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Corporate and Financial Weekly Digest

August 17, 2007

SEC/Corporate

New Rule Removes References to Filer's IRS ID Numbers in Certain SEC Filings

On August 6, the Securities and Exchange Commission adopted a final rule providing for the deletion of references to a filer's IRS identification number on Schedules 13G, 13D and TO and Form 144. The rule also removes references to IRS identification numbers in the descriptions and instructions in Forms 3, 4 and 5. In 2003, the SEC modified Forms 3, 4 and 5 to remove references to IRS identification numbers, but inadvertently did not remove references to IRS identification numbers in the descriptions and instructions.

The rule became effective on August 10.

http://www.sec.gov/rules/final/2007/33-8830.pdf

Broker Dealer

Phlx Proposes Standardized Bid/Ask Differential and Split-Price Rules

The Philadelphia Stock Exchange (Phlx) has filed proposed rule changes with the Securities and Exchange Commission relating to bid/ask differentials and split-price priority in open outcry that would standardize the rules to apply equally to options on equities, options on exchange-traded fund (ETF) shares and index options. Phlx's Rule 1014(c)(i)(A), which relates to bid/ask differentials, currently refers only to equity options, while Phlx Rule 1014(g)(i)(B), which affords split-price priority in open outcry to orders of 100 contracts or more, applies only to transactions in equity options, including options overlying ETFs. The proposed amendment would specify that these rules apply to all options traded on Phlx, including index options.

http://www.sec.gov/rules/sro/phlx/2007/34-56249.pdf

Amex Proposes to Loosen Restrictions on Entering Limit Orders on Both Sides of Market

The American Stock Exchange (Amex) has filed proposed rule changes with the Securities and Exchange Commission to eliminate its prohibition on the entry of certain limit orders on both sides of the market for exchange-traded fund (ETF) shares and other equity derivative products. Currently, Amex rules provide that members, whether acting as principal or agent, may not permit the entry of limit orders for ETF shares into Amex's electronic order routing system if the orders are for the account or accounts of the same or related beneficial owners and, by entering the orders, the member or the beneficial owner effectively would be operating as a market maker. Amex is

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proposing to amend its rules to eliminate this prohibition for members operating as market makers; however, customer agency orders remain subject to the prohibition.

http://www.sec.gov/rules/sro/amex/2007/34-56255.pdf

Banking

FRB Lowers Discount Rate and Extends Term of Financing to 30 Days

This morning the Federal Reserve Board (FRB) lowered the discount rate by 50 basis points and extended the term of such loans to 30 days in order to address the current market situation. Due to its importance, the complete text of the FRB's release is presented below:

"To promote the restoration of orderly conditions in financial markets, the Federal Reserve Board approved temporary changes to its primary credit discount window facility. The Board approved a 50 basis point reduction in the primary credit rate to 5-3/4 percent, to narrow the spread between the primary credit rate and the Federal Open Market Committee's target federal funds rate to 50 basis points. The Board is also announcing a change to the Reserve Banks' usual practices to allow the provision of term financing for as long as 30 days, renewable by the borrower. These changes will remain in place until the Federal Reserve determines that market liquidity has improved materially. These changes are designed to provide depositories with greater assurance about the cost and availability of funding. The Federal Reserve will continue to accept a broad range of collateral for discount window loans, including home mortgages and related assets. Existing collateral margins will be maintained. In taking this action, the Board approved the requests submitted by the Boards of Directors of the Federal Reserve Banks of New York and San Francisco."

The rate used at the discount window is distinct from the federal funds rate that the Open Market Committee sets and maintains by injecting or withdrawing money from the financial system. That rate is currently set at 5.25 percent and was not changed by this morning's action. In a related statement, the Open Market Committee released a prepared statement presented below:

"Financial market conditions have deteriorated, and tighter credit conditions and increased uncertainty have the potential to restrain economic growth going forward. In these circumstances, although recent data suggest that the economy has continued to expand at a moderate pace, the Federal Open Market Committee judges that the downside risks to growth have increased appreciably. The Committee is monitoring the situation and is prepared to act as needed to mitigate the adverse effects on the economy arising from the disruptions in financial markets."

http://www.federalreserve.gov/boarddocs/press/monetary/2007/20070817/default.htm

Consumer Illustrations Complementing Subprime Guidance Released

On August 14, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the Banking Agencies) issued proposed illustrations of consumer information regarding certain components of subprime mortgages. Subprime mortgage disclosures had recently been discussed in the Banking Agencies' Joint Statement on Subprime Mortgage

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Lending effective July 10, 2007, that applies to all banks and their subsidiaries, savings and loan holding companies and their subsidiaries and credit unions (the Joint Statement). The Joint Statement recommended that consumers have "clear, balanced, and timely information about the relative benefits and risks of adjustable rate mortgage products." The proposed illustrations are meant to assist in the delivery of this information.

Notably, use of the proposed illustrations would be voluntary.

Comments on the proposed illustrations are due within 60 days from the date of publication.

http://www.occ.treas.gov/ftp/release/2007-85a.pdf

Litigation

SEC May Bring Control Person Liability Claim Without Joining Primary Violator

The Securities and Exchange Commission brought a securities fraud action against former senior officers of iGo Corporation who allegedly engaged in fraudulent accounting practices and aided and abetted iGo's violations of §13(a) of the Securities Exchange Act of 1934. The SEC also sought to impose liability against one former officer, Kenneth Hawk, on the grounds that he was a "control person" under § 20(a) of the Exchange Act. Hawk moved for partial summary judgment to dismiss the § 20(a) claim contending that the SEC (i) was not authorized to bring such a claim, and (ii) even if it was so authorized, could not prevail because it did not include the alleged primary wrongdoer as a party-defendant.

