

Corporate and Financial Weekly Digest

Business/Financial News in Brief
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SEC/Corporate

SEC Votes to Propose New Executive Compensation Disclosure Rules

On January 17, the Securities and Exchange Commission voted to propose extensive revisions to the disclosure requirements in proxy statements, annual reports and registration statements, including a requirement that such disclosures to be in plain English, and modifications to the requirements of Form 8-K regarding compensation arrangements.

A new narrative section, Compensation Discussion and Analysis, would address the “objectives and implementation of executive compensation programs.” Following this section would be three broad categories of largely tabular disclosure:

1) A reorganized Summary Compensation Table showing compensation of the principal executive and financial officers, and the three other highest paid executive officers for the past three years, which would include:

- a new column reporting the amount of total compensation;
- a dollar value for all stock-based awards, measured at grant date fair value pursuant to Statement of Financial Accounting Standards No. 123(R);
- in the “All Other Compensation” column, the aggregate increase in actuarial value of pension plans accrued during the year and all earnings on deferred compensation that is not tax-qualified;
- Disclosure of perquisites (additional interpretive guidance will be provided as to what constitutes a perquisite) aggregating over \$10,000 (the current threshold is \$50,000).

In addition, two supplemental tables would report grants of Performance-Based Awards and Grants of All Other Equity Awards.

2) Two tables disclosing outstanding equity-related interests:

- The Outstanding Equity Awards at Fiscal Year-End Table, which would show outstanding awards representing potential amounts that may be received in the future; and
- the Option Exercises and Stock Vested Table, which would show amounts realized on equity compensation during the last year.

3) Retirement plan and post-employment disclosure would include:

- the Retirement Plan Potential Annual Payments and Benefits Table, which would disclose annual benefits payable to each named executive officer;
- the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table, which would disclose year-end balance, and executive contributions, company contributions, earnings and withdrawals for the year; and
- disclosure of payments and benefits (including perquisites) payable on termination or change in control, including quantification of these potential payments and benefits.

A Director Compensation Table would disclose director compensation for the last year, comparable to that in the Summary Compensation Table, and would also include a related narrative.

Related party transaction disclosure would be revised to include a description of policies and procedures for approval of related party transactions, an expansion of the category of related persons, a change in the disclosure threshold from \$60,000 to \$120,000 and a more “principles-based” disclosure requirement to disclose a transaction in which the company participates if a related person has a direct or indirect material interest.

A new proposed Item 407 of Regulation S-K would require disclosure of whether directors and director nominees are independent, a description of any relationships not otherwise disclosed that were considered as part of the determination of such independence, and disclosure of any audit, nominating and compensation committee members who are not independent. Current requirements only require disclosure of independence as determined under exchange or NASDAQ listing rules.

Finally, the proposed rules would modify the disclosure requirements in Form 8-K to capture some employment arrangements and material amendments thereto only for named executive officers, and consolidate all Form 8-K disclosure regarding employment arrangements under a single item.

Given the 60 day (from publication in the Federal Register) comment period, the proposals will not be effective for the 2006 proxy statement season.

<http://www.sec.gov/news/press/2006-10.htm>

For more information, contact:

Robert L. Kohl at (212) 940-6380 or e-mail robert.kohl@kattenlaw.com,
Mark A. Conley at (310) 788-4690 or e-mail mark.conley@kattenlaw.com, or
David A. Pentlow at (212) 940-6412 or e-mail david.pentlow@kattenlaw.com

Banking

OFAC Describes Sanction List Enforcement for First Time

The Office Of Foreign Assets Control (OFAC), a division of the U.S. Department of the Treasury, announced on January 12, an interim final rule regarding violations of its sanctions lists entitled “Economic Sanctions Enforcement Procedures for Banking Institutions Regulated by the FFIEC-Member Supervisory Agencies.” (See 71 Federal Register 1971, January 12, 2006)

According to the press release, OFAC will now take an “institutional” approach to enforcement of its regulations which generally require banks and other financial companies to check OFAC-issued lists of suspected terrorists or criminals before engaging in banking or banking-related transactions. Pursuant to this new approach, OFAC will periodically review institutions with apparent OFAC violations and will share information related to these apparent violations and OFAC compliance with the institution’s functional banking regulator. OFAC will also receive information from the functional banking regulators concerning apparent OFAC violations. Notably, OFAC will not review institutions that do not have an apparent OFAC violation.

Importantly, the interim final rule states that the new enforcement procedures “take into account that each banking institution’s situation is different and that its compliance program should be tailored to its unique circumstances. This includes an analysis of its size, business volume, customer base and product lines.”

