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Corporate and Financial Weekly Digest

April 27, 2007

SEC/Corporate

House of Representatives Passes “Say On Pay” Bill

On April 20, the House of Representatives passed The Shareholder Vote on Executive Compensation Act which provides shareholders a nonbinding and advisory vote on a public company’s executive pay plans. The bill, which was opposed by the White House, would not impose limits on compensation paid to company executives. The bill passed the House of Representatives by a vote of 269 to 134 and is intended to build on the Securities and Exchange Commission’s efforts to tighten executive compensation disclosure rules. (*Securities Law 360,* 4/20/07)

SEC Announces Roundtable Discussions Regarding Proxy Voting

On April 24, the Securities and Exchange Commission announced that it will host a series of roundtable discussions in May on shareholder rights and federal proxy rules. The first of three roundtable discussions will take place on May 7 and will consist of panels addressing the following:

- The federal role in upholding shareholders’ state law rights
- The purpose and effect of the federal proxy rules
- Non-binding proposals under the proxy rules
- Binding proposals under the proxy rules

The second and third roundtable discussions on proxy voting (more specific agendas have not yet been released) will take place on May 24 and May 25, respectively. The roundtable discussions will be held in the Auditorium at the SEC’s headquarters at 100 F Street, NE, Washington D.C. and will be open to the public. The roundtable discussions also will be available via webcast on the SEC’s website at www.sec.gov. The SEC welcomes feedback regarding any of the topics to be addressed at the roundtable discussions.

http://www.sec.gov/news/press/2007/2007-71.htm

SEC Announces Next Steps Relating to IFRS

On April 24, the Securities and Exchange Commission announced a series of actions it intends to take relating to the acceptance of financial reporting in International Financial Reporting Standards (IFRS) as published by the International Accounting Standards Board (IASB).

The SEC anticipates issuing a Proposing Release this summer that will request comments on proposed changes to the SEC’s rules to allow the use of IFRS in financial reports filed by foreign private issuers that are registered with the SEC. The proposed rule would allow foreign private issuers to choose between following IFRS or generally accepted accounting principles (U.S.

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GAAP). In addition, the SEC plans a Concept Release relating to issues surrounding the possibility of treating U.S. and foreign issuers similarly in this respect by also providing U.S. issuers the alternative to use IFRS.

The SEC's rules currently require that foreign private issuers who report in IFRS, or any other non-U.S. GAAP, provide a reconciliation of those financial statements to U.S. GAAP. The SEC's planned proposal this summer would address eliminating that reconciliation requirement with respect to financial statements filed in IFRS beginning in 2009.

Comments on both releases would be due in the fall.

http://www.sec.gov/news/press/2007/2007-72.htm

Broker Dealer

NSX Rule Regarding Annual Compliance and Supervisory Certification Proposed

On April 13, the National Stock Exchange, Inc. (NSX or Exchange) filed with the Securities and Exchange Commission a proposal to adopt NSX Rule 5.7 and accompanying Interpretations and Policies .01 (Annual Compliance and Supervision Certification). The new rule would require each Equity Trading Permit (ETP) Holder's Chief Executive Officer to certify annually to having in place a process to establish, maintain, review, modify and test policies and procedures reasonably designed to achieve compliance with the applicable rules of the Exchange and federal securities laws and regulations.

Specifically, the proposed rule would require the CEO to certify on an annual basis that the ETP Holder has in place processes to: (i) establish and maintain policies and procedures reasonably designed to achieve compliance with applicable NSX rules and federal securities laws and regulations; (ii) modify such policies and procedures as business, regulatory and legislative changes and events dictate; and (iii) test the effectiveness of such policies and procedures on a periodic basis, the timing of which is reasonably designed to ensure continuing compliance with applicable NSX rules and federal securities laws and regulations, all of which processes are to be evidenced in a report reviewed by the CEO (or equivalent officer), chief compliance officer and such other officers as the ETP Holder may deem necessary to make the certification. The CEO also would certify that the CEO (or equivalent officer) has conducted one or more meetings with the chief compliance officer in the preceding 12 months and consulted with the chief compliance officer, outside consultants, lawyers and accountants, to the extent deemed appropriate, in order to attest to the statements made in the certification.

