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Corporate and Financial Weekly Digest

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SEC/CORPORATE

NASDAQ Amends Global Select Market Initial Listing Requirements

On April 14, the Securities and Exchange Commission published a notice soliciting comments on an amendment to NASDAQ's Global Select Market Initial Listing Requirements. NASDAQ filed the rule change with the SEC on April 6 and has designated the proposed rule change as constituting a non-controversial rule change which renders the proposal effective upon filing with the Commission.

The amendment would reduce the requirements for listing on the Global Select Market as follows: the market capitalization requirement would be reduced to $160 million; the total assets requirement to $80 million; and the total stockholders' equity to $55 million. Companies qualifying under this standard will also have to meet all other requirements of NASDAQ Rule 5315, including the ownership and market value requirements contained in Rule 5315(f) and, upon listing, would be subject to the Global Market continued listing standards. NASDAQ is also reducing the market value of publicly held shares requirement from $70 million to $45 million for companies listing in connection with an initial public offering or that are affiliated with, or a spin-off from, another company listed on the Global Select Market.

The rules also provide that a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time (i.e., a special purpose acquisition company), as described in IM-5101-2, is not eligible to list on the NASDAQ Global Select Market.

Comments should be submitted within 21 days after publication in the *Federal Register*.

Click here for the full text of the proposed amendments.

BROKER DEALER

FINRA Issues Guidance Regarding Private Placement Obligations

The Financial Industry Regulatory Authority, Inc. issued guidance to member firms in Regulatory Notice 10-22 regarding the sale of Regulation D private placements. The notice does not set forth new obligations, but rather reminds members of longstanding duties. FINRA describes a broker-dealer's regulatory obligations to engage in a reasonable investigation of a Regulation D offering as required by the antifraud provisions of the federal securities laws. FINRA notes that the scope of a firm's responsibility will depend upon relevant facts and circumstances, for example, the nature of its affiliation with the issuer, its role in the transaction, and whether the customers are retail investors or more sophisticated institutional investors. FINRA also provides examples of practices that some broker-dealers have adopted to help them discharge their reasonable investigation obligations. FINRA also touches on separate FINRA requirements that apply to the sale of private placements such as suitability obligations and advertising and supervisory requirements.

Read more.

FINANCIAL MARKETS

Senate Committee Approves Wall Street Transparency and Accountability Act

On April 21, the Senate Committee on Agriculture, Nutrition and Forestry approved the Wall Street Transparency and Accountability Act of 2010 (the Bill) introduced by Chairman Blanche Lincoln. The Bill builds on, and is expected to replace, the Over-the-Counter Derivatives Markets Act, which is a part of the broader financial regulatory reform package approved by the Senate Banking Committee in March. As negotiations over financial regulatory reform continue, it is likely that the Bill will undergo additional changes before consideration by the full Senate, possibly as early as next week. Among other provisions, the Bill would:

- Effectively require banks to spin off their swap desks.
- Authorize the Commodity Futures Trading Commission and the Securities and Exchange Commission to adopt rules establishing criteria for determining that a swap or any group, category, type or class of swap is required to be cleared. The agencies may adopt these rules without complying with the provisions of the Administrative Procedure Act providing for notice and an opportunity for public comment.
- Require that any swap cleared through a derivatives clearing organization must be executed on a designated contract market or a swap execution facility.
- Provide a narrow exemption from the requirement that a swap be cleared for "commercial end users" to the extent such swaps are used to hedge commercial risk. A commercial end user is defined to mean any entity that, as its primary business activity, owns, uses, produces, processes, manufactures, distributes, merchandises or markets goods, services or commodities. Significantly, "financial entities" may not take advantage of this exemption.
- Extend the definition of a swap dealer to include any entity that regularly engages in the purchase and sale of swaps in the ordinary course of business.
- Impose a fiduciary duty on swap dealers to the extent they provide advice regarding, or enter into, a swap with a governmental agency, pension plan, endowment or retirement plan.
- Specifically exclude from the definition of a major swap participant any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (2)(A) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974 for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan.
- Require that any person that accepts customer funds in connection with cleared swaps must be registered with the CFTC as a futures commission merchant and must hold such funds in a segregated account comparable to the customer segregated account for customer transactions executed on a designated contract market.

