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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC to Consider Adopting Proxy Disclosure Rules Next Week

The Securities and Exchange Commission announced that at its next open meeting on December 16, the Commission will determine whether to adopt the rules it proposed in July relating to enhanced disclosure in issuers' proxy statements of (i) the impact of overall compensation policies and practices (including those applicable to non-executive employees) on risk-taking; (ii) the qualifications, experience, skills and other attributes of directors and nominees to serve on the board or a committee of the board; (iii) the role of the board of directors in risk management; (iv) the rationale for the issuer's corporate leadership structure; and (v) potential conflicts of interests of compensation consultants. These proposed rules were originally reported in the July 2 edition of *Corporate and Financial Weekly Digest*.

Read more.

SEC Approves NYSE Governance Listing Standards Amendments

On November 25, the Securities and Exchange Commission approved amendments to the New York Stock Exchange's corporate governance listing standards in Section 303A of the NYSE Listed Company Manual. Many of the proposed amendments, which will become effective January 1, 2010, incorporate existing SEC rules and guidance into the NYSE listing standards. The proposal of these amendments was previously reported in the September 11 edition of *Corporate and Financial Weekly Digest*.

The adopted amendments include, among other items, the following changes to the current NYSE listing standards:

- The current NYSE corporate governance disclosure requirements regarding independent directors will be aligned with the disclosures listed in Item 407 of Regulation S-K. Item 407 requires a description of any transactions, relationships or arrangements considered by the company's board of directors in determining whether a director is independent.

- A company will be permitted to make certain corporate governance disclosures required by the NYSE rules on the company's website, instead of in its proxy statement or in printed form, provided that the company include in its proxy a statement to that effect and the address of the website.

- A company must notify the NYSE if any executive officer becomes aware of "any" non-compliance with the NYSE's listing standards. The current rule provides that such notification must be provided only if an executive officer becomes aware of any "material" non-compliance. Non-compliance is no longer required to be reported in annual reports.

- Adjustments will be made to the transition periods for compliance with governance rules for IPOs, spin-off new listings and companies which cease to be controlled companies and foreign private issuers.

- Companies will be permitted to hold regular executive sessions of independent directors to satisfy the current requirement of holding regular executive sessions of non-management directors.

- A company must disclose any waiver of its code of conduct and ethics granted to an executive officer or director within four business days in a press release, on its website or in a Form 8-K. The current rules provide that such waivers must be disclosed "promptly."

- If a member of a company's audit committee simultaneously serves on more than three public company audit committees, the company must determine whether the director's ability to serve on the company's audit committee is impaired and disclose such a determination. Currently, the rules state that only companies that do not limit audit committee members to serving on three or fewer audit committees would need to make such a determination.

Click here to view the full SEC release adopting these amendments to the NYSE listing standards.
Click here and here to view the NYSE's prior releases from August 26 and September 11, respectively, proposing these amendments.

SEC Remarks at Annual AICPA National Conference

Commissioner Elisse Walter, Director of the Division of Enforcement Robert Khuzami, Chief Accountant of the Division of Corporation Finance Walter Carnall and several Corporation Finance staff members spoke at the 2009 American Institute of Public Accountants National Conference on Current Securities and Exchange Commission and Public Company Accounting Oversight Board Developments in Washington, D.C., this week. In addition to their prepared remarks, there are several presentation materials which provide a good overview of the organization of the Division of Corporation Finance and the filings review process as well as current accounting disclosure developments, interactive data requirements and current areas of frequent staff comments on financial institutions disclosures.

Commissioner Walter's remarks are available here.
Other speakers' remarks are available here.
Click here for a presentation from the Division of Corporation Finance.

LITIGATION

Ninth Circuit Rejects Request to Apply Civil Loss Causation Rule to Sentencing

The Ninth Circuit recently declined to apply the loss causation rule applicable to civil securities fraud cases to the determination of the appropriate sentence for criminal securities fraud convictions. In March 2003, Richard I. Berger was indicted for 36 counts of bank and securities fraud, and was later convicted on 12 of those counts. After the Court of Appeals for the Ninth Circuit affirmed the conviction but remanded for re-sentencing, the district court considered several facts, including the loss attributable to the fraud, and significantly increased the sentence Mr. Berger received.

On appeal to the Ninth Circuit for the second time, Mr. Berger argued that in determining his sentence the district court improperly calculated the loss caused by his fraud by refusing to apply the loss causation principles set forth in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). In *Dura*, the Supreme Court ruled that allegations that the plaintiff purchased securities at an inflated price are insufficient to sustain a claim for civil securities fraud. Instead, a plaintiff must show that the fraud caused the shareholder to suffer actual economic loss.

