Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

Business/Financial News in Brief
August 11, 2006

SEC/Corporate

SEC Proposes Additional Relief from Section 404 Compliance Deadline for Non-Accelerated Filers and Newly Public Companies

On August 9, the Securities and Exchange Commission proposed an additional extension of the deadline by which non-accelerated filers will be required to comply with the requirements of Section 404 of the Sarbanes-Oxley Act of 2002. The extended deadline would require non-accelerated filers to include management's report on internal control over financial reporting in annual reports for fiscal years ending on or after December 15, 2007 (a five-month extension of the current deadline), and would require the auditor's attestation report on internal control over financial reporting in annual reports for fiscal years ending on or after December 15, 2008 (a 17-month extension of the current deadline). In addition, since management's report on internal control will now be filed before the auditor's attestation report, the management's report on internal control filed during the first year of compliance would be deemed "furnished" rather than "filed" with the SEC. The SEC also observed that if revisions to Auditing Standard No. 2 have not been finalized by the December 15, 2008 fiscal year deadline for auditor's attestation reports, additional extensions of such deadline are possible.

In the same release, the SEC also proposed that newly public companies would not be required to comply with Section 404 and provide either a management assessment or an auditor attestation until the filing of their second annual report with the SEC. This would provide relief for companies that conclude their initial public offering late in their fiscal year and would otherwise have less than a year to establish internal controls over financial reporting in accordance with Section 404.
www.sec.gov/rules/proposed/2006/33-8731.pdf

SEC Extends Section 404 Compliance Deadline for Certain Foreign Private Issuers

On August 9, the Securities and Exchange Commission issued a final rule extending the deadline for foreign private issuers that are accelerated filers, but not large accelerated filers, to comply with Section 404 of the Sarbanes-Oxley Act of 2002. Such foreign private issuers will not be required to include an attestation report by the issuer's registered public accounting firm in their annual reports until fiscal years ending on or after July 15, 2007. This represents a one-year extension of the current deadline.
http://www.sec.gov/news/press/2006/2006-135.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 Pentlow at (212) 940-6412 or email david.pentlow@kattenlaw.com

Broker Dealer

NASDAQ Implements Fees for Members' Required Use of WebCRD

NASDAQ has proposed to implement fees for NASDAQ members that are not members of NASD. The proposed fees are in connection with such members' use of NASD's Web Central Registration Depository (CRD) system, which is required by NASDAQ Rule 1013. The fees are similar to those charged by other self-regulatory organizations (SROs) that use NASD's WebCRD. Members will pay the NASD fees associated with WebCRD directly to NASD through WebCRD. To the extent that NASDAQ members are already members of another SRO that participates in WebCRD, these fees are already being assessed by NASD under the authority of the SRO. Accordingly, this filing will not result in the imposition of duplicative fees by NASD. The application of the proposed rule change is effective immediately.
http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-12892.htm

NASDAQ Market Makers Acting in the Capacity of Exchange Market Maker Exempt from Trading Activity Fee

NASDAQ began to operate as a national securities exchange on August 1 for NASDAQ-listed securities. Until NASDAQ is operational as an exchange in all National Market System (NMS) securities, the Trading Activity Fee (TAF) exemption will apply only to NASDAQ-listed securities. Section 1 of Schedule A to NASD's By-Laws exempts from the TAF proprietary transactions by a firm that is a member of both the NASD and a national securities exchange that are effected through a registered market maker's quote on the NASDAQ Exchange. The exemption does not apply to other transactions permitted by Section 11(a), such as bona fide arbitrage or hedge transactions.

Accordingly, when NASDAQ became operational as an exchange in NASDAQ securities, NASD member firms that are also members of the NASDAQ Exchange, became exempt from the TAF for transactions in which they act in their capacity as a registered market maker in such NASDAQ securities. Further, when NASDAQ becomes operational as an exchange in Consolidated Quotation System (CQS) securities on approximately October 1, NASD member firms that are also members of the NASDAQ Exchange, will be exempt from the TAF for transactions effected on the NASDAQ Exchange, in which they act in their capacity as a registered market maker in CQS securities.

NASD has published a Question and Answer discussion, which can be accessed at the link below, in order to facilitate members' understanding of the application of the exemption to market making activity on the NASDAQ Exchange.
http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_017066.pdf

NASD Proposal to Align NASD Rules with Regulation NMS

NASD has proposed to amend its rules to align them with Regulation NMS and to amend the rules that govern quoting, trade reporting, and clearing through the Alternative Display Facility (ADF) to extend this functionality to all National Market System (NMS) stocks, as defined in the Securities and Exchange Commission Rule 600(b)(47), including stocks listed on the New York Stock Exchange, American Stock

