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Corporate and Financial Weekly Digest

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SEC/Corporate

SEC Approves Rule Providing for Expedited and Free Access to Ongoing Disclosures by Municipal Bond Issuers

On December 8, the Securities and Exchange Commission announced the adoption of a final rule designating the Municipal Securities Rulemaking Board (MSRB) as the sole central repository for all electronic continuing disclosure information provided pursuant to Rule 15c2-12 and establishing a continuing disclosure service of the MSRB's Electronic Municipal Market Access system (EMMA). The rule will improve the availability of information about municipal securities, creating faster and free access to this information for investors, market professionals, and the public generally, replacing a cumbersome, slow and often costly system of accessing such disclosures at one of the four Nationally Recognized Municipal Securities Information Repositories (NRMSIRs).

Deficiencies in the quality, timing and dissemination of disclosure in the $2.6 trillion municipal securities market have been a serious problem that has been exacerbated by recent liquidity problems of municipal auction rate securities and rating downgrades of municipal bond insurers, which have contributed to the current credit crisis.

Currently, under Rule 15c2-12, participating underwriters are prohibited, subject to certain exemptions, from purchasing or selling municipal securities covered by the Rule in a primary offering, unless the participating underwriter has reasonably determined that an issuer of municipal securities or an obligated person has undertaken in a written agreement or contract for the benefit of holders of such securities (continuing disclosure agreement) to provide specified annual information and event notices to certain information repositories consisting of: (i) certain annual financial and operating information and audited financial statements (annual filings); (ii) notices of the occurrence of any of eleven specific events (material event notices); and (iii) notices of the failure of an issuer or other obligated person to make a submission required by a continuing disclosure agreement (failure to file notices). Rule 15c2-12 also requires the participating underwriter to reasonably determine that an issuer of municipal securities or an obligated person has undertaken in the continuing disclosure agreement to provide: (i) annual filings to NRMSIRs; and (ii) material event notices and failure to file notices either to each NRMSIR or to the MSRB.

The amendments to Rule 15c2-12 require a participating underwriter to reasonably determine that the issuer or obligated person has agreed at the time of a primary offering: (i) to provide the continuing disclosure documents to the MSRB instead of to each NRMSIR and (ii) to provide the continuing disclosure documents in an electronic format and accompanied by identifying information as prescribed by the MSRB.

SEC/CORPORATE

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The MSRB rule change will establish, as a component of EMMA, a continuing disclosure service for the receipt of, and for making available to the public, continuing disclosure documents and related information to be submitted by issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Rule 15c2-12. The continuing disclosure service will accept submissions of (i) continuing disclosure documents as described in Rule 15c2-12, and (ii) other disclosure documents specified in continuing disclosure undertakings entered into consistent with Rule 15c2-12 but not specifically described in Rule 15c2-12. Submitters will be responsible for the accuracy and completeness of all documents and information submitted to EMMA. With the creation of EMMA, municipal securities investors will have free and instant access to municipal bonds disclosures in a manner that resembles the access that corporate securities investors have to company information through the SEC's Electronic Data Gathering, Analysis and Retrieval system.

The SEC's rule amendments and the MSRB's rule change will be effective on July 1, 2009.

http://www.sec.gov/news/digest/2008/dig120808.htm
http://www.sec.gov/rules/final/2008/34-59062.pdf
http://www.sec.gov/rules/sro/msrb/2008/34-59061.pdf

SEC to Consider XBRL Filing Requirement

In a Sunshine Act notice published on December 10, the Securities and Exchange Commission indicated that at its open meeting on December 17 it will consider whether to adopt amendments requiring that financial statements of registered companies be filed in interactive data format according to a specified phase-in schedule.

http://www.sec.gov/news/openmeetings/2008/ssamtg121708.htm

Litigation

Sarbanes-Oxley Whistleblower Protection Requires Definite and Specific Allegations

The Fourth Circuit Court of Appeals affirmed a Department of Labor Administrative Review Board (ARB) decision holding that a former employee's termination did not trigger whistleblower protection under the Sarbanes-Oxley Act of 2002 (the Act). The employee was fired from her position as a manager of labor relations, ostensibly because of a conflict of interest stemming from a personal relationship with a superior. The employee alleged that the relationship was a pretext and that she was actually terminated for calling attention to her employer's failure to collect certain fees from a union and paying employee union members on days they attended union meetings in contravention of the employer's policy.