The proposed rule change also creates a new Interpretation and Policy .01 to Rule 5.7, which sets forth the language of the certification and gives further guidance as to the requirements and limitations of the rule.

http://www.sec.gov/rules/sro/nsx/2007/34-55631.pdf

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Banking

President's Identity Theft Task Force Releases Report

On April 23, the President's Identity Theft Task Force issued a report entitled *Combatting Identity Theft: A Strategic Plan*. In the report, the members of the Task Force, who include the US Attorney General, the Chairman of the Federal Trade Commission, as well the respective leaders of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the

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Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the National Credit Union Administration and others, made specific recommendations with respect to identity theft.

Those recommendations include: (i) decreasing the unnecessary use of social security numbers in the public sector by developing alternative strategies for identity management; (ii) educating federal agencies on how to protect data and monitoring their compliance with existing guidance; (iii) ensuring effective, risk-based responses to data breaches suffered by federal agencies; (iv) establishing national standards for private sector data protection requirements and breach notice requirements; (v) developing comprehensive records on private sector use of social security numbers; (vi) better educating the private sector on safeguarding data; (vii) establishing a national identity theft law enforcement center; and (viii) developing and promoting the use of a universal identity theft report.

Other recommendations are also included.

The task force was established in May 2006 by executive order of the President in order to create a coordinated approach among government agencies to combat identity theft crime.

http://www.idtheft.gov/reports/StrategicPlan.pdf

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United Kingdom Developments

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FSA Continues Move Towards More Principle-Based Regulation

The Financial Services Authority (FSA) published a paper, *Principles-based Regulation - Focusing on the Outcomes that Matter* on April 23 setting out its approach to a more-principles-based regulatory regime. The paper was published in conjunction with a conference held on that date at which the FSA and the financial services industry discussed the challenges and opportunities presented by a move towards a more principles-based regulation.

Under the FSA's new approach, its FSA Handbook will rely increasingly on principles and outcome-focused high level rules rather than detailed prescriptive rules focussing on how outcomes must be achieved. As part of their move to a more-principles-based regulatory regime, the FSA has committed to provide, either directly or through confirmation of industry guidance, a greater range of information to help firms plan their business processes and controls. This recognizes the difficulty of regulated firms attaining confidence that they understand the regulatory environment represented by a less rules-based system. It appears that greater dependence on professional advisors is another likely outcome of the change to more principles based regulation.

http://www.fsa.gov.uk/pubs/other/principles.pdf

Greater Cooperation in Supervision of Hedge Funds Encouraged

In a speech given to the Financial Service Authority's (FSAs) More Principles-based Regulation conference on April 23, UK Treasury minister Ed Balls said that the UK will propose that financial regulators work more closely together in sharing information on major counterparties' exposures to hedge funds. The proposal is based on the view that the quality of prudential supervision of hedge fund activity will be enhanced by greater co-operation between regulators in monitoring counterparties' exposures to hedge funds.

Although Mr Balls accepted that requiring hedge funds to disclose their portfolio positions to regulators would not be productive, he announced that he

intended to discuss with other G8 Finance Ministers a proposal to broaden the scope of the six-monthly enquiries that the FSA currently addressed to other international regulators as well as to prime brokers and other hedge fund counterparties which it regulates

http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2007/press_48_07.cfm

AIM to be Subject to MiFID Changes

The London Stock Exchange (LSE) announced on April 24 that it is consulting on proposed rule changes that would allow third party trading platforms to trade securities listed on its Alternative Investment Market (AIM) as a result of the EU Markets in Financial instruments Directive (MiFID), due to be implemented from November 1. The LSE main market will be within the scope of MiFID and subject to MiFID transparency rules as a result. Even though AIM is outside the scope of MiFID, the LSE believes that MiFID's transparency should also apply to AIM.

