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CORPORATE & FINANCIAL
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SEC/CORPORATE

SEC to Consider Proxy Access Rules Next Week

On August 18, the Securities and Exchange Commission provided notice that at an open meeting on August 25, the Commission will consider whether to adopt changes to the federal proxy and other rules to facilitate director nominations by shareholders.

In June 2009, the SEC proposed proxy access rules, but delayed adopting them pending confirmation, in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, of its power to implement such rules. Speculation with respect to the new rules centers primarily around the percentage and duration of ownership necessary to require the company to include the stockholder's nominees in the company's proxy statement and whether there will be some relief for smaller public companies.

The SEC's Sunshine Act Notice can be accessed here.
The SEC's 2009 Proxy Access proposal can be accessed here.

New York State Adopts Amendments to Power of Attorney Law

In 2009, New York State adopted amendments to the New York Power of Attorney Law imposing more demanding power of attorney disclosure and execution requirements aimed at reducing the risks of abuse and fraud in elderly care and the financial planning process. The 2009 law required the use of longer, more comprehensive forms, as well as notarization of the signatures on the power of attorney. The 2009 law provided no exceptions for commercial transactions. Because agency relationships are regularly established in the proxy process, real estate transactions, brokerage arrangements and various commercial agreements, the lack of commercial transaction exception in the 2009 law gave rise to much uncertainty among transactional lawyers. On August 13, New York enacted corrective amendments revising the ambiguities and correcting the unintended consequences of the 2009 law.

The corrective amendments clarify the 2009 law's various ambiguities and list exceptions from its rigorous provisions. These exceptions include:

1. a power of attorney given primarily for a business or commercial purpose, including without limitation:
    a) a power to the extent it is coupled with an interest in the subject of the power;
    b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction;
    c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal, tangible or intangible;
2. a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
3. a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;
4. a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government, agency or other third party (including powers of attorney given to file forms with the Securities and Exchange Commission);

5. a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power;
6. a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such;
7. a power contained in a partnership agreement or in limited liability company operating agreement, as well as in condominium documents and offering plans or other agreements or instruments governing the internal affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to such entity;
8. certain powers given to condominium managing agents or licensed real estate brokers;
9. a power authorizing acceptance of service of process on behalf of the principal; and
10. a power created pursuant to authorization provided by another statute that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.

The corrective amendment, effective September 12, will be retroactive to September 1, 2009, the effective date of the 2009 law. Thus, as long as a power of attorney complies with the provisions of the corrective amendment, it will be deemed valid and will not need to be re-executed even if it was improperly executed under the 2009 law.

Click here to read the text of the amended New York Power of Attorney Law.

BROKER DEALER

SEC Approves New FINRA Consolidated Rule Regarding Short Sale Delivery Requirements

The Securities and Exchange Commission recently approved the Financial Industry and Regulatory Authority's proposal to adopt NASD Rule 3210, with a few changes, as FINRA Rule 4320 in the Consolidated FINRA Rulebook. New FINRA Rule 4320 applies short sale delivery requirements to equity securities not covered by Regulation SHO's close-out requirements. The Rule, among other things, clarifies the borrowing requirements for clearing agency participants that sell short non-reporting threshold securities for which a fail to deliver position has not been closed out in the requisite time. FINRA will apply all interpretive positions issued by the SEC and its staff regarding the parallel provisions of Regulation SHO to FINRA Rule 4320.

Click here to read the FINRA Regulatory Notice 10-35.

CFTC

CFTC and SEC Publish Joint Advance Notice of Proposed Rulemaking on Swaps Regulation

The Commodity Futures Trading Commission and the Securities and Exchange Commission have issued a joint advance notice of proposed rulemaking (the Joint Notice) seeking public comment regarding the agencies' mandate to regulate swaps and security-based swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Joint Notice requests public comments on the CFTC's and SEC's joint regulation of "mixed swaps" and the adoption of regulations further defining the following terms: (1) "swap"; (2) "security-based swap"; (3) "swap dealer"; (4) "security-based swap dealer"; (5) "major swap participant"; (6) "major security-based swap participant"; (7) "eligible contract participant"; and (8) "security-based swap agreement". The comment period for the Joint Notice expires on September 20.

A copy of the *Federal Register* release of the Joint Notice is available here.

