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SEC/Corporate

SEC Issues Order Approving Exchange Act Registration of Securities to be Traded on Nasdaq Stock Market LLC

On July 31, the Securities and Exchange Commission issued an order effective immediately affecting companies listed on the Nasdaq Global Market and the Nasdaq Capital Market to facilitate Nasdaq's transition from a national securities association to a national securities exchange. The order grants a request made by Nasdaq and the NASDAQ Stock Market LLC on behalf of Nasdaq's listed companies for registration of the companies' securities under Section 12(b) of the Securities Exchange Act of 1934. Exchange Act Section 12(a) prohibits brokers and dealers from effecting transactions in any security on a national securities exchange unless the security is registered under Section 12(b). To register securities under Section 12(b), issuers must file a registration statement with the SEC and the exchange must certify that the securities are approved for listing and registration.

Recognizing the unique circumstances of Nasdaq's transition to an exchange structure, and in view of the fact that the type of information elicited by registration under Section 12(b) already has been required to be publicly disclosed by the vast majority of the approximately 3,300 companies listed on Nasdaq that previously have registered their securities under Section 12(g) of the Exchange Act, the SEC permitted the request by Nasdaq and the NASDAQ Stock Market LLC to serve as the single application for Exchange Act registration on behalf of all of these listed companies. This action avoided the cost and administrative burden that otherwise would have resulted from the filing of individual Exchange Act registration statements. The application also served as certification of securities by the NASDAQ Stock Market.
http://www.sec.gov/news/press/2006/2006-127.htm

SEC and CESR Launch Work Plan Focused on Financial Reporting

On August 2, the Securities and Exchange Commission and the Committee of European Securities Regulators (CESR) published a joint work plan. The work plan, which will be implemented immediately, is a direct result of the December 2005 meeting between SEC Chairman Christopher Cox and CESR Chairman Arthur Docters van Leeuwen, at which they emphasized their desire to build on the dialogue between the SEC and CESR. The main focus of the work plan is the application by internationally active companies of International Financial Reporting Standards (IFRS) and US Generally Accepted Accounting Principles (GAAP) in the United States and the European Union, respectively. In addition, the staff of the SEC and CESR will forge a closer dialogue on the modernization of financial reporting and disclosure information technology, and regulatory platforms for risk management.

The close co-operation between the staff of the SEC and CESR on the application of IFRS and US GAAP in the United States and the European Union will promote: the development of high quality accounting standards; the high quality and consistent application of IFRS around the world; full consideration of international counterparts' positions regarding application and enforcement; and the avoidance of conflicting regulatory decisions on the application of IFRS and US GAAP. In practical terms, as part of its regular review of corporate filings, the staff of the SEC will review issuers' implementation of IFRS in the United States. Staff of CESR also will continue to review US GAAP implementation by US issuers in the European Union. Under the work plan, the output of these reviews will be used in the following ways:

- The staff of the SEC and CESR-Fin, the expert group within CESR focused on financial reporting, will share information about areas of IFRS and US GAAP that raise questions in terms of high-quality and consistent application; and
- Where appropriate, the staff of the SEC and the staff of CESR will consult on issuer-specific matters regarding the application of US GAAP and IFRS in order to facilitate a solution that contributes to the consistent application of US GAAP or IFRS by companies that are both listed in the EU and registered with the SEC. Protocols for the sharing of this confidential information between the staff of CESR members and the staff of the SEC will be established.

http://www.sec.gov/news/digest/2006/dig080206.txt

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ERISA

Pension Bill Changing 25% Test Sent to President

This morning the Senate approved a new pension bill, HR 4, which had already been approved by the House of Representatives. HR 4 makes significant changes throughout ERISA including changing the "25% test" for determining whether an entity is deemed to hold "plan assets" and adding a number of statutory prohibited transaction exemptions. Although HR 4 provides that the "25% test" remains at 25%, that test no longer includes as "benefit plan investors" plans that are not subject to ERISA or Section 4975. This would exclude from the numerator, in the application of the test, governmental plans, foreign plans and many church plans. HR 4 also provides that "[a]n entity shall be considered to hold plan assets only to the extent of the percentage of equity interests held by benefit plan investors." This means that an investee fund would count a "plan asset" fund-of-funds as a "benefit plan investor" only to the extent of "benefit plan investor" participation in that plan asset fund-of-funds (e.g., if 50% of a fund-of-funds consists of ERISA/4975 money, then only 50% of that fund-of-funds' investment would count as a benefit plan investor when invested in an investee fund).

HR 4 also adds a number of statutory prohibited transaction exemptions, each with a significant number of conditions. It exempts (i) the provision of certain investment advice, (ii) block trading, (iii) foreign exchange transaction and (iv) cross trading, in each case provided the conditions are satisfied.