The court rejected both arguments. Although noting the existence of conflicting authority on the issue of whether the SEC could maintain an enforcement action under § 20(a), the court sided with the majority and concluded that the SEC could. Applying a standard statutory construction analysis, the court reasoned that because (i) § 20(a) permits any "person" to whom a controlled person is liable to obtain relief, and (ii) the SEC is included within the Exchange Act's definition of "person," the "plain meaning" of the statute permits the SEC to assert claims under § 20(a). With respect to Hawk's second argument, after noting that § 20(a) makes the liability of the primary violator an element of proof, the court held that nothing in the statute mandates that such person also be included as a defendant in order for a § 20(a) claim to proceed. (*SEC v. Hawk*, 2007 WL 2257321 (D.Nev. Aug. 3, 2007))

Securities Claim Dismissed Because Omissions Were Neither Manipulative Nor Deceptive

A former shareholder-partner of a privately-held company asserted claims under, *inter alia,* § 10 of the Securities Exchange Act of 1934 and Rule 10b-5 against his ex-partner and the company in connection with his sale of stock in the company. Under the terms of the plaintiff's employment agreement, he was required to sell his stock to his ex-partner upon his resignation. The plaintiff contended that he accepted an unreasonably low sale price for his shares because defendants knew but did not disclose that the company's financial performance had greatly improved. The District Court granted defendants' motion for summary judgment against the federal securities claim.

On appeal, the plaintiff asserted that he agreed to sell his stock for $16,000 because the defendants withheld information about the company's improved performance after his resignation which, according to the plaintiff, supported

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a $5,000,000 sale price for his shares. The Court of Appeals noted, however, that (i) the plaintiff knew that he was unaware of the company's financial condition following his resignation, and (ii) the defendants did not make any false or misleading statements about the company's financial condition (but simply refused to provide plaintiff with any information). The Court ruled that even assuming that the alleged omission was material, because the plaintiff "knew what he did not know," the omission was neither manipulative or deceptive. Accordingly, the Court affirmed the dismissal of the federal securities law claims. (*Cardon v. Testout! Corporation*, 2007 WL 2285860 (C.A.10 Aug. 10, 2007))

CFTC

CFTC

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Amendments to Certain Procedural Rules Applicable to Registered Entities and ECMs Proposed

The Commodity Futures Trading Commission has proposed a series of rule amendments relating to exempt commercial markets (ECMs), contract markets and other trading facilities. Among other things, the CFTC is proposing to delegate to the Director of the Division of Enforcement the authority to issue special calls to ECMs for information relating to possible market manipulation or fraudulent conduct. The CFTC separately has proposed to conform the notice and approval requirements for "dormant" contracts and rules to those that otherwise apply to new contracts and rules that are listed or implemented by designated contract markets (DCMs) and derivatives clearing organizations (DCOs).

The proposed rules also would make clear that registered entities (DCMs, DCOs and the National Futures Association) are required to submit self-certified contracts and rules at least one full business day prior to implementation. Finally, the CFTC is proposing to permit duly authorized persons at a registered entity to declare an "emergency" in appropriate circumstances. The rule currently permits an emergency to be declared only by a registered entity's governing board.

http://www.cftc.gov/stellent/groups/public/@lrfederalregister/documents/file/e7-15370a.pdf

NFA to Require Annual Registration Update

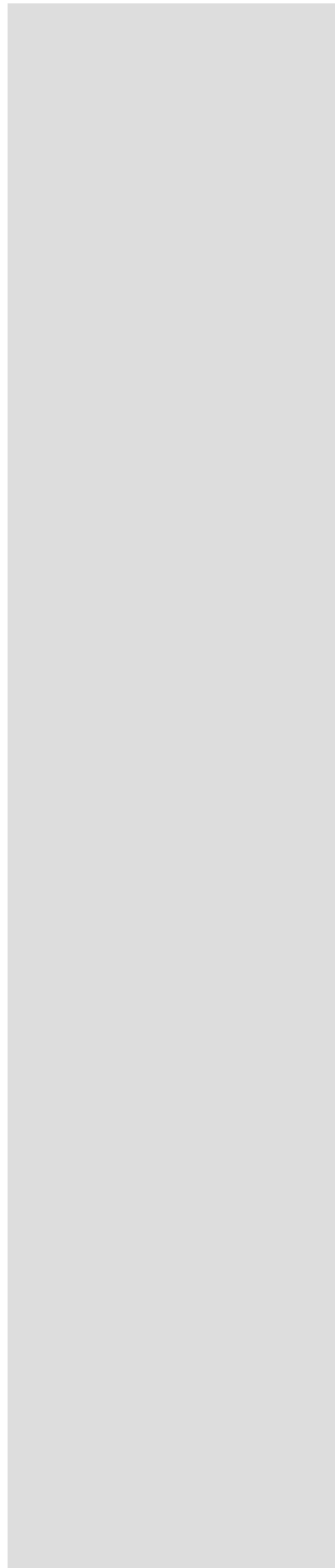
The National Futures Association (NFA) announced that it now requires firms to complete an electronic Annual Registration Update as part of their required annual filings. Firms can find their due date on NFA's Online Registration System. The update process will begin with NFA sending notice to each firm. Firms that fail to make the required updates can have their NFA membership withdrawn.

http://www.nfa.futures.org/registration/081307.asp

CFTC Proposes to Extend the Period for Filing Termination Notices

The Commodity Futures Trading Commission has requested comments on proposed amendments to CFTC Regulations 3.12 and 3.31 that would extend, to 30 days (from 20), the period during which a registered futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant must file a notice with the National Futures Association to report the termination of an associated person or principal.

http://www.cftc.gov/stellent/groups/public/@lrfederalregister/documents/file/e7-15869a.pdf



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