CFTC Withdraws Proposed Energy Position Limits

The Commodity Futures Trading Commission has withdrawn its January proposal to establish federal speculative position limits for futures and option contracts on certain energy products. In its withdrawal notice, the CFTC cited the significant revisions to the Commodity Exchange Act (CEA) introduced by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFTC plans to issue a notice of rulemaking and propose position limits for exempt and agricultural commodity derivatives, including energy derivatives, in compliance with the CEA as

amended by the Dodd-Frank Act (which requires the CFTC to establish limits for exempt and agricultural commodity derivatives within 180 days and 270 days, respectively, of the date of enactment of the Dodd-Frank Act).

The notice of the CFTC withdrawal is available here.

CFTC Issues Letter to CME in Support of EFF Transactions on ELX

In connection with the long-running dispute between CME Group, Inc. and ELX Futures regarding so-called "exchange of futures for futures" (EFF) transactions on ELX, the Commodity Futures Trading Commission sent a letter to CME reaffirming the position previously taken by CFTC staff that neither the Commodity Exchange Act (CEA) nor CFTC regulations prohibit such transactions. EFF transactions are designed to permit market participants effectively to move a Treasury futures position from the Chicago Board of Trade (CBOT) to ELX for clearing. The CFTC letter was written in response to CBOT's October 19, 2009, Market Regulation Advisory Notice stating that CBOT rules do not permit the execution of EFF transactions.

The CFTC also directed its staff to undertake an analysis of whether the CBOT Advisory Notice complies with Core Principle 18 of Section 5(d) of the CEA (antitrust considerations). In connection with this directive, the CFTC Division of Market Oversight sent a second letter requesting from CBOT a written response and the production of records addressing certain related matters.

The CFTC press release regarding its letters to CME, including links to both letters, is available here.

LITIGATION

Delaware Rules on Shareholder Access to Corporate Books and Records

Shareholder Westland Police & Fire Retirement System brought an action under Section 220 of the Delaware General Corporate Law to review the books and records of Axcelis Technologies, Inc., a manufacturer of ion implantation and semi-conductor equipment. In 2008, Sumitomo Heavy Industries, Ltd. (SHI) made an unsolicited proposal to acquire Axcelis for $5.20 per share, later increasing the offer to $6.00 per share. The Axcelis board rejected both offers as inadequate, but agreed to meet with SHI to explore whether the parties could reach an agreement on a transaction. After the parties executed a confidentiality agreement and conducted diligence, SHI requested additional time to consider a further acquisition proposal. Axcelis rejected this request and SHI then put all discussions "on hold." Axcelis' share price declined significantly following the "on hold" development.

During the negotiation period, Axcelis held its annual shareholder meeting at which three members of Axcelis' classified board were up for election. Previously, Axcelis had adopted by board resolution a "plurality plus" rule providing that any director who received a plurality but not a majority of shareholder votes must submit a resignation letter, which the board then could in its discretion either accept or reject. At the 2008 meeting, three directors received less than a majority of votes and submitted their resignation letters. The Axcelis board declined to accept the resignations on the ground that it was not in the company's best interest to do so at that time.

After SHI put its acquisition effort on hold, Westland submitted a books and records request for the purpose of investigating whether the Axcelis board members breached their fiduciary duties by (a) rejecting the SHI acquisition proposals (a possible *Unocal* violation), and (b) declining to accept the director resignations submitted pursuant to the plurality plus policy (a possible *Blasius* violation). The Chancery Court found that investigating possible management wrongdoing was a "proper purpose" for a Section 220 books and records inspection, but that Westland had failed to provide evidence establishing a "credible basis" to infer corporate wrongdoing. Specifically, the Chancery Court found that the mere rejection of an acquisition proposal is not a defensive measure under *Unocal* and that the plurality plus provision expressly provided the board with discretion to accept or reject any resignations.

The Delaware Supreme Court affirmed the Chancery Court's rulings. Notably, however, the Court's opinion went on to make clear that Westland's books and records request for information regarding the directors' resignations would have been appropriate if Westland had argued that its "proper purpose" was to investigate "director suitability" rather than corporate wrongdoing. The Court found that "[w]here, as here, the board confers on itself the power to override an exercised shareholder voting right without prior shareholder approval", the board must be accountable. Specifically, where stockholders withhold sufficient votes to trigger a corporation's plurality plus

policy, a credible basis to infer director unsuitability is established and shareholders are entitled under Section 220 to the documents and other records that the board relied on in declining to accept the resignations. (*City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, No. 594,2009 (Del. August 11, 2010))