OFAC is seeking public comment on the interim final rule. All comments are due by March 13, 2006.

http://www.treas.gov/offices/enforcement/ofac/legal/regs/fr71_1971.pdf

For more information, contact:

Jeff Werthan at (202) 625-3569 or e-mail jeff.werthan@kattenlaw.com, or

Christina J. Grigorian at (202) 625-3541 or e-mail christina.grigorian@kattenlaw.com

Broker Dealer

SEC No-action Letter on Advisers Act Rule 202(a)(11)-1, and Application for Compliance Extension Filed

The Staff of the Securities and Exchange Commission issued a no-action letter to the Securities Industry Association relative to Rule 202(a)(11)-1 of the Investment Advisers Act of 1940. The SEC Staff said that a broker-dealer portraying itself in advertisements or otherwise to the public as a financial planner and providing investment advice as part of a financial plan is an investment adviser under the rule. Whether a financial plan brings a broker-dealer within the definition of an investment adviser turns on whether it delivers advice on a customer’s long-term financial needs and may include recommendations as to insurance, savings, tax, estate planning and investments. This is distinct from a financial tool that is used to provide guidance with respect to a particular transaction or allocation of a customer’s funds and securities, but that is not provided in the context of a more comprehensive plan. A broker-dealer that is an investment adviser because it offers a customer a financial plan may effect transactions with that customer when the broker-dealer has ceased acting as a financial planner for that customer and has provided that customer full disclosure of the change in the relationship so that the customer reasonably understands that the broker-dealer/investment adviser is removing itself from the position of trust and confidence that exists in an advisory relationship.

Since the no-action letter was issued, the SIA has requested the SEC to extend to March 31, 2006 the compliance date for Rule 202(a)(11)-1(b) that was the subject of the no-action letter.

<http://www.sec.gov/divisions/investment/noaction/sia121605.htm>

SEC Approves NASDAQ as National Securities Exchange But Conditions Commencement of Operations

The Securities and Exchange Commission approved the registration as a national securities exchange under the Securities Exchange Act of 1934 of what is now the Nasdaq Stock Market Inc., subject to several conditions on its commencement of operations. The new exchange will have to (i) adopt, and have approved by the SEC, a plan for submitting fingerprints of employees of members to the FBI; (ii) enter into an agreement with National Association of Securities Dealers Regulation for the allocation of regulatory responsibilities, and have that agreement approved by the SEC; and (iii) adopt and have approved by the SEC a Minor Rule Violation Plan dealing with the imposition of fines for minor rule violations in lieu of commencing formal disciplinary actions. The new exchange will operate three trading markets—Nasdaq, BRUT and INET. These three entities must be consolidated into one trading platform by September 30, 2006. The new exchange must join the Consolidated Transaction Association Plan, the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, the Consolidated Quotation System Plan (and the National Association of Securities Dealers, Inc. must maintain its membership in this plan as well), the Intermarket Trading System Plan (and NASD must continue to maintain its membership in this plan). Further, until the new exchange adopts a plan under Exchange Act Rule 12f-5 that is approved by the SEC, it may not grant unlisted trading privileges to any issue.

The new exchange will have a holding company, Nasdaq Holding Company (Holding Company). Holding Company will have two subsidiaries - Nasdaq Stock Market LLC (Exchange) and Trade Reporting Facility LLC (Reporting). Exchange will have an Executive Committee, Audit Committee, Management Compensation Committee, a Nasdaq Listing and Hearing Review Committee to deal with appeals of listing decisions, a Nasdaq Review Committee, a Nominating Committee, a Member Nominating Committee, an Arbitration and Mediation Committee, a Market Regulation Committee and a Regulatory Oversight Committee. The Regulatory Oversight Committee will meet regularly with the Exchange's Chief Regulatory Officer (CRO) and as requested either by the CRO or a committee member. The committee will be advised of the CRO's compensation, promotion, or termination, and may inquire as to the adequacy of resources provided to the CRO. The Exchange will contract out to NASD Regulation its regulatory responsibilities, including membership registration, examination, investigation and issuing complaints and bringing enforcement actions. Exchange will have a market watch operation to determine if trading should be halted or suspended in any issue and to assess unusual market activity. Exchange member firms will have to comply with NASD's Order Audit Trail System (OATS) requirements.

Because of the electronic nature of the Exchange, the prohibitions of Exchange Act Section 11(a) and compliance with Exchange Act Rule 11a2-2(T) on trading for the account of a member firm for orders originated on the floor of an exchange either will not apply or will be fulfilled by nature of the Exchange's operation. All securities currently traded on Nasdaq National Market System and Nasdaq Capital Market (formerly known as Nasdaq SmallCap) will be listed on the Exchange and will be subject to the short sale rules (Regulation SHO). A temporary exemption was granted to allow NASD Rule 3350 (which prohibits short sales on a minus or zero minus bids) to apply to Exchange listed securities and to exempt short sales on the Exchange from Exchange Act Rule 10a-1.

Current NASD members may apply on an expedited basis to become Exchange members and to register their associated persons with the Exchange. In the future, a firm applying for NASD membership may have its application also be an application for Exchange membership.