The Wall Street Transparency and Accountability Act of 2010 can be accessed here.

CFTC

NFA Proposes Amendments to "Know Your Customer" Rules

The National Futures Association (NFA) has proposed amendments to its Compliance Rule 2-30 and the associated Interpretive Notice, which set out "know your customer" and customer risk disclosure requirements for NFA member firms. The proposed amendments were prompted by the regulatory harmonization meetings between the Commodity Futures Trading Commission and Securities and Exchange Commission in late 2009, and would preserve NFA's traditional view that customer "suitability" for purposes of trading futures is appropriately a customer-by-customer analysis (rather than trade-by-trade, as in the securities industry), while making several modifications intended to provide increased customer protection. Specifically, the amendments would (1) expand Compliance Rule 2-30 to cover all customers who do not qualify as "eligible contract participants" under CFTC rules (rather than covering only natural persons, as is currently the case); (2) require futures commission merchants (FCMs) to periodically request updated account information from their active customers; (3) require the NFA member that currently solicits and communicates with a customer (whether the clearing FCM, a separate introducing FCM, an introducing broker or commodity trading advisor) to determine, based on any updated account information received by the clearing FCM, whether additional risk disclosure to the customer is necessary; and (4) prohibit NFA members and associates from making individualized recommendations to customers who have been (or should have been) advised that futures trading is too risky for them.

NFA has submitted its proposed rules to the CFTC for review and approval. A copy of NFA's proposal is available here.

CFTC to Consider Whether ICE, NGX, CCX Contracts Perform Significant Price Discovery Function

The Commodity Futures Trading Commission has announced a public meeting, scheduled for April 27 at 9:30 a.m. EDT, to consider whether a number of contracts listed on the IntercontinentalExchange Inc. (ICE), the Natural Gas Exchange Inc. (NGX) and the Chicago Climate Exchange Inc. (CCX) should be designated as "significant price discovery contracts" (SPDCs) pursuant to Section 2(h)(7) of the Commodity Exchange Act and CFTC Rule 36.3. Between June and November 2009, the CFTC issued a series of *Federal Register* releases announcing its intention to determine whether a wide array of contracts listed on these exchanges should be deemed SPDCs. In July 2009, the CFTC designated the Henry Financial LD1 Fixed Price natural gas contract traded on ICE as an SPDC—the first (and, to date, only) contract to be so designated.

As exempt commercial markets (ECMs) under CFTC rules, ICE, NGX and CCX, and the contracts traded thereon, generally are subject to minimal regulation by the CFTC. However, the designation of ECM-listed contracts as SPDCs subjects the listing ECM, with respect to the designated contracts, to many of the obligations that apply to designated contract markets, such as large trader reporting, publication of daily trading information, and the establishment of position limits or position accountability levels for SPDCs.

The CFTC press release announcing the public meeting is available here.

LITIGATION

Anonymous Internet Promoter Liable for Securities Fraud

The Tenth Circuit Court of Appeals held that a stock promoter's anonymous Internet postings about a struggling golf equipment company constituted material misrepresentations that subjected the promoter to liability for securities fraud.

Jonathan Curshen appealed a district court's ruling that he violated several securities laws and regulations, including Rule 10(b)-5 prohibiting securities fraud, in connection with his online promotion of a company called "Freedom Golf." The Securities and Exchange Commission sued Mr. Curshen after he posted 35 messages on Internet bulletin boards under various screen names touting Freedom Golf's financial performance and business prospects. The SEC argued that Mr. Curshen's statements were materially misleading because, among other things, he failed to disclose that he was paid to promote the company. It was undisputed that the statements were made in connection with the purchase or sale of a security.

Mr. Curshen asserted that his postings, which included "optimistic" statements about the company such as, "Get in now before the fireworks," were mere puffery, and that reasonable investors would not be misled by anonymous Internet messages. The Tenth Circuit disagreed, however, finding that some of Mr. Curshen's postings suggested he was vouching for Freedom Golf's management and thus "the fact that he was compensated as a promoter would be necessary to make the statements not misleading." (*S.E.C. v. Curshen*, No. 09-1196, 2010 WL 1444910 (10th Cir. April 13, 2010))

Seller Had No Duty to Investigate Accuracy of Information

A federal court in Minnesota dismissed all claims against a seller of consumer debt accounts after the purchaser failed to establish that the seller knew the accounts had, contrary to the representations in the seller's advertising, been turned over to collection agencies.

Summit Recovery, LLC purchased 40,828 debt accounts from Credit Card Reseller, LLC (CCR), after CCR informed Summit that the accounts, which CCR had purchased from another entity, had not been turned over to collection companies. The contract memorializing the deal expressly stated that the buyer had not relied on any representation made by the seller. The portfolio underperformed, however, and when it discovered that the accounts had been turned over to collection companies, Summit sued CCR asserting claims of, among other things, fraudulent and negligent misrepresentation.

Summit argued that CCR was liable for fraudulently misrepresenting the nature of the accounts because it consciously ignored the fact that the information it had concerning the accounts was unreliable. The district court rejected this argument, holding that Summit had not demonstrated that CCR should have known the accounts had been turned over to collection agencies and that CCR had no duty to investigate the true condition of the accounts before selling them to Summit. The court also dismissed Summit's claims for negligent misrepresentation, rejecting Summit's argument that CCR had a special relationship with it based upon the fact that CCR provided it with information concerning the accounts. (*Summit Recovery, LLC v. Credit Card Reseller, LLC*, No. 08-5273, 2010 WL 1427322 (D. Minn. Apr. 9, 2010))

EXECUTIVE COMPENSATION AND ERISA

Health Care Reform: Insured Health Plans to Comply with Nondiscrimination Rules

Under Section 10101(d) of the Patient Protection and Affordable Care Act (PPACA), which became law in March 2010, insured group health plans will soon be subject to nondiscrimination rules that are similar to those that have been applicable to self-insured plans for the past 30 years. In other words, insured plans will be prohibited from discriminating in favor of highly compensated individuals. Such nondiscrimination rules will apply to calendar year plans beginning January 1, 2011.

The application of new nondiscrimination rules to insured health plans will likely affect certain welfare benefits that employers often provide to executives and other highly compensated individuals. Under the current rules, employers may adopt fully-insured executive-level welfare plans that offer medical, dental and vision benefits that are over and above the coverage provided to rank and file employees. Employers also sometimes purchase insurance policies to satisfy obligations associated with post-termination or retirement health care benefits provided to certain former executives. However, when insured health plans become subject to nondiscrimination requirements, providing such benefits to only a select group of employees will likely result in adverse tax consequences to both the executive and the employer.

Because the PPACA is new, it is currently unclear how the new nondiscrimination rules will be enforced and what consequences will apply if discrimination exists. However, given that the law may begin to be enforced in the near future, employers should examine their insured plans for evidence of discrimination, and determine what must be done to avoid continuation of any discriminatory plans into 2011.

The Text of the PPACA can be found here.

COBRA Subsidy Extended Until May 31

Under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), certain group health plan participants who lose their coverage are permitted to continue coverage for a period of time by electing continued coverage and paying the relevant premium themselves. The American Recovery and Reinvestment Act of 2009, as amended, provided a subsidy to certain eligible individuals that allowed them a discount of up to 65% of their COBRA premiums for up to 15 months.

The eligibility period for the COBRA subsidy has expired and been extended several times. Most recently, the eligibility period would have expired on March 31. However, President Obama signed the Continuing Extension Act of 2010, which extends the COBRA subsidy eligibility period until May 31. As such, participants who experience a qualifying event on or before such date may be eligible for the subsidy.

Various aspects of the COBRA subsidy have been changed since its original enactment. For more information about the original subsidy, click here, and for information about several important changes to the original subsidy, click here.

The text of the Continuing Extension Act of 2010 can be found here.

UK DEVELOPMENTS

FSA Fines London Stockbroker for Penny Stocks Failings

On April 15, the UK Financial Services Authority (FSA) announced that it had fined Hythe Securities Limited, a London-based stockbroker, £200,000 (approximately $310,000) for failings in its systems and controls relating to the sale of higher risk securities, including penny stocks. The FSA also fined Hythe's senior director, Meenaz Mehta, £35,000 (approximately $55,000) and banned him indefinitely from holding any significant influence function with any firm marketing penny stocks to retail customers.

Hythe was found to have breached FSA Core Principle 3 (exercising due skill, care and diligence) as well as several specific FSA rules by:

- using aggressive sales practices, including recommending penny stocks to customers against their wishes and exceeding agreed trading limits;
- providing customers with misleading information about penny stocks and failing to disclose all commissions and charges; and
- failing to ensure that suitable advice was given to customers, particularly by failing to carry out a proper "know your customer" fact-finding exercise.

During the relevant period, Mr. Mehta as the chief executive was responsible for the day to day running of Hythe. He also held the compliance oversight function. The FSA found that, despite recognizing the potential risk to customers, Mr. Mehta failed to take sufficient action to ensure that Hythe complied with the relevant FSA rules. Further, as a result of failing to implement adequate reporting procedures, Hythe was unable to identify or control many of the regulatory risks arising from the firm's business model, particularly those relating to the fair treatment and protection of retail customers.

When setting the fine, the FSA took into account improvements which Hythe had made in its sales and compliance procedures, and also that Hythe has since varied its permissions so that it can no longer have retail customers.

To read the decision in full, click here.

FSA Announces Market Abuse Fines and Bans

As reported in the January 15 edition of *Corporate and Financial Weekly Digest*, on January 11, the UK Financial Services Authority (FSA) had announced that Sameer Patel and Robin Chhabra had been found to have committed market abuse by using inside information to carry out a series of profitable spread bets.

On April 16, the FSA announced that it had banned both men from working in the financial services industry and fined Mr. Patel £180,541 (approximately $277,000) and Mr. Chhabra £95,000 (approximately $145,000). Mr. Patel's fine comprises a punitive element of £95,000 (approximately $145,000) and disgorgement of profits of £85,541 (approximately $132,000). Mr. Chhabra's fine comprised a punitive element only.

To read the decision in full, click here.

EU DEVELOPMENTS

CESR Consults on Technical Advice for the European Commission Review of MiFID

On April 13, the Committee of European Securities Regulators (CESR) published three consultation papers on its technical advice to the European Commission for the Commission's review of the Markets in Financial Instruments Directive (MiFID). The Commission will be conducting a review to assess the effectiveness of MiFID throughout 2010.

The CESR consultation paper on transaction reporting focuses on the following key areas:

- the introduction of a third trading capacity (riskless principal);
- the collection of client and meaningful counterparty identifiers;
- standards for client and counterparty identifiers;
- client ID collection when orders are transmitted for execution; and
- transaction reporting by market members that are not authorized as investment firms (for example, members of a regulated market or multi-lateral trading facilities (MTF)).

The main points of the investor protection consultation include:

- requirements relating to the recording of telephone conversations and electronic communications—CESR is considering a pan-European regime for recording all transaction orders received or transmitted over the telephone or through electronic communications; and
- execution quality date—CESR is also considering whether regulatory intervention is necessary to ensure that the necessary information is available in the market to select appropriate execution venues.

The equity markets consultation paper follows on from CESR's other work in this area including its focus on dark pools. The main topics covered in the paper include:

- pre-trade and post-trade transparency regimes for regulated markets and MTFs;
- the definition of and obligations for systematic internalizers;
- application of transparency obligations to equity-like instruments;
- regulatory framework for consolidation and cost of market data; and
- regulatory boundaries and requirements.

The comment period for each of the three consultation papers ends on May 31.

To read the consultation paper on transaction reporting, click here.
To read the consultation paper on investor protection, click here.
To read the consultation paper on equity markets, click here.

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