SEC'S Claims of Fraudulent Kickback Scheme Will Proceed to Trial

In a recent case filed by the Securities and Exchange Commission, the agency asserts that Donald McKelvey, as President of Telco-Technology, Inc., engaged in an illegal kickback scheme involving "sham" consulting agreements. According to the SEC, Mr. McKelvey directed Telco to issue millions of shares of its penny stock to Wall Street Communications, Inc. under cover of Forms S-8 purportedly as compensation for consulting services performed by Howard Scala, the owner of Wall Street. The SEC contends that Mr. Scala never performed any valid consulting services for Telco. Instead, the SEC alleges that Wall Street sold its Telco shares at Mr. Scala's direction soon after obtaining them from Telco, and then funneled half of the proceeds back to Mr. McKelvey purportedly as compensation for separate consulting services that Mr. McKelvey performed for Mr. Scala's affiliate through Donalson Capital Partners, a separate entity controlled by Mr. McKelvey.

The SEC moved for summary judgment on its claims against Mr. McKelvey, alleging violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Mr. McKelvey likewise moved for summary judgment, arguing: (1) that there was no evidence supporting the SEC's claims that he and Mr. Scala were involved in an illegal kickback scheme; (2) that the Form S-8 registration statements were proper; and (3) that the consulting arrangements between Mr. Scala and Telco, on the one hand, and Donalson and Mr. Scala, on the other, were valid.

In denying both parties' respective motions for summary judgment, the court concluded that there are genuine issues of fact regarding whether the Form S-8 stock was issued for an improper purpose. Specifically, the court determined that there are disputed facts regarding whether the Forms S-8 were proper when filed and whether the stock was issued under a proper consultant compensation plan. Mr. McKelvey testified that the stock was issued pursuant to the consulting agreement between Telco and Wall Street and Mr. Scala. However, in the court's view, a jury could conclude based on all of the relevant facts that a scheme existed whereby Wall Street agreed to sell the Telco shares soon after obtaining them in order to funnel half of the proceeds back to Mr. McKelvey through Donalson. Moreover, the court found that there was a genuine issue of fact as to whether Wall Street was the "alter ego" of Mr. Scala, a finding which would be required in order to permit Telco to issue shares registered under a Form S-8 to Wall Street, a corporate entity, rather than to Mr. Scala directly. (*SEC v. Wall Street Communications, Inc.*, 2010 WL 3189976 (M.D.Fla. Aug. 10, 2010))

BANKING

Federal Reserve Releases Multiple Rules Related to Consumer Mortgage Transactions

On August 16, the Board of Governors of the Federal Reserve System (the Federal Reserve) released a number of rules (both final and interim) related to consumers and their mortgage transactions.

In the first issuance, the Federal Reserve issued final rules to require that consumers receive a notice when their mortgage loan has been sold or transferred. Under this rule, the purchaser or its assignee must provide written notice to a consumer that it has acquired the loan within 30 days of the acquisition. The mandatory compliance date for this final rule is January 1, 2011. Read more.

In the second issuance, the Federal Reserve announced final rules that prevent a loan originator from receiving compensation that is based on the consumer's interest rate or other loan terms. Loan originators may, however, continue to receive compensation that is based on a percentage of the loan amount. This rule also prohibits a loan originator who receives compensation directly from a consumer from also receiving compensation from the lender or another third party and prohibits such originators from directing a consumer to accept a mortgage loan that is not in the consumer's best interest in order to increase the originator's compensation. This rule is effective April 1, 2011. Read more.

The Federal Reserve also released an interim rule that requires lenders to disclose how consumers' mortgage payments may change over time. Lenders must comply with this rule with respect to applications they receive on or after January 30, 2011. The Federal Reserve is also soliciting comments on the interim rule for 60 days after publication in the *Federal Register*. Read more.

EXECUTIVE COMPENSATION AND ERISA

SEC Proposes New Marketing Rules for Target Date Retirement Funds

The Securities and Exchange Commission has proposed amendments to multiple rules under the Securities Act of 1933 and the Investment Company Act of 1940 regarding the marketing of target date retirement funds. In general, a target date retirement fund is a fund designed to hold a diversified portfolio of assets that is automatically rebalanced among asset classes over time without the need for the investor to rebalance the assets.