The consultation closes May 21.

http://www.londonstockexchange.com/en-gb/about/Newsroom/pressreleases/2007/aimsecurities.htm

Office of Fair Trading Closes LME Investigation

The UK Office of Fair Trading announced on April 20 that it had finally and unconditionally closed its investigation of the London Metal Exchange (LME). The case was opened in response to a complaint in 2003 from Spectron Group plc (Spectron) which alleged that the operation of the LME Select electronic trading platform, was anti-competitive. Spectron provides an electronic platform (eMetals) for trading LME non-ferrous metals contracts in competition to the LME.

http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/closure/LME

FSA Considering Introduction of Plea Bargaining

The Financial Times published a study on April 22 which confirmed the findings of earlier work by the UK Financial Services Authority (FSA) that there had been possible insider trading ahead of a takeover announcement in almost one in four cases in 2005 (FSA study published on March 7 and reported in the March 9 *CFWD*).

In response to questioning by the Financial Times, Margaret Cole, FSA's Director Enforcement, confirmed that the FSA was considering with the UK Treasury the introduction of immunity from prosecution and plea-bargaining in insider dealing market abuse cases. Ms. Cole said, "In the past, the idea of the plea bargain in this country has been looked at with disdain. But we have been studying the US experience and are now seriously looking at whether we can introduce a form of plea bargaining which can be hugely advantageous." This would represent a major change of approach by the UK regulator and future developments are awaited with interest.

http://www.ft.com/cms/s/5e3da614-f112-11db-838b-000b5df10621.html

EU Developments

Legal Action for Failure to Implement MiFID Commenced

On April 24, the European Commission commenced infringement proceedings

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against 24 EU member states for failing to implement the Markets in Financial Instruments Directive (MiFID) into their national law. At present, only the UK, Ireland and Romania have met their obligations under the Directive under which they were required to implement the new MiFID requirements before January 31 to give EU firms sufficient time to prepare for the November 1 date on which MiFID requirements come into force.

It is rare for infringement proceedings to run their full course. Although their commencement triggers a formal process that could potentially reach the European Court of Justice, the Commission's goal is to force the non-complying member states to step up the pace of their implementation of this significant Directive.

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/547&format=HTML&aged=0&language=EN&guiLanguage=en

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Securities Law Complaint Dismissed Under PSLRA

In a class action brought by purchasers of securities in defendant Sierra Wireless, plaintiffs alleged that Sierra and its officers artificially inflated the value of Sierra's stock by issuing statements containing material misrepresentations and omissions about the company's future performance and business strategy. The defendants moved to dismiss, arguing that the complaint did not plead securities fraud with the particularity required by the Private Securities Litigation Reform Act (PSLRA) and the Federal rules.

Plaintiffs' complaint alleged that Sierra and its executives made materially misleading statements by, among other things, continuing to tout the company's prospects without disclosing its failure to win contracts from important customers. For example, the complaint pointed to several optimistic statements Sierra made about its ability to compete in the market for selling products to original equipment manufacturers (OEMs), including that it expected the OEM business to "continue to be a healthy business for the foreseeable future," without disclosing that one of its largest customers, PalmOne, had decided not to purchase such products for use with the next generation of its Treo smartphones. Sierra made similar statements about its ability to compete in the PC card business even though it knew it had lost a contract to produce such cards for Verizon.

The Court found that Sierra's statements concerning the prospects for its business were either literally true, and not refuted by the loss of a particular contract, or "expressions of puffery and corporate optimism" that "do not give rise to securities violations." The Court pointed out that although the loss of a particular contract may have been a setback for the company, it would not necessarily undermine its ability to compete in a particular area and thus would not demonstrate that a broad statement of corporate optimism about its business was false. Having failed to allege specific facts that would demonstrate that the statements made by Sierra and its executives were false when made, plaintiffs could not satisfy the heightened pleading standards of Rule 9(b) and the PSLRA. Accordingly, the District Court dismissed the complaint without prejudice. (*In re Sierra Wireless, Inc., Sec. Litig.*, No. 05-md-1696 (SHS), 2007 WL 1149235 (S.D.N.Y. April 18, 2007))

