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Corporate and Financial Weekly Digest

April 13, 2007

SEC/Corporate

SEC to Review Proposals on "Ticker" Symbols

On April 5, the Securities and Exchange Commission announced that it had received two proposed national market system plans from separate groups of stock exchanges relating generally to securities symbols. In addition, Nasdaq has filed with the SEC a separate proposal to permit a company to retain its symbol when transferring its listing to Nasdaq from another stock exchange.

Historically, security symbols have been assigned under an informal understanding among the listing markets. It has been the practice of the New York Stock Exchange to list companies using 1-, 2- and 3-character symbols. Other exchanges, including the American Stock Exchange and regional exchanges, have also listed companies using 3-character symbols. Nasdaq has always listed companies using 4- and 5-character symbols.

The Nasdaq Proposals. Since November 2005, Nasdaq has made a series of announcements regarding its intention to begin listing companies with 1-, 2- and 3-character symbols and, on March 21, filed a proposal to allow one company, Delta Financial Corporation, to transfer its listing from Amex to Nasdaq while keeping its 3-character symbol. In addition, on March 29, Nasdaq filed a proposal that would permit the display of 3-character symbols on Nasdaq. This proposal will be considered by the SEC after the required public comment period which will close on April 25.

The General Proposals. At the request of the SEC, for the past two years the exchanges have discussed a national market system plan for the process of reserving, selecting, and allocating securities symbols. Following these discussions, the exchanges recently submitted two competing proposals relating generally to symbols. One proposed plan is supported by Amex, the NYSE and NYSE Arca and limits the use of 1-, 2- and 3-character symbols to those listing markets that traditionally used those symbols. Such proposal does not address the use of 4- and 5-character symbols. The second proposed plan is supported by Nasdaq, NASD, the National Stock Exchange and the Philadelphia Stock Exchange. This plan would permit any listing market to use 1-, 2-, 3-, 4- or 5-character symbols. The SEC intends to publish these two proposed plans for public comment.

http://www.sec.gov/news/press/2007/2007-63.htm
http://www.sec.gov/rules/sro/nasdaq/2007/34-55519.pdf
http://www.sec.gov/rules/sro/nasdaq/2007/34-55563.pdf
http://www.sec.gov/rules/sro/4-533.pdf
http://www.sec.gov/rules/sro/4-534.pdf

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NASDAQ and ISA Rule Changes Relating to Sponsored Access

On February 23, the NASDAQ Stock Market LLC (Nasdaq or Exchange) filed with the Securities and Exchange Commission a proposed amendment to Nasdaq Rule 4611 aimed to update and codify the requirements applicable to the Exchange members that provide sponsored access to other firms and customers to the Nasdaq execution system. Because the Exchange filed the proposal as a "non-controversial" rule change, the rule is effective upon filing with the SEC.

As amended, the sponsored access rule would be identical to the corresponding rule of NYSE Arca, Inc., which the SEC has approved and determined to be consistent with the Securities Exchange Act of 1934. The Exchange maintains that proper usage of Nasdaq's systems and the protection of investors will be achieved by virtue of sponsored participants having to enter into and maintain customer agreements with one or more sponsoring members of the Exchange which contain "Sponsorship Provisions." Such provisions:

- obligate the sponsoring member and sponsored participant to enter into a contractual relationship with the Exchange;
- ensure that orders and trades are honored;
- hold the sponsoring member responsible for the conduct of sponsored participants;
- obligate sponsored participants to comply with all applicable Nasdaq rules;
- restrict access to Nasdaq systems to a limited group of known and educated users;
- require sponsoring members to have procedures to monitor its employees, agents and customers in their access to and use of the Nasdaq systems; and
- ensure full payment of all applicable Nasdaq fees.

