compensation committee and a nominating and governance committee, each of which will consist only of independent directors. The Certificate of Incorporation will not allow anyone to vote more than 10% of the total number of shares entitled to vote on a matter, and no person, acting alone or with others, may acquire (a) more than 10%, or (b) beneficial ownership of more than 20% of the number of shares entitled to vote on a matter. NYSE Group's books and records are subject to inspection and copying by the SEC and by any of the NYSE Group's regulated subsidiaries for purposes of enforcing the federal securities laws. Amendments to the NYSE's Certificate of Incorporation require prior approval by Regulation and Market, and, if either of those companies so determine, the amendment must be filed with the SEC for approval under Section 19 of the Securities Exchange Act of 1934.

NYSE's board will consist of the independent directors of NYSE plus 20% but not less than two directors, selected as described below. Market and Regulation each will have a board consisting of the CEO, a majority of the independent directors of NYSE and 20%, but not less than two, selected as described below. Each of these three companies will select a committee of representatives of upstairs, floor broker and specialist firms that will nominate the two or 20% of directors to be representatives of member firms. In addition, a candidate can be placed on the board ballot by petition signed by at least 10% of the member firms.

There will no longer be seats or memberships in the NYSE. Each year Market will conduct a "Dutch auction" to sell trading licenses at a minimum bid of not more than 80% of the prior year's clearing bid. The clearing bid will be that bid which sells at least 1000 trading licenses. No more than 1366 trading licenses can be sold. No firm may have more than the greater of 35 or 125% of the number of trading licenses it utilized prior to the auction. Trading licenses may not be leased or transferred, although they may be transferred to an affiliated member organization. If less than 1366 trading licenses are sold, Market may sell additional trading licenses during the year to reach the 1366 maximum at a 10% premium over the clearing bid.

Regulation will establish its own budget and establish, administer and enforce the rules of the NYSE. These rules will take the place of the current Constitution and rules of the New York Stock Exchange, Inc. Regulation will conduct surveillance and investigations and initiate enforcement actions. Also, the Office of Hearing Board will continue. However, appeals of its actions and oversight of its activities will be conducted by the non-management members of Regulation's Board of Directors acting as a Committee for Review.
http://www.sec.gov/rules/sro/nyse/34-53073.pdf

OCC Adopts Gross Negligence Standard

The Securities and Exchange Commission has approved a by-law amendment of The Options Clearing Corporation (OCC) to provide that the OCC will not be liable to its members other than for losses dues to OCC's gross negligence, willful misconduct, or violation of federal securities laws for which there is a

private right of action. In approving this action, the SEC said that it is not establishing a federal standard of care for user-governed clearing agencies, and will allow the agencies themselves to allocate losses associated with the agencies' clearing business.

http://www.sec.gov/rules/sro/occ/34-53053.pdf

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Litigation

Online Financial Newsletter Subject to Investment Advisors Act

Defendants sought dismissal of a Securities and Exchange Commission action against an online financial newsletter that made recommendations regarding options trading and offered "auto-trading", a service enabling subscribers to authorize an online advisor to direct trades in accounts opened with various brokerage firms. The SEC alleged that defendants violated the Investment Advisors Act by falsely promising that the auto-trading program "will yield substantial profits in most trading markets" when, in fact, subscribers typically lost between 60% and 100% of the amounts invested. In rejecting arguments that publishers of financial newsletters available to the general public were not subject to the Investment Advisors Act, the court held that, if proven, allegations that defendants delivered personalized advice to auto-trading subscribers would be actionable under the Act. (*Securities and Exchange Commission v. Terry's Tips, Inc.*, No. 2:05-CV-188, 2006 WL 44181 (D. Vt. Jan. 9, 2006))

Stay of Discovery Warranted in Derivative Action

First Bancorp, a defendant in certain federal securities law class actions, sought a stay of discovery in a related derivative action. Despite the fact that the statutory stay applicable to actions under the Private Securities Litigation Reform Act does not require a stay in related derivative actions, and that, "on the whole federal courts have refused to stay discovery in derivative actions brought independently of parallel securities fraud class actions," the court exercised its discretion to grant a stay. In staying discovery pending determination of First Bancorp's motion to dismiss under Rule 23.1, which specifies several special requirements that must be met in order for plaintiffs to maintain a derivative action, the court noted "Congress' concern that derivative actions – in which individual shareholders seek, in effect, to speak for the corporation – may often partake of their own special abuses and therefore ought to be subject to earlier scrutiny by the courts." (*In re First Bancorp Derivative Litigation*, No. 05 Civ. 9458 (JSR), 2006 WL 41231 (S.D.N.Y. Jan. 8, 2006))

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CFTC

CFTC Amends Rules for Exempt Markets, Derivatives Transaction Execution Facilities and Designated Contract Markets and Changes Procedures for Derivatives Clearing Organization Registration Applications

The Commodity Futures Trading Commission published technical and clarifying amendments to its rules for exempt markets, derivatives transaction execution facilities and designated contract markets. The amendments are intended to clarify and codify acceptable practices under the CFTC rules for trading facilities, and also include various technical corrections and conforming amendments. In addition, the amendments revise the application and review process for registration as a derivatives clearing organization (DCO) by eliminating the presumption of automatic fast-track review of applications and replacing it with the presumption that all applications will be reviewed pursuant to the 180-day timeframe and procedures specified in Section 6(a) of the Commodity Exchange Act. In lieu of the current 60-day automatic fast-track review, the CFTC will permit applicants to request expedited review and to be registered as a DCO by affirmative CFTC action not later than 90 days after the CFTC receives the application. The amendments become effective on February 13, 2006.
http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-242.pdf

CFTC Approves NFA's Proposed Amendments to Enhanced Supervisory Requirements Interpretative Notice

The Commodity Futures Trading Commission has approved the National Futures Association's proposed changes to the Interpretive Notice to Compliance Rule 2-9 requiring NFA members to adopt enhanced supervisory procedures if their sales force includes a specified number of associated persons who have worked at firms that have been disciplined by the NFA or CFTC for abusive marketing practices. The changes become effective on February 15, 2006.
http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=1520

CFTC Approves NFA's Proposed Amendments Regarding Recordkeeping Requirements

The Commodity Futures Trading Commission has approved amendments to the National Futures Association's Compliance Rule 2-10. The amendments were proposed by NFA in an effort to ensure that books and records subject to review by NFA were preserved in the English language. The amendments require: (i) futures commission merchants (FCMs) to maintain their books and records in an office located in the U.S. or a Part 30 jurisdiction (e.g., Great Britain, Canada); (ii) FCMs that maintain their books and records in a Part 30 jurisdiction to reimburse NFA for any necessary travel and related expenses; and (iii) NFA members subject to minimum capital requirements to prepare financial and other required reports in English, using U.S. dollars and U.S. accounting standards, and to maintain a general ledger in English using U.S. dollars. The amendments also require all NFA members to file documents with NFA in English, maintain English translations of foreign-language promotional material, maintain required procedures in English, provide English translations of other documents when requested and ensure that an English-speaking individual who is knowledgeable about the member's business is available to assist NFA during an audit.
http://www.cftc.gov/opa/adv06/opawa02-06.htm

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