The Fourth Circuit agreed with the ARB that the employee's allegations must be "definitively and specifically related to one of the areas [expressly] accorded protection" in the Act. Although the employee argued, and an administrative law judge had previously found, that the employer's failure to collect fees "inherently involved the use of mail and wires," thus triggering the wire fraud provision of the Act, the court affirmed the ARB's holding that these facts did not satisfy the employee's burden. To the contrary, the court found that the employee's actions amounted to "little more than alerting... management to an internal billing issue." Because mere billing discrepancies are not expressly covered by the Act and because "a billing discrepancy, without more, does not equal fraud," the court agreed that the employee had failed to adequately allege that she was entitled to whistleblower protection under the Act. (Platone

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v. U.S. Dep't of Labor, 2008 WL 5077822 (4th Cir. Dec. 3, 2008))

Securities Fraud Claims Reinstated Against Officers of Underwriter

The First Circuit Court of Appeals reversed a district court ruling dismissing a Securities and Exchange Commission action against certain senior executives of the primary underwriter for a family of mutual funds stemming from allegedly false statements included in the prospectuses for the mutual funds regarding their prohibition of "market timing" transactions. The SEC alleged that the defendants were secondarily liable for violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder for "implied statements" made in the prospectuses that were not true when made. The SEC also alleged primary liability for violations of Section 17(a)(2) of the Securities Act of 1933 for obtaining money in the offer or sale of securities by the means of an untrue statement of a material fact.

The defendants, as senior executives of the primary underwriter, were responsible for disseminating informational materials for the mutual funds, including their prospectuses. During the relevant time period, the fund prospectuses were amended to limit and, in some instances, ban "market-timing"—i.e., an investor's rapid succession round-trip transactions made to take advantage of short-term inefficiencies in the fund's prices. Notwithstanding these amendments, the SEC alleged that the executives affirmatively approved special arrangements with particular investors to permit "market-timing" transactions that conflicted with the provisions of the applicable prospectuses.

The First Circuit held that the SEC's allegations sufficiently alleged an uncharged primary violation against the defendants' underwriter-employer, ruling that the language in the prospectus banning market-timing was misleading in light of the conflicting arrangements made with particular investors. With respect to the individual defendants' secondary liability under Section 10(b) and Rule 10b-5, the First Circuit held that the SEC had sufficiently alleged their knowledge of the fraud and that defendants had substantially assisted the fraud, ruling that defendants' "positions as officers... imposed upon them a duty to review the accuracy of the prospectus disclosures" which they failed to satisfy as a result of their "failure to correct the misleading disclosures." In addressing the primary liability claim under Section 17(a)(2), the First Circuit held that under Section 17(a)(2), in contrast to Section 10(b) and Rule 10b-5, a claim could be stated so long as a materially misleading statement allegedly was made in connection with the offer or sale of securities, regardless of whether the statement was alleged to have been made by the defendants charged with the violation. (*SEC v. Tambone*, 2008 WL 5076554 (1st Cir. Dec. 3, 2008))

Broker Dealer

FINRA Requests Comment on Proposed Rule Addressing the Circulation of Rumors

The Financial Industry Regulatory Authority (FINRA) has requested comments on proposed Rule 2030, a new, stand-alone rule, that prohibits members from originating or circulating any rumor about a security which the member knows or has reasonable grounds to believe is false and would improperly influence the market price of such security. FINRA is proposing that Rule 2030 retain the standard in Rule 6140(e) that a rumor not be originated or circulated if the member knows or has reasonable grounds for believing that the rumor is "false or misleading or would improperly influence the market price of such security." FINRA is also proposing that Rule 2030 apply to all securities, not just those securities reported to the Consolidated Tape. The proposal does not include an NYSE exception for discussions of "unsubstantiated information published

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by a widely circulated public media," as widely circulated rumors in the public media that would otherwise be covered by the rule are not of any less concern in terms of the market integrity concerns related to such rumors.