Similarly, the International Securities Exchange, LLC (ISE) has proposed an amendment to ISE Rule 706 to permit sponsored customers of a member to access ISE. A sponsored customer's access to ISE is conditioned on such customer entering into a sponsorship arrangement with a sponsoring member. Each sponsorship arrangement includes the following components: maintenance of a customer agreement with a sponsoring member, which would incorporate the "Sponsoring Provisions;" and an express acknowledgement of the sponsoring member's responsibility for the orders, executions and actions of its sponsored customer.

http://www.sec.gov/rules/sro/nasdaq/2007/34-55550.pdf
http://www.sec.gov/rules/sro/ise/2007/34-55586.pdf

NTM Interpreting SEC's Net Capital Rule

The NASD in Notice to Members 07-16 issued several interpretations of the net capital rule. Among them are (i) duty of a broker to know its net capital not just at the end of the day but at all times during the day; (ii) payment for order flow is not an allowable asset; (iii) adverse arbitration awards are to be booked

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as a liability upon entry of the award regardless that no appeal or judgment has been finalized; (iv) requests for an extension to file the Audited FOCUS Report must be submitted at least 3 days in advance of the due date; and (v) there is a $1,000 a day fine for each day a FOCUS Report is late, up to 10 days.

http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_018897.pdf

Banking

Agencies Announce HMDA Information Availability

On April 12, the Board of Governors of the Federal Reserve System, the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the Agencies) announced the availability of the 2006 home loan data disclosed pursuant to the Home Mortgage Disclosure Act (HMDA).

Enacted in 1975, HMDA requires "most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity, report the data annually to the government, and make the data publicly available in a modified Loan Application Register."

HMDA information may be used by the Agencies to "facilitate fair lending supervision and enforcement" as HMDA data "are analyzed in conjunction with other factors to assess an institution's level of risk for lending discrimination."

http://www.fdic.gov/news/news/press/2007/pr07031.html

Litigation

Arbitration Award Vacated Due to "Manifest Disregard" of Controlling Law

Finding that an arbitrator manifestly disregarded the express terms of a collective bargaining agreement which governed a labor dispute, the United States District Court for the District of New Jersey took the "drastic" step of vacating the arbitrator's decision. Acknowledging the strict standard that must be met to overturn an arbitrator's award, the Court explained that vacatur, although "rarely invoked," may be appropriate when an arbitrator ignores, alters or amends unambiguous provisions of a contract. In granting the petitioner's request to vacate the award, the Court found, among other things, that the arbitrator substituted his own personal interpretation of a crucial and unambiguous contractual term instead of applying the definition expressly provided in the agreement between the parties. (*Lourdes Medical Center of Burlington County v. JNESO*, 2007 WL 1040961 (D.N.J. Apr. 5, 2007))

Circuit Court Rules that Interests in RLLPs Constituted "Securities"

Reversing a district court decision, the Eleventh Circuit Court of Appeals found that partnership interests in 18 registered limited liability partnerships (RLLPs) engaged in the business of buying, collecting and reselling credit card debt were "investment contracts," and thus, "securities" for purposes of the registration and anti-fraud provisions of the Securities Act of 1933 and the Exchange Act of 1934. Defendants argued that the partnership interests in the RLLPs were not "securities" and were not subject to regulation under the federal securities laws because the purchasers had the power to actively participate in the management of the RLLPs. After applying the factors

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established in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), to determine whether interests in the RLLPs constituted "investment contracts" under the federal securities laws, the Circuit Court rejected defendants' position.

Based on its analysis, the Circuit Court found, among other things, that, because the purchasers (i) from the inception, and notwithstanding the language of the partnership agreements, had virtually no control over management of the RLLPs; (ii) did not have any experience in the specialized credit card debt business that would enable them to effectively manage the RLLPs; and (iii) were entirely dependent on the expertise of others with respect to management of the RLLPs, their partnership interests were "investment contracts." After ruling that the defendants had violated the registration provisions of the securities laws, the Circuit Court remanded the case to the District Court for a determination as to whether the defendants' sale of the partnership interests violated Section 10(b) of the 1934 Act or Section 17(a) of the 1933 Act. (*SEC v. Merchant Capital LLC*, 2007 WL 983082 (11th Cir. Apr. 4, 2007))

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