The Ninth Circuit acknowledged that the Second and Fifth Circuits have suggested that *Dura* should apply to criminal sentencing, but nevertheless declined to apply *Dura* when reviewing if a sentence was appropriate for two reasons. First, the court noted that in the civil context, the primary focus is on the loss that the defendant caused the plaintiff, while in criminal sentencing, the harm that society as a whole suffered is what is relevant. Thus, although an individual may not suffer as a result of the value of securities being inflated by the defendant's fraud, society as a whole does suffer. Second, the court noted that, in the federal sentencing guidelines, Congress clearly endorsed calculating loss by looking to the amount the security was overvalued by the defendant's fraud by expressly citing an example in which the overvaluation method was used for that purpose. (*United States v. Berger*, No. 08-50171, 2009 WL 4141478 (9th Cir. Nov. 30, 2009))

Investor Who Purchased Securities Through Limited Partnership Has Standing to Bring Federal Securities Claim

The U.S. District Court for the Southern District of New York recently denied a motion to dismiss federal securities law claims brought by a plaintiff investor who was allegedly defrauded into investing in defendant 3F Therapeutics, Inc. through a limited partnership. In denying the motion, the court rejected the defendant's argument that the plaintiff did not have standing to bring a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 because he was not an actual purchaser or seller of the company's securities.

In 2005, an agent of defendant who allegedly was in charge of promoting its sale, Theodore Skokos, contacted plaintiff regarding an investment opportunity. According to plaintiff, Mr. Skokos claimed that the company was poised for a sale, but needed to eliminate debt from its balance sheet to negotiate with potential buyers "from a position of strength." Plaintiff subsequently invested $4 million in defendant's securities, but, at defendant's behest, did so indirectly by investing in a limited partnership, rather than directly acquiring defendant's securities. The sale did not take place as represented and, after the company was ultimately acquired, plaintiff's investment was converted to illiquid restricted stock.

In holding that plaintiff had standing to assert a federal securities fraud claim, the court pointed out that the Second Circuit has held that the rule requiring a plaintiff to be an actual purchaser or seller must be interpreted liberally so that the "design of the Exchange Act... is not frustrated by the use of novel or atypical transactions." The court found that the plaintiff, although investing indirectly, was the actual party at risk because, among other things: (i) he was contacted directly by the defendant's agent; (ii) the limited partnership through which he invested was formed after that contact and the plaintiff was told by defendant that making the investment through it would not have a significant effect on the transaction; and (iii) both parties were aware that the funds plaintiff invested in the limited partnership would be promptly transferred to the defendant. As a result, the court found that the purpose of the actual purchaser rule—to prevent "bystanders" to a transaction from obtaining a remedy for a fraudulent transaction to which they were not a party—would not be frustrated by allowing plaintiff's claims to stand and denied the motion to dismiss. (*Abbey v. 3F Therapeutics, Inc.*, No. 06 CV 409, 2009 WL 4333819 (S.D.N.Y. Dec. 2, 2009))

BROKER DEALER

FINRA Proposes New Rules Governing Registration

The Financial Industry Regulatory Authority called for comment regarding its proposal to adopt consolidated rules governing registration and qualification requirements. There are substantive differences between the proposed new rules and current requirements. For example, persons engaged in the "investment banking or securities business" of a member firm will be required to maintain an "active" registration while other persons who are otherwise engaged in "a bona fide business purpose" of a member firm will be allowed to maintain an "inactive" registration. Persons maintaining "inactive" registrations will be "associated persons" for all purposes but will only be considered to be "registered persons" for certain enumerated FINRA rules. The proposal also includes, among other things, new "Principal Financial Officer and Principal Operations Officer" and "Compliance Officer" registration categories, a revised definition of the term "principal," and various changes to the rules describing qualification examination and registration requirements. The comment period for the proposal expires on February 1, 2010.

Read more.

FINRA to Adopt Consolidated Rules Governing Financial Responsibility

The Securities and Exchange Commission recently approved the Financial Industry Regulatory Authority's proposal to adopt new consolidated rules governing financial responsibility, effective February 8, 2010. The new FINRA Rules (4110, 4120, 4130, 4140 and 4521) are based in part on, and replace, provisions in current National Association of Securities Dealers and New York Stock Exchange rules. They include former NYSE financial requirements that will now apply to all FINRA member clearing firms. For example, all FINRA member clearing firms will now be subjected to certain restrictions on the ability to withdraw equity capital without FINRA prior written approval. Further, FINRA member clearing firms will now have to comply with notification requirements that apply when specified financial triggers are reached.