The President is expected to sign the bill. These provisions would become effective when the President signs the bill.
http://www.rules.house.gov/109_2nd/text/pensions_cr/HWC_373_xml.pdf

Katten Muchin Rosenman LLP will be preparing a Client Advisory providing further details.

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Broker Dealer

NASD and NYSE Issue Joint Statement on Guidance for Fixed Income Research

In 2005, the New York Stock Exchange and the NASD (together SROs) issued a joint report on the effectiveness of the SROs research analyst conflict of interest rules. Those rules apply only to equity research reports, although the joint report noted that the SROs would monitor the extent to which member firms have adopted the Bond Market Association's "Guiding Principles to Promote the Integrity of Fixed-Income Research." The Guiding Principles are voluntary, principle-based guidelines designed to help firms manage potential conflicts of interest that may arise in the context of fixed income research activities. The SROs examination of member organization's compliance with the Guiding Principles found many instances in which firms had failed to adhere to the Guiding Principles or had no effective written supervisory procedures for fixed income research in place. The most prevalent failures involved the inadequacy of disclosures contained in fixed income research reports and member organizations which had supervisory procedures in place but failed to enforce them. These disclosures include, but are not limited to, whether the analyst's compensation is based on such factors as the firm's overall performance, or the profitability or revenues of the fixed income department or the asset class covered by the analyst, whether the analyst or certain relatives have a financial interest in the security that is the subject of the research report, whether the analyst is affiliated with the issuer, and whether the firm trades or may trade as principal in the securities that are the subject of the research report. The SROs confirmed that blanket or boilerplate disclosures should not be used in a fixed income research report when more specific disclosures are necessary to alert investors to specific conflicts. The SROs noted that the Guiding Principles are not rules they can enforce and reserved the right to adopt rules regarding fixed income research.
http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_017059.pdf

NASD Rule on Short Sales

The National Association of Securities Dealers, Inc. filed with the Securities and Exchange Commission an amendment to NASD Rule 5100 to allow members to use the Nasdaq Stock Market best (inside) bid rather than the national best (inside) bid for purposes of the rule, through November 3. Rule 5100 provides that, with respect to trades reported to NASD's Alternative Display Facility or the Trade Reporting Facility, no member shall effect a short sale in a Nasdaq Global Market Security otherwise than on an exchange at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid.
http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-12176.pdf

Nasdaq Stock Market Begins Operations

On August 1 The Nasdaq Stock Market LLC began operations as a national securities exchange registered with the Securities and Exchange Commission. Trading will be limited initially to securities listed on the Nasdaq Capital Market, Nasdaq Global Market (formerly the National Market System) and the Global Select Market. In a July 31 order, the SEC granted registration under Section 12(b) of the Securities Exchange Act of 1934 to all of these securities that were registered under Section 12(g) of the Exchange Act. The Nasdaq markets included securities of four insurance companies and nine foreign issuers exempt from registration under Section 12(g) of the Exchange Act. (See the **SEC/Corporate** section above.) The SEC issued a second order exempting brokers-dealers from Section 12(a) of the Exchange Act's prohibitions on trading on a national securities exchange in a security not registered under Section 12 of

the Exchange Act. This exemption expires August 1, 2009. Pursuant to two staff no action letters the Nasdaq Stock Market will not be required to maintain copies of filings by listed companies and third parties that are submitted to the SEC's EDGAR system. The Nasdaq Stock Market has a contract with a third party supplier for access to EDGAR filings as those items are filed. Similar relief had previously been given to the New York and American Stock Exchanges.
http://www.sec.gov/news/press/2006/2006-127.htm
http://www.sec.gov/rules/other/2006/34-54240.pdf
http://www.sec.gov/rules/exorders/2006/34-54241.pdf
http://www.sec.gov/divisions/marketreg/mr-noaction/nasdaq080106.pdf

SEC Broker-Dealer/Investment Adviser Regulation Study Moves Forward

In connection with its April 2005 adoption of Rule 202(a)(11)-1 under the Investment Advisers Act of 1940, the Securities and Exchange Commission undertook to conduct a study comparing the regulation of broker-dealers and investment advisers. In June 2006 the SEC issued a Request for Information in the form of a request for comment on a proposed Request for Proposal (RFP) for a third party to conduct such study. In response to comments received, the SEC revised and published the RFP. Responses to the RFP are due by August 24.
http://www.sec.gov/news/press/2006/2006-129.htm
http://www.sec.gov/news/extra/2006/sechq1-06-r-0177.pdf
http://www.sec.gov/rules/final/34-51523.pdf

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Banking

Banking Agencies Release Revisions to Bank Secrecy Act/Anti-Money Laundering Examination Manual

On July 28, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration and the Financial Crimes Enforcement Network (federal administrator of the Bank Secrecy Act) (collectively, the Agencies) released revisions to the Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual (the Manual). Notably, the Office of Foreign Assets Control collaborated on the revisions made to the section that addresses compliance with regulations enforced by OFAC.