Party Cannot Monopolize Market It Does Not Compete In

Plaintiff Olde Monmouth, a stock transfer agency, brought antitrust causes of action against defendants Depository Trust & Clearing Corp. (DTTC) and Depository Trust Company (DTC), a subsidiary of DTTC, alleging

monopolization and attempted monopolization in violation of Section 2 of the Sherman Act. Olde Monmouth asserted that defendant DTC, the largest depository for stock certificates, abused its monopoly power in the securities depository industry when it excluded plaintiff from participation in a securities transfer program it had set up. The Court granted the defendants' motion to dismiss, finding that plaintiff's complaint failed to allege that DTC competes in the relevant market and, therefore, that it could not state a claim under Section 2 of the Sherman Act.

To state a claim for attempted monopolization, a plaintiff must allege "'(i) that the defendant engaged in predatory or anticompetitive conduct with (ii) a specified intent to monopolize and (iii) a dangerous probability of achieving monopoly power' in the relevant market." Olde Monmouth asserted that the relevant market is that of stock transfer agent services and that DTC exerts influence over this market from its monopoly position in the securities depository industry. The Court rejected this argument, finding that the securities depository industry in which DTC operates is distinct from the stock transfer agent industry in which plaintiff competes. Applying Second Circuit law, the Court held there is no danger of monopolization where a defendant does not compete in the relevant market and there is no indication that it ever sought to do so. (*Olde Monmouth Stock Transfer Co., v. Depository Trust & Clearing Corp.*, No. 07 Civ. 990 (CSH), 2007 WL 1180441 (S.D.N.Y. Apr. 23, 2007))

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Intermediaries to Complete Annual Online Updates to Registration Information

The Commodity Futures Trading Commission has proposed to amend CFTC Rule 3.10 to require each registered futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator and leverage transaction merchant to complete online annual reviews and updates of the information maintained by the National Futures Association relating to the registrant. Under the rule proposal, a failure to update that information within 30 days of the date established by NFA for completion would be deemed to be a request for withdrawal of registration. The public comment period for the rule proposal expires May 29.

The CFTC previously repealed a similar, paper-based updating requirement in 2002. The CFTC explained that it is proposing to re-establish an up-dating requirement in light of recent problems experienced by NFA concerning the accuracy of information provided by certain intermediaries. The CFTC added that the proposed rule changes do not alter a firm's continuing firm obligation under Regulation 3.31(a)(1) to promptly correct any deficiency or inaccuracy in its NFA registration file.

http://www.cftc.gov/opa/press07/opa5325-07.htm

Tokyo Financial Exchange Receives No-Action Letter from CFTC

The Commodity Futures Trading Commission's Division of Market Oversight has issued a no-action letter to Tokyo Financial Exchange (TFX) authorizing TFX members located in the U.S. to install and use TFX's electronic trading and order matching system (the System). The no-action letter, issued on March 6, confirms that TFX may provide such direct access without first applying to the CFTC for designation as a contract market or registration as a derivatives transaction execution facility.

The no-action letter specifically permits TFX to make the System available to TFX members that are: (i) located in the U.S. and trade on the System for their

proprietary accounts; (ii) futures commission merchants (FCMs) or firms exempt from registration pursuant to CFTC Rule 30.10 (Rule 30.10 Firms) that submit orders from or on behalf of U.S. customers directly to the System for execution; (iii) commodity pool operators or commodity trading advisors who submit orders on behalf of U.S. pools they operate or U.S. customer accounts for which they trade provided that an FCM or 30.10 Firm acts as clearing firm and guarantees all such trades; and (iv) FCMs or Rule 30.10 Firms that transmit orders from or on behalf of U.S. customers via an automated routing system for execution on the System.

http://www.cftc.gov/files/tm/letters/07letters/tm07-02.pdf

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