Since their inception during the 1990s, target date retirement funds have exploded in popularity and are frequently an investment option offered under 401(k) retirement plans. This increased popularity, combined with market losses in 2008, has caused federal regulatory agencies to examine target date retirement funds more closely. For example, the Department of Labor and the SEC held a joint hearing in June 2009 regarding target date retirement funds. As part of its scrutiny, the SEC identified concerns with how such funds are marketed to investors and learned that investors often misunderstand how such funds operate. Consequently, the SEC has proposed rule changes to help alleviate misunderstandings and prevent misleading marketing materials.

If adopted, the proposed rule changes would generally:

A. require a target date retirement fund to disclose what the fund's asset allocation will be on its target date immediately adjacent to the first use of the fund's name in marketing materials;
B. require marketing materials for a target date retirement fund to include a table, chart or graph depicting the fund's asset allocation over time (in five-year increments), preceded by a statement explaining such table, chart or graph;
C. require marketing materials that place a "more than insubstantial focus" on a target date retirement fund to include statements that advise an investor (1) to consider other factors besides the investor's age or retirement date when selecting a target date retirement fund (e.g., risk tolerance and personal circumstances), (2) that target date retirement funds do not guarantee an investment (i.e., the investor could incur losses), and (3) whether, and the extent to which, the fund managers can modify the intended asset allocations without shareholder approval; and
D. provide that a statement could be misleading (for purposes of rules prohibiting materially misleading sales literature) if it emphasizes a single factor (e.g., an investor's age or tax bracket) or represents that investing in the securities requires little or no monitoring by the investor. *Note: this change is not limited to target date retirement funds and would apply to all investment companies (e.g., mutual funds).*

The above rules will not be effective until the SEC adopts them, but it expects that, upon adoption, items A through C would be effective 90 days later, and item D would be effective immediately.

The proposed rules can be found here.

Interim Final Rules Impose New Requirements for Internal Claims/Appeals and External Review

Internal Claims/Appeals

Effective for plan years beginning on or after September 23 (January 1, 2011, for calendar year plans and policies), non-grandfathered group health plans (including non-Employee Retirement Income Security Act plans such as governmental and church plans) and health insurance issuers will be required under the Patient Protection and Affordable Care Act (PPACA) to comply with federal rules for administering health plan claims and appeals. ERISA plans already are required to adhere to existing Department of Labor (DOL) claim and appeal regulations, but interim final regulations issued jointly by the Department of the Treasury, the DOL and the Department of Health and Human Services (75 Fed. Reg. 43330) extend those requirements to non-ERISA group health plans and health insurance policies and also impose new requirements for all group health plans and insurers.

The new requirements imposed on all group health plans and health insurance issuers include the following: (1) an expanded "adverse benefit determination" definition; (2) a reduction of the 72-hour notification period for urgent care claim determinations to 24 hours (or fewer); (3) new claim/appeal file disclosure requirements; (4) conflict of interest protections that require claims and appeals to be handled by independent and impartial

decision-makers; (5) more extensive adverse benefit determination notification disclosures, including the date of service, the health care provider, the claim amount, the diagnosis code, the treatment code, the denial code and the meanings of the codes, along with a description of the plan's or issuer's standard (if applicable) used in denying the claim; (6) a "strict adherence" to the internal claim/appeal rules standard, which differs from the "substantial compliance" standard that has been applied under the existing DOL claim/appeal regulations; and (7) requirements that a plan or an insurer must continue the claimant's coverage while a claim or an appeal is pending, and that administrator and insurers may not reduce or terminate benefits for an ongoing course of treatment without providing advance notice and an opportunity for advance review.

External Review

Effective for plan years beginning on or after September 23 (January 1, 2011, for calendar year plans and policies), non-grandfathered group health plans and health insurance issuers will be required to comply with either a state external review process or the federal external review process requirements imposed by the PPACA. Self-funded non-ERISA group health plans (such as governmental and church plans) and insured individual and group policies that are subject to state external review programs that follow the National Association of Insurance Commissioners (NAIC) Uniform Model Act must comply with the applicable *state* external review process. The interim final rules outline the requirements for state external review processes, which are consistent with the protections in the NAIC Uniform Model Act.

Self-funded ERISA group health plans and insured individual and group policies that are *not* subject to state external review programs that follow the NAIC Uniform Model Act must comply with the *federal* external review process. The interim final rules state that the agencies will be establishing the standards for the federal external review process and that such standards will resemble those that apply under the NAIC Uniform Model Act. The standards are expected to address compliance approaches for non-grandfathered self-funded group health plans that already have internal appeals processes that otherwise satisfy the federal external review requirements.

A copy of the interim final rules is available here.

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