The Exchange has incorporated into its rules many currently existing NASD Rules. The SEC will permit this, and will not require the Exchange to file applications under Exchange Act Section 19(b) whenever

the NASD proposes to amend, alter or repeal these incorporated rules. However, the Exchange will have to give notice to its members whenever the NASD proposes a change in any of these incorporated rules.
<http://www.sec.gov/litigation/opinions/34-53128.pdf>

For more information, contact:

James D. Van De Graaff at (312) 902-5227 or e-mail james.vandegraaff@kattenlaw.com,
Daren R. Domina at (212) 940-6517 or e-mail daren.domina@kattenlaw.com,
Michael T. Foley at (312) 902-5494 or e-mail michael.foley@kattenlaw.com,
Patricia L. Levy at (312) 902 5322 or e-mail patricia.levy@kattenlaw.com, or
Morris N. Simkin at (212) 940-8654 or e-mail morris.simkin@kattenlaw.com

Litigation

No Liability Under Robinson-Patman for Sales of Specially-Ordered Goods

The Supreme Court held that the Eighth Circuit Court of Appeals erred when it ruled that a manufacturer could be held liable under the Robinson-Patman Act for price discrimination without any evidence that it discriminated between dealers that were competing to sell the manufacturer's product to the same customer. Plaintiff was a truck dealer that sold specially-ordered trucks manufactured by Volvo. Plaintiff sued Volvo, alleging that it was offering more favorable prices to competing dealers in violation of the Robinson-Patman Act, which proscribes price discrimination that injure competition. In reversing the Eighth Circuit's decision, the Court held that the dealer failed to come forward with any evidence of transactions where the supposedly favored dealers received better prices from Volvo to use in responding to the order of the same customer as plaintiff. Since the pricing on each specially-ordered truck was affected by a number of factors, the dealer therefore could not show it was "'in actual competition' with a favored purchaser for the same customer" and could not demonstrate a competitive injury as required by the Robinson-Patman Act. (*Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905, 2006 WL 43971 (U.S., Jan. 10, 2006))

Court Dismisses Indictment Where Government Concealed Criminal Investigation

A District Court in Oregon dismissed the indictment of three former executives for conspiracy and securities fraud where the United States Attorney's Office and the Federal Bureau of Investigation purposely concealed their investigation into the executives' conduct in order to reap the benefits of the Securities and Exchange Commission's investigation of the same people. The Court held that since the executives had no warning that there could be criminal charges against them, even though the prosecutors identified them as targets at the beginning of the investigation, it was a violation of their due process rights and an "abuse of the investigative process" for the government agencies to conceal the criminal investigation while using the SEC to gather information to use against them. (*U.S. v. Stringer*, No. CR 03-432-HA, 2006 WL 44193 (D. Or. Jan. 9, 2006))

For more information, contact:

Steven Shiffman at (212) 940-6785 or e-mail steven.shiffman@kattenlaw.com, or
Joanna M. Bernard at (212) 940-6549 or e-mail joanna.bernard@kattenlaw.com

CFTC

Chicago Board of Trade Files to Register as a Stock Exchange with the SEC

The Chicago Board of Trade has filed written notice with the Securities and Exchange Commission to register as a national securities exchange. Pursuant to Section 6(g) of the Securities Exchange Act of

1934, the CBOT's registration was effective on filing. Notice registration as a national securities exchange is a prerequisite to the listing of futures on single stocks and narrow-based stock indices. The CBOT's filing is expected to be available in the SEC's Public Reference Room as File No. 10-137 by January 23.

<http://www.sec.gov/rules/other/34-53060.pdf>

Chicago Mercantile Exchange Reduces Class A Share Requirement for Clearing Members

Chicago Mercantile Exchange Holdings Inc. announced on January 18, that it will reduce the requisite number of CME Class A Shares that its clearing members must acquire and hold as part of their capital investment requirement. Effective February 1, 2006, new firms applying for clearing member status will be required to acquire 15,000 shares of CME Class A stock, down from the previous requirement of 30,000 shares. Based on the closing price of CME stock on the New York Stock Exchange on January 18, 2006, this change will reduce the cost of clearing membership by more than \$5.6 million. The number of Class A shares that must be assigned to existing CME clearing members (on or before February 1, 2006) will be decreased incrementally by 3,000 shares per month over a five-month period. All other capital investment requirements, including the purchase of two CME memberships, two IMM memberships, two IOM memberships and one GEM membership, remain in effect for all clearing members of the exchange.

<http://www.cme.com/about/press/cn/printerFriendly/06-08Clearingstockreduction17082.html>

For more information, contact:

Kenneth Rosenzweig at (312) 902-5381 or e-mail kenneth.rosenzweig@kattenlaw.com,

William Natbony at (212) 940-8930 or e-mail william.natbony@kattenlaw.com,

Fred M. Santo at (212) 940-8720 or e-mail fred.santo@kattenlaw.com,

David Benson at (312) 902-5642 or e-mail david.benson@kattenlaw.com,

Megan A. Flaherty at (312) 902-5589 or e-mail megan.flaherty@kattenlaw.com, or

Joshua Yang at (312) 902-5554 or e-mail joshua.yang@kattenlaw.com

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KattenMuchinRosenman LLP Locations

www.kattenlaw.com

401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax