

Corporate and Financial Weekly Digest

Business/Financial News in Brief
April 28, 2006

SEC/Corporate

SEC to Issue Effectiveness Orders Electronically

On April 25, the Securities and Exchange Commission announced that on May 22, it would begin issuing notifications of effectiveness for Securities Act registration statements and post-effective amendments electronically via its website and via the EDGAR system. Notices will not be provided where a registration statement becomes effective automatically by law (presumably including Forms S-8 and WKSI automatic shelf registration statements). These notifications will be posted the morning after a filing is determined to be effective. The SEC will no longer prepare and mail paper effectiveness orders associated with these filings. Registrants will continue to be notified promptly by telephone that their registration statements or post-effective amendments are effective. After May 22, the SEC's website (<http://www.sec.gov/>) will also present a list of filings declared effective on the previous business day. The effectiveness notices will be distributed as an EDGAR form type called "EFFECT." It will accordingly be possible to search for a company's filings and be able to see when the SEC staff declared a particular Securities Act registration statement effective.

<http://www.sec.gov/news/press/2006/2006-61.htm>

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Broker Dealer

FinCEN Says Agent-Lender is Customer Under Bank Secrecy Act

The Department of Treasury's Financial Crimes Enforcement Network (FinCEN) recently published a question and answer pertaining to a broker-dealer's responsibility in treating agent-lenders as "customers" for purposes of the Customer Identification Procedures (CIP) rule pursuant to a securities lending and borrowing program. The guidance provided was specific to the typical scenario when a U.S. bank or broker-dealer (Agent) arranges for a loan or loans of Agent's customers' securities to broker-dealers. The Agent typically holds the securities for its customers which become available through contract with or without restrictions on the Agent's discretion, to be loaned through the Agent's securities lending program. The Agent notifies broker-dealer borrowers of potentially available securities and enters into a stock loan/stock borrow agreement, usually using the standard form of stock loan agreement. The broker-dealer will record the transaction in the name of the Agent and not the underlying owner of the securities. The Agent may provide the broker-dealer with information regarding the identities of the Agent's

customers whose securities are loaned to the broker-dealer. In this scenario, the Agent's customers are not customers of the broker-dealer, and, to that extent, the broker-dealer need not adhere to the know your customer specifics for the customers of the Agent. The CIP rule defines the term "customer" as "a person that opens a new account," which for these purposes would be the Agent lending the securities. Although the broker-dealer has information about the customer of the Agent, FinCEN and the Securities and Exchange Commission have explained that a broker-dealer is not required to look through an omnibus, trust, or similar account to its beneficiaries, and is required only to verify the identity of the named account holder, the Agent.

http://www.fincen.gov/cip_faq.pdf

Extension of Termination Date of Short Sale Pilot Order

The Securities and Exchange Commission recently issued an order extending the termination date to August 6, 2007 for the short sale pilot under Regulation SHO. The SEC adopted Regulation SHO in 2004, and issued a first pilot order creating a one year pilot program to suspend the provisions of Rule 10a-1(a) (prohibiting short sales on a minus tick and zero-minus tick) under the Securities Exchange Act and the Nasdaq short sale price test. Subsequently, a second pilot was issued extending the termination until April 2006. Under the pilot program each trading market has grouped listed equity securities into three categories: Category A securities have no tick test. Category B securities have no tick test for trades from 4:15 p.m. Eastern Time until the next day's opening of the consolidated tape. Category C securities have no tick test from the close of the consolidated tape until the next day's opening of the consolidated tape. The consolidated tape operates from 4:00 a.m. Eastern Time to 8:00 p.m. Eastern Time. Each market's trading data in Category A, B and C securities is available at the SEC's website.

<http://www.sec.gov/rules/other/2006/34-53684.pdf>

NYSE Proposes Rule Change to Annual Branch Office Inspection

The Securities and Exchange Commission has published for comment New York Stock Exchange LLC proposed new Rule 342.24 (Annual Branch Office Inspection) and new Rule 342.25 (Risk-Based Surveillance and Branch Office Identification) (Rules). The proposed Rules would allow member organizations, with the approval of the NYSE, to exempt certain branch offices from the annual branch office inspection by implementing and utilizing an NYSE-approved risk-based surveillance system. The new Rules would require that these exempt branch offices be inspected at least once every three calendar years instead of the now required annual inspection. NYSE proposed the Rules to provide member organizations flexibility in reducing unnecessary inspections of low-risk branch offices with good compliance records. Proposed Rule 342.25 outlines the policy and procedure requirements that member organizations would be required to include in any risk-based surveillance system. These include 1) the flexibility to initiate "for cause" inspections on any exempt branch office when the circumstances warrant, 2) policies which would allow employees to report compliance issues on a confidential basis outside the branch office chain of command, and 3) at least half of the required annual inspections are done on an unannounced basis. The Rules set forth 15 risk-based factors to apply in determining whether a branch office should be exempted from annual inspections. The NYSE has noted that certain branch offices, given their size (25 or more registered representatives or one of the firm's top 20% in production), scope of supervisory activities or otherwise will not be allowed to be exempt under the proposed Rules.

<http://www.sec.gov/rules/sro/nyse/2006/34-53689.pdf>

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United Kingdom Developments

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Takeover Panel Aims to Treat Derivatives Dealings as Equivalent to Dealings in Shares

In Response Statement 2005/3 issued on April 21, the Takeover Panel announced a number of amendments to The Takeover Code designed to implement an approach where dealings in contracts for differences, options and other derivatives will be treated as equivalent to dealings in the underlying shares in a consistent manner across all of the rules of the Code.

The Panel's position on the disclosure of derivatives dealings contrasts with that of the Financial Services Authority (FSA) in its consultation on share disclosure rules reported in the April 7 issue of the *Corporate and Financial Weekly Digest*.

<http://www.thetakeoverpanel.org.uk/new/consultation/DATA//RS200503.pdf>

Takeover Panel's Code to Have Force of Law

The Takeover Panel's Response Statement 2005/5, also issued on April 21, confirmed that the Panel's Takeover Code (hitherto an extra-statutory regime governing UK company takeovers) will be given the force of law from May 20 until the necessary legislation and regulations required to implement the European Union Takeovers Directive (2004/25/EC) in the United Kingdom can be passed by Parliament. This enables the UK to meet the Takeovers Directive's implementation deadline of May 20. RS2005/5 contains various Code amendments and transitional provisions which reflect the interim legal position.

<http://www.thetakeoverpanel.org.uk/new/consultation/DATA//RS200505.pdf>

Takeover Panel Announces Abolition of its Substantial Acquisitions Rules

In a third Response Statement (2005/4) issued on April 21, the Takeover Panel announced that its Substantial Acquisitions Rules (SARs) will be dropped from the Takeover Code on May 20. The SARs were designed to restrict the speed with which a bidder could raise his stake in a company from 15% to 29.9% of its voting rights. They stipulated that a bidder could buy up to 14.9 % of a target's shares, then had to wait at least one week before buying a further 9.9 %, and required a pause of another week before a further 4.9 % could be acquired.

<http://www.thetakeoverpanel.org.uk/new/consultation/DATA//RS200504.pdf>

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Litigation

CFTC Does Not Have Jurisdiction To Regulate "Spot" Transactions

The Commodity Futures Trading Commission filed an action alleging that defendants "engaged in solicitation fraud by running a classic 'boiler room' operation" in which inexperienced telemarketers cold called unsophisticated customers and, after determining their interest, turned them over to defendants who "promised high returns with virtually no risk of loss" from trading in foreign currencies. In seeking summary judgment, defendants asserted that the contracts signed by their customers prior to trading should be viewed as involving "spot" transactions rather than as transactions for future delivery, because they involved currencies bought at prices determined by the market at the time of the underlying

transactions and not by fixed prices at some future point. The court, relying on *CFTC v. Zelener*, 2003 WL 22284295 (N.D. Ill. Oct. 3, 2003), agreed with defendants and awarded summary judgment on the ground that the CFTC did not have jurisdiction over the alleged conduct at issue. (*Commodity Futures Trading Commission v. Erskine*, 2006 WL 1050677 (N.D. Ohio Apr. 19, 2006)).

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CFTC

NFA Announces Effective Date of Amendments to NFA Financial Requirements Sections

Amendments to National Futures Association (NFA) Financial Requirements Sections 1, 5, and 11 will become effective as of July 31, 2006. These amendments increase the minimum net capital requirements from \$250,000 to \$500,000 for futures commission merchants (FCMs) that are not forex dealer members, from \$250,000 to \$1,000,000 for forex dealer members, and from \$30,000 to \$45,000 for independent introducing brokers. The amendments also impose a \$7,500,000 minimum capital requirement on FCMs with affiliates that are authorized to act as a counterparty to off-exchange forex transactions with retail customers solely by virtue of their affiliation with a registered FCM and a \$5,000,000 minimum capital requirement on all FCMs that are counterparties to off-exchange forex options transactions with retail customers, regardless of whether the FCM is a Forex Dealer Member.

<http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=1572>

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