Exchange, and certain other exchanges. Further, this rule proposal would reorganize the ADF trade reporting rules and make changes to enhance its clarity. The rule proposal primarily addresses implementation of the Order Protection Rule and the Access Rule of Regulation NMS. It does not address issues related to the sub-penny rule or market data rules.
http://www.sec.gov/rules/sro/nasd/2006/34-54277.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

Investment Advisor and Investment Company

SEC Chairman Cox Issues Statement Concerning Recent *Goldstein* Decision

On August 7, Christopher Cox, Chairman of the Securities and Exchange Commission, issued a statement stating that the SEC would not appeal the District of Columbia Court of Appeals' decision in *Phillip Goldstein, et al. v. Securities and Exchange Commission* which vacated the SEC's rules requiring many advisers to hedge funds to register with the SEC as investment advisers. Chairman Cox stated that two of the SEC's primary reasons for not appealing the decision was the fact that the decision was based on multiple grounds and was unanimous.

However, Chairman Cox indicated that the SEC will issue new related regulatory proposals shortly, including a new anti-fraud rule that would clarify that the anti-fraud provisions of the Investment Advisers Act of 1940 extend to investors of a hedge fund. Such a rule would reverse the implication in the Goldstein decision that the anti-fraud provisions apply only to 'clients' as the Court of Appeals interpreted that term, and not to investors in a hedge fund. Other proposals under consideration include increasing the minimum asset and income requirements for individuals who invest in hedge funds. Additionally, the SEC staff is expected to provide guidance to address the grandfathering, transition and other miscellaneous relief necessitated by the vacating of the rule. Chairman Cox concluded his statement stating that the SEC will continue to enforce violations of the federal securities laws against hedge funds and hedge fund advisers, and that "Hedge funds are not, should not, and will not be unregulated."

The immediate consequence of the SEC's decision not to appeal is that an SEC-registered investment adviser who was required to register because of the vacated rule may now consider deregistration. In addition, advisers who imposed a two year lock-up on investor redemptions in order to remain unregistered may now consider eliminating the two year lock-up.
http://www.sec.gov/news/press/2006/2006-135.htm

For further information contact:
Daren Domina at (212) 940 6517 or e-mail daren.domina@kattenlaw.com,
Peter Shea at (704) 44 2017 or e-mail peter.shea@kattenlaw.com,
Morris Simkin at (212) 940 8654 or e-mail morris.simkin@kattenlaw.com,
Marybeth Sorady at (202)625 3727 or e-mail marybeth.sorady@kattenlaw.com, or
Marilyn Selby Okoshi at (212) 940-8512 or e-mail marilyn.okoshi@kattenlaw.com

Plaintiffs Failed to Identify Factual Allegations that Allegedly Rendered Statements False

Plaintiffs' federal securities law class action complaint alleged that Leapfrog Enterprises, Inc., a technology-based educational product designer, and its senior executives, falsely represented adverse factors in its quarterly and annual filings with the Securities and Exchange Commission by referring to problems the defendants allegedly "knew were occurring" as "mere 'risk factors' that 'could' occur." In dismissing the complaint with leave to replead, the Court held that plaintiffs failed to make factual allegations to support their claims that: (i) Leapfrog's statements were false when made and (ii) defendants knew that the statements were false when they made them. In particular, the Court found that the complaint failed to identify which specific statements were rendered false by the factual allegations that allegedly supported plaintiffs' claims. (*In re Leapfrog Enterprises, Inc. Securities Litigation*, No. C-03-05421 (RMW), 2006 WL 2192116 (*N.D. Cal. Aug. 1, 2006*))

Dismissal Granted where Plaintiffs Failed to Allege Sufficient Facts to Support Their Misrepresentation Claims

Plaintiffs' federal securities law class action complaint alleged that IntraBiotics Pharmaceutical, Inc. and its senior employees made false or misleading statements concerning the safety of its experimental drug and the progress of the clinical trials for that drug in several press releases, as well as in a registration statement for a public offering of common stock. In particular, plaintiffs alleged that IntraBiotics impermissibly obtained interim results of the double-blind clinical trials that rendered its statements concerning the prospects for the drug false. Plaintiffs based their allegations on a confidential informant's report that his research team provided data to one of the research organizations performing the trials. However, the Court concluded that even if the confidential informant's testimony were credited, it did not establish that the results were transmitted from the research organization to IntraBiotics. As a result, the Court granted the motion to dismiss, holding that plaintiffs failed to sufficiently allege facts to support their allegations that IntraBiotics had access to the interim results of the clinical trial before they made the alleged misrepresentations. (*In re IntraBiotics Pharmaceuticals, Inc. Securities Litigation*, No. C-04-02675 (JSW), 2006 WL 2192109 (*N.D. Cal. Aug. 1, 2006*))

For more information, contact:

Steven Shiffman at (212) 940-6785 or e-mail steven.shiffman@kattenlaw.com, or
Julia Chung at (212) 940-6394 or e-mail julia.chung@kattenlaw.com