Read more.

PRIVATE INVESTMENT FUNDS

House Bill Includes Provisions to Tax Carried Interest as Ordinary Income; Requires Disclosure by Offshore Funds of U.S. Investors

The House of Representatives approved the Tax Extenders Act of 2009 (the Bill) on December 9, which will now move to the Senate for consideration. If the Bill is enacted in its current form, it will temporarily extend certain individual and business tax breaks for one year and add provisions with significant impact on many hedge and private equity funds and their managers. These include, among others:

Carried Interest

The Bill proposes to offset the loss of revenue from the short-term tax relief with a permanent increase in the tax rate on the "carried interest" or "investment services partnership interest," such as the interest held by private equity and hedge fund managers, as follows:

- Income and gain from such investment services partnership interest would be treated as ordinary income subject to self-employment tax and taxed at the higher ordinary income tax rate rather than the lower capital gains rate, effective generally for amounts earned after 2009. Existing carried interests are not "grandfathered" under the Bill.

- Capital gains rates would still apply to the portion of an investment services partnership interest that is a "qualified capital interest," which consists of any portion of an investment services partnership interest attributable to contributions by the manager and any portion previously reported as ordinary income.

Foreign Account Tax Compliance

- The usual withholding rate on U.S.-source interest and dividends earned by foreign investors is 30%, but this withholding rate is commonly reduced by tax treaties and does not apply in the case of many types of debt instruments. U.S.-source capital gains are also normally exempt from U.S.-withholding taxes for foreign investors. The Bill proposes that foreign financial institutions and foreign hedge funds, private equity funds and other foreign investment vehicles would be subject to 30% U.S. withholding tax on their U.S.-source dividends, interest and capital gains unless the applicable entity enters into an agreement with the Internal Revenue Service agreeing to provide information with respect to its direct or indirect U.S. investors (other than U.S. tax-exempt investors, publicly traded corporations, real estate investment trusts, mutual funds and government entities). This provision would implement a new and vastly expanded system of tax withholding, effective generally for payments made after 2012. The Bill would "grandfather" and, hence, exempt from expanded withholding, payments on any obligation that (as of the date of enactment of this provision) has been outstanding for at least two years.

- Any individual that holds more than $50,000 in certain foreign financial assets (including foreign private equity and hedge funds) must report information about these assets on the individual's annual tax return. Failure to comply would subject the individual to a penalty of up to $10,000 and up to $50,000 if the failure is not remedied within 90 days following notification from the U.S. Treasury Department. Additional penalties could apply for related understatements of income.

- Shareholders of a passive foreign investment company would be required to file an annual report containing such information as the Treasury Secretary may require.

Dividend Equivalent Payments

- The Bill would subject dividend-equivalent payments on U.S. stocks covered by "specified notional principal contracts" to 30% U.S. withholding tax effective for payments made on or after the date that is 90 days after the date of enactment, without any "grandfathering" of currently outstanding contracts. The withholding tax would be imposed on the gross amount of any dividend-equivalent payments even if such payments are netted against (and even if fully offset by) payments due from the foreign investor to the contract issuer. The provision authorizes the Treasury to issue guidance identifying contracts that, it believes, are not being used primarily as a means of avoiding withholding tax.

To read the text of the House Bill click here.
To read the House summary of the provisions included in the Bill click here.

CFTC

NFA Proposes New Interpretive Notice on Use of Online Media and Social Networking Sites

National Futures Association (NFA) has filed with the Commodity Futures Trading Commission proposed rule amendments regarding the use of online social networking groups and other media to communicate with the public. NFA's amendments would expand Compliance Rule 2-29, which currently requires NFA approval of any radio or television advertisement by an NFA member that makes specific trading recommendations or profit claims, to include any other audio or video advertisements accessible by members of the public (including via audio podcasts and Internet video postings).

NFA has also proposed the adoption of a new Interpretive Notice regarding the use of online media and social networking groups to communicate with the public, which makes clear that NFA's rules on promotional materials apply to content generated by an NFA member or associate and made available through such sites. Among other things, the Notice provides that NFA members and associates who host a blog, chat room or online forum where futures or forex products are discussed must supervise the use of that site, including by regularly monitoring its content, removing misleading or fraudulent posts by third parties and banning abusive users as necessary. NFA members are advised in the Notice to formulate and enforce policies governing the use of such sites by their employees.