Significant revisions were made to the following sections of the Manual: (i) risk assessment, (ii) Automated Clearing House transactions, (iii) trade finance activities, (iv) regulatory and supervisory guidance, (v) emerging laundering risks, and (vi) reformatting of the manual.

According to the Agencies' accompanying press release, there will be industry calls with respect to the changes in September. Registration information will be communicated later by the Agencies.
http://www.fincen.gov/final_joint_interagency_transmital_07262006.html

FDIC Issues Computer Tool Designed to Calculate Bank Base Premiums

On July 26, the Federal Deposit Insurance Corporation released a computer tool for banks with less than $10 billion in assets to use in calculating the base premiums they would pay under the FDIC's previously proposed premium assessment scheme released by the FDIC on July 11. The proposed assessment scheme implements provisions required by the Federal Deposit Insurance Reform Act of 2005.

The FDIC stated in its release of the Excel-based calculator tool that use of such calculator would result in an estimated assessment rate. According to the FDIC, "actual rates adopted by the FDIC could differ substantially."
http://www.fdic.gov/deposit/insurance/initiative/index.html

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United Kingdom Developments

FSA Fines Hedge Fund Manager and Senior Trader $1.3 million each for Market Abuse and Breach of Principles

On August 1st, the Financial Services Authority (FSA) confirmed that it had imposed fines of £750,000 each ($1.3 million) on GLG Partners LP (GLG), one of Europe's largest alternative investment managers and Philippe Jabre, one of GLG's former managing directors and senior traders for market abuse and breach of FSA's principles. In the March 10 issue of *Corporate and Financial Weekly Digest* we reported that although not the subject of a formal announcement the finding and fine against GLG and Jabre had been widely publicized. The FSA's Final Notice announcing the fines was issued after Jabre withdrew his appeal to the Financial Services and Markets Tribunal (FSMT) following two decisions handed down by the FSMT on July 27 ruling against him on preliminary points concerning the scope of the market abuse offence and the extent of the FSMT's jurisdiction.

Jabre received non-public information from Goldman Sachs International as part of the pre-marketing of a new issue of convertible preference shares in Sumitomo Matsui Financial Group (SMFG). He agreed to be restricted from dealing in SMFG shares until the issue was publicly announced. However he sold short about $16 million of SMFG shares on the Tokyo market before the issue was announced, making a substantial profit for a GLG fund he managed.

Jabre was found to have committed market abuse and to have breached the FSA Principles for Approved Persons on market conduct and due skill, care and diligence. GLG was found to have committed market abuse and to have breached the FSA Principles for Businesses on market conduct by failing to properly supervise Jabre.

This is the first major FSA disciplinary proceeding against a hedge fund manager and the largest fine imposed on an individual in an FSA enforcement proceeding.
http://www.fsa.gov.uk/pubs/final/jabre.pdf

FSA Consultation on Implementing MiFID for Firms and Markets

On July 31, the Financial Services Authority (FSA) published a consultation paper (CP06/14) on implementing the EU Markets in Financial Instruments Directive (MiFID) for FSA-regulated firms and markets.

CP06/14 is in three parts:

- Part I explains the proposed changes to FSA rules, guidance or procedures arising from the implementation of MiFID requirements relating to the scope of UK regulation; the authorization of investment firms and their passporting rights; the registration of tied agents; and the enforcement powers and regulatory cooperation obligations of competent authorities.
- Part II sets out the FSA's proposals for implementing the MiFID requirements on client assets, together with the prudential requirements and capital adequacy data requirements for MiFID firms that are exempt from the Capital Adequacy Directive.
- Part III explains how the FSA intends to implement MiFID's provisions governing regulated markets (RMs) and Multilateral Trading Facilities (MTFs), where they are not already covered by proposed legislation. It also deals with pre- and post-trade transparency for transactions in shares admitted to trading on an RM and concluded either on RMs, MTFs or by investment firms trading outside an RM or an MTF, including those acting as systematic internalizers; and the MiFID provisions on transaction reporting.

Key areas of change include:

- the replacement of the current opt-out from client money protection rules for professional clients with an alternative set of arrangements having broadly similar economic effects. Other amendments will make the client money regime more flexible for firms, particularly when performing reconciliations;
- the introduction of the MiFID pre- and post-trade transparency regime for transactions in shares admitted to trading on an RM, which will apply to deals done on RMs and MTFs, and to investment firms trading outside RMs and MTFs; and
- the proposed extension of transaction reporting to include commodity, interest rate, and foreign exchange derivatives contracts admitted to trading on RMs – in order to comply with the Directive – and other requirements, not expressly required by MiFID, in relation to the definition of reportable transactions and the contents of transaction reports.

The consultation period ends on October 31. The FSA intends to issue feedback, together with made rules and guidance in January 2007 to take effect on November 1, 2007 when MiFID comes into force.
http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/075.shtml

UK Treasury Consultation on Third EU Money Laundering Directive

On July 31, the UK Treasury released its consultation on the EU Third Money Laundering Directive (2005/60/EC). The Directive was adopted in September 2005 (*Corporate and Financial Weekly Digest*, September 23, 2005) and is required to be implemented in EU member states by December 2007. It extends anti-money laundering provisions beyond the banking and financial sectors. As well as covering lawyers, notaries, accountants, real estate agents, casinos, trust and company service providers, all providers of goods for which payments are made in cash and the sum is greater than €15,000 (approximately $19,300) are now within its scope.

The Treasury's consultation addresses the following issues:

- The scope of sectors subject to the Regulations and new definitions included in the Directive;
- The new customer due diligence requirements in the Directive, including new measures for situations of higher and lower risk;
- Reliance on third parties for customer due diligence;
- Equivalence of third countries' measures;
- Reporting, record keeping, training and internal procedures requirements; and

- Penalties for non-compliance.

http://www.hm-treasury.gov.uk/consultations_and_legislation/money_laundering_directive/consult_thirdmoney_index.cfm

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Litigation

NASD Panel Did Not Manifestly Disregard the Law

Appealing a lower court's confirmation of an NASD panel's award of more than $700,000 in favor of a customer arising from unauthorized trading and churning, appellants argued that the panel had acted in manifest disregard of the law. The DC Circuit, finding "[a] colorable justification for the arbitrators' judgment," rejected arguments as to the customer's ratification of the unauthorized trades and his failure to close out his account and thereby mitigate damages. The Court held that the panel could have found a disparity in sophistication between appellants and the customer and that appellants' assurances that the account would "turn" around could have forestalled the customer from filing a written objection, as required by his margin agreement, or from closing the account. (*Kurke v. Oscar Gruss & Son, Inc*., 2006 WL 1982851 (D.C. Cir. July 18, 2006))

Meeting Competition Defense Precludes Antitrust Liability

Plaintiffs, a distributor and dealers of marine products, asserted price discrimination claims against a manufacturer of those products for offering one of their competitors excessive discounts. The Fifth Circuit, affirming a lower court's judgment in favor of the manufacturer following a bench trial, agreed that the manufacturer had an absolute defense under the Robinson-Patman Act. It had lowered its pricing to plaintiffs' competitor in a "good faith" attempt to meet competition for that company's business from another manufacturer. The evidence showed the manufacturer's good faith reliance on the prices it believed it had to meet in order to attract the business of plaintiffs' competitor and, as a result, the manufacturer had established a "meeting competition defense". (*Water Craft Management LLC v. Mercury Marine*, 2006 WL 2052285 (5th Cir. July 25, 2006))

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CFTC

NFA Implements Enforcement/Compliance Contact Requirement

The National Futures Association is now requiring each firm applying for registration or currently registered with the Commission to provide contact information for an Enforcement/Compliance Contact (ECC), including the person's name, street address, city, state, telephone number and e-mail address, in NFA's Online Registration System (ORS). A firm may have more than one ECC, but the required information must be provided for each ECC. The ECC's information must be updated through NFA's ORS, which can be accessed at http://www.nfa.futures.org/
http://www.nfa.futures.org/compliance/071306.asp

CFTC Extends Comment Period on Proposed Acceptable Practices for Exchange Governance and Conflicts of Interest

The Commodity Futures Trading Commission has extended the comment period on its proposed Acceptable Practices for Exchange Governance and Conflicts of Interest to September 7. The proposed Acceptable Practices offer designated contract markets (DCMs) a safe harbor for compliance with the requirement, set forth in Section 5(d)(15) of the Commodity Exchange Act, that DCMs minimize conflicts of interest in their decision-making processes by maintaining governing boards composed of at least fifty percent "public" directors. The CFTC proposal also addresses the composition of DCMs' disciplinary panels; would require the establishment of board-level Regulatory Oversight Committees, consisting solely of public directors, to oversee the DCM's regulatory functions; and define "public" for persons serving on DCMs' boards and disciplinary panels.
http://cftc.gov/opa/press06/opa5210-06.htm

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