NFA filed the proposed rule amendments with the CFTC on December 8 and intends to make the rule changes and related Interpretive Notice effective 10 days after their receipt by the CFTC, unless the CFTC notifies NFA that it intends to review the proposal.

The NFA rule filing is available here.

BANKING

Secretary Geithner Releases Letter to Capitol Hill Regarding TARP

On December 9, Treasury Secretary Timothy Geithner released a copy of a letter to House Speaker Nancy Pelosi outlining the Obama administration's exit strategy with respect to the Troubled Asset Relief Program (TARP) established by the Emergency Economic Stabilization Act of 2008 (EESA).

In outlining TARP's successes, Secretary Geithner noted that TARP investments are likely to be "significantly lower than previously expected" and that the government expected a positive return on its investment. He also noted that the administration expects that TARP will cost taxpayers at least $200 billion less than was projected in the August Mid-Session Review of the President's Budget.

With respect to the administration's exit strategy for TARP, Secretary Geithner outlined four broad elements. The first involves the termination and winding down of many of the government programs put into place in the fall of 2008. With respect to the second element, the federal government intends to limit new commitments in 2010 to the following: (a) mitigating foreclosure for responsible homeowners; (b) launching initiatives to provide capital to small and community banks and to facilitate small business lending; and (c) possibly increasing the government's commitment to the Term Asset-Backed Securities Loan Facility. The third component of the exit strategy is to only use remaining funds if necessary to respond to an immediate and substantial threat to the economy stemming from financial instability. Finally, the government intends to manage its investments in a commercial manner and seek to dispose of such investments as soon as practicable.

Secretary Geithner also noted that, although the $700 billion program has been extended, it was not expected that more than $550 billion would be used.

For more information, click here.

Office of Thrift Supervision Reminds Savings Banks About Responsibilities Regarding Credit Losses and Impairments

On December 9, the Office of Thrift Supervision (OTS) issued a reminder regarding the importance of accurately accounting for credit losses or impairments of investments in the form of a CEO letter. The letter stated that "the operating environment remains challenging with increased levels of unemployment, weakened residential real estate markets and mounting strains in the commercial real estate market. The combination of these factors has led to a growing level of nonperforming loans and foreclosures. Additionally, there is a larger level of performing loans or investments with underlying credit or documentation issues."

Specifically, the OTS stated that "examiners continue to identify situations where institutions have not provided for timely charge offs of nonperforming loans or other-than-temporary impairment of investments or established an adequate level of loan loss allowances relative to the thrift's risk exposures. Of particular concern is the increasing number of institutions identified by examiners that do not have policies, procedures and written documentation related to impaired loans that is consistent with accounting standards and interagency guidance."

The CEO letter itself references other CEO letters that provide additional guidance. In addition, the OTS referenced a recent sample comment letter from the Securities and Exchange Commission that would be useful to publicly traded bank and thrift holding companies.

Click here to read the OTS memo.
Click here to read the SEC's sample letter.

ANTITRUST

Congress Contemplates Overturning Heightened Federal Civil Pleading Standard

Last week, Senator Patrick Leahy of Vermont, chairman of the Judiciary Committee, held a hearing to consider a bill that would overturn the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* , 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). In *Twombly* and *Iqbal* the Court set forth a new, more stringent pleading standard that plaintiffs filing civil cases in federal court have to satisfy to avoid dismissal. In *Twombly*, an antitrust case, the Court held that a complaint must allege "enough facts to state a claim to relief that is plausible on its face." Subsequently, in *Iqbal*, a religious and race discrimination case, the Court extended that standard to all federal civil actions. These decisions retired the previous standard from *Conley v. Gibson*, 355 U.S. 41 (1957), which said that civil cases should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

At the hearing, Senator Leahy was strongly critical of the *Twombly* and *Iqbal* decisions. The bill, entitled the Notice Pleading Restoration Act (S. 1504), would restore the *Conley* pleading standard. A similar bill (H.R. 4115) has been introduced in the House. Since *Twombly* and *Iqbal*, the ability of defendants, and particularly corporate defendants, to get a case dismissed at the pleading stage has increased substantially and has put a bigger burden on plaintiffs to include more facts in their complaints. If the *Twombly* and *Iqbal* decisions are legislatively overturned, however, defendants in antitrust and other civil cases would not be able to have plaintiffs' factual allegations tested as rigorously early in litigation.

The Leahy statements are available here.
The Senate bill is available here.
The House bill is available here.

EXECUTIVE COMPENSATION AND ERISA

DOL Advises on Application of Plan Asset Rules to "Target Date" Mutual Funds

"Target date" mutual funds have become a popular investment option in 401(k) plans. These funds typically invest in shares of other mutual funds of the same mutual fund company to create a blended portfolio which is periodically reallocated so that its risk/reward characteristics become more conservative as the investor becomes older.

In Advisory Opinion 2009-04A, dated December 4 (2009-04A), the U.S. Department of Labor (DOL) considered whether these funds should be treated any differently under the Employee Retirement Income Security Act of 1974 (ERISA) than other registered investment company funds (i.e., mutual funds), and concluded that, when a plan subject to ERISA invests in a target date fund, the registered investment company does not act as a fiduciary to the plan when it selects the mutual funds that make up the target date portfolio, and the shares of those other mutual funds do not become "plan assets" for purposes of ERISA.

This is consistent with ERISA's treatment of other mutual funds. The statute has always provided that, in general, when a plan invests in registered investment company shares, the investment does not by itself cause the investment company or its investment advisor or principal underwriter to be deemed a fiduciary or party in interest for purposes of ERISA (ERISA Section 3(21(B)) and the underlying assets of the registered investment company are not plan assets—the plan asset is the mutual fund shares, not the underlying investments of the mutual fund (ERISA Section 401(b)(1)). The DOL applied these principles in 2009-04A, and concluded that the plan asset is the shares of the target date fund, not the mutual funds in which it invests, and the act of selecting the target date fund's portfolio of mutual funds is not a fiduciary act.

One application of this ruling may be to counter claims that the managers of target date funds have breached their ERISA fiduciary duty by investing in mutual funds with higher expense ratios, thus lowering plan participants' investment returns. Courts tend to give considerable weight to DOL Advisory Opinions, and if 2009-04A were applied to such a claim, the result would seem to be that since the target fund manager is not a fiduciary under

ERISA, it cannot breach an ERISA fiduciary duty. However, 2009-04A does not affect other fiduciary duties; for example, plan fiduciaries' selection of target date funds to be offered under a 401(k) plan is still a fiduciary act and subject to ERISA's fiduciary requirements.

Advisory Opinion 2009-04A may be found here.

UK DEVELOPMENTS

JMLSG Publishes Revised Money Laundering Guidance

On December 3, the UK Joint Money Laundering Steering Group (JMLSG) published its revised Money Laundering Guidance for the Financial Sector. The proposed amendments have been made following a review by the JMLSG of its guidance which looked at:

- areas of omission;
- provisions of the guidance that are difficult to implement or effect; and
- provisions of the guidance that no longer reflect current practice.

This revised guidance has been submitted to the UK Treasury for approval.

To read the guidance in full, click here.

FSA Publishes Feedback Statement on Remuneration

On December 8, the UK Financial Services Authority (FSA) published a feedback statement on the main issues arising from its March consultation on reforming remuneration practices in financial services (as reported in the March 27 edition of *Corporate and Financial Weekly Digest*). The FSA's Remuneration Code comes into force for large banks, building societies and broker dealers on January 1, 2010. It will apply to any remuneration awards made by these firms for 2009.

Part of the March consultation paper invited discussion on whether the Remuneration Code should be extended to other FSA authorized firms. At this stage the FSA has decided not to introduce any new rules and will not extend the rules to other sectors. The FSA does not think it is beneficial to make changes now as adjustments will need to be made in 2010 because of the many pending European directives that contain remuneration provisions.

To read the feedback statement in full, click here.

UK Government Announces One-Off Bank Payroll Tax

In its December 9 Pre-Budget Report, the UK Government announced a new one-off bank payroll tax (BPT) payable by banks and certain other financial services firms. The BPT will be chargeable at 50% on bonuses exceeding £25,000 (approximately $40,700) per employee between December 9, 2009, and April 5, 2010, although certain payments (including some existing contractual entitlements) are excluded. The BPT will also apply to the UK branches of foreign banks and financial services firms. The draft rules include carefully drafted anti-avoidance provisions, but independent asset managers and investment advisors and asset management and investment advisor subsidiaries of banks appear to be excluded from the BPT.

To read the UK Government summary, click here.
To read the technical note, with draft legislation, click here.

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