Comments are due by December 18.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117413.pdf

NYSE Eliminates Sub-Penny Halt Trading Condition

Effective November 17, the New York Stock Exchange eliminated the "Sub-penny Halt" trading condition that was imposed pursuant to NYSE Rule 123D(3). The NYSE amended Rule 123D(3) on March 5, 2007, to create a non-regulatory halt triggered whenever a security trading on the NYSE was reported on the Consolidated Tape during normal trading hours as being executed at a price of $1.05 or less per share. At the time, Exchange systems did not accommodate sub-penny executions on orders routed to better-priced protected quotations. The Sub-penny Halt is being eliminated because Exchange systems are now capable of recognizing protected quotations with a sub-penny component in its round-lot market and accommodating away from market executions in a sub-pennies, in compliance with Securities and Exchange Commission Rules under Regulation NMS.

http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E885257501007526 81/$FILE/Microsoft%20Word%20-%20Document%20in%2008-56.pdf

FINRA Issues Guidance on Amendments to FINRA Rules Relating to SEC Regulation M

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 08-74 to provide additional information and guidance on new FINRA Rules governing notification requirements and marketplace-specific rules relating to Regulation M. The new rules take effect on December 15. On September 11, the Securities and Exchange Commission approved a proposed rule change that:

- Adopts new FINRA Rule 5190, which includes the Regulation M-related notification requirements applicable to firms participating in securities offerings. Rule 5190 consolidates some of the Regulation M-related notification requirements that currently are found in NASD and NYSE rules. Unlike FINRA's current rules, the new rule applies uniformly to distributions of listed and unlisted securities.

- Adopts new FINRA Rule 6470, which includes certain Regulation M-related requirements that are currently in the OTC Bulletin Board rules and applies to all OTC Equity Securities. Rule 6470 requires that, in connection with a distribution of an OTC Equity Security, a firm must withdraw its quotations in the offered security to comply with the applicable restricted period under Regulation M.

The proposed rule changes also make conforming amendments to the Regulation M-related rules applicable to the Alternative Display Facility. Consistent with the amendments, and as part of the rule change approved by the SEC, FINRA has clarified the scope and application of certain marketplace-specific requirements.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117501.pdf

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Investment Companies and Investment Advisers

SEC Staff Emphasizes Importance of Compliance During Times of Financial Crisis

On December 2, Lori Richards, Director of the Securities and Exchange Commission's Office of Compliance Inspections and Examinations, published an open letter to the CEOs of SEC-registered firms, including investment advisers, investment companies, broker-dealers and transfer agents. The SEC staff reminded firms that while reductions and cost-cutting measures are common in periods of economic downturn, SEC-registered firms have a legal obligation to maintain an adequate compliance program reasonably designed to achieve compliance with the firm's obligations under the securities laws. As SEC Chairman Cox noted recently, "[n]ow more than ever, companies need to take a long-term view on compliance and realize that their fiduciary responsibility requires a constant commitment to investors. That means sustaining their support for compliance during this market turmoil, and beyond it as well."

SEC examiners may focus on any decrease in compliance resources. Consequently, firms should be prepared to justify decreases in compliance resources and assure themselves that compliance objectives can still be met with reduced resources.

http://www.sec.gov/about/offices/ocie/ceoletter.htm

First Circuit Permits SEC Fraud Action Against Mutual Fund Distributor/Underwriter and its Executives

Please see "Securities Fraud Claims Reinstated Against Officers of Underwriter" under **Litigation**.

Structured Finance and Securitization

Congressional Oversight Panel Criticizes Treasury's Use of TARP Funds

On November 10, the Congressional Oversight Panel for Economic Stabilization, charged with reviewing the government's $700 billion financial industry rescue plan, the Troubled Asset Relief Program (TARP), released a report questioning whether the Treasury Department has mishandled TARP funds. While the Congressional Oversight Panel's report offers no conclusions or specific allegations, it contains a number of suggestions for the Treasury.

The report sets forth a view that the Treasury should do more to help prevent foreclosures, and asserts that the Treasury needs to be more transparent about how it is spending taxpayer money. The report argues that the public should know what, if any, conditions have been placed on institutions receiving taxpayer money, and how the Treasury determines which institutions will receive TARP funds. The panel also states in the report that, in the context of consumer credit, it is important to ask the Treasury what restrictions will be placed on credit issuers to ensure that tax dollars are not used to subsidize predatory lending practices. The report also notes that the Treasury needs to be cognizant of the challenges still to come as it spends TARP funds.

The report comes as the Bush administration is considering whether to seek access to the second half of the $700 billion in TARP funds.

http://www.house.gov/apps/list/hearing/financialsvcs_dem/cop121008.pdf

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Treasury Assistant Secretary Kashkari Delivers Remarks and Testifies on TARP Capital Purchase Program

On December 5, Treasury Interim Assistant Secretary for Financial Stability Neel Kashkari delivered remarks at a Mortgage Bankers Association event on the Capital Purchase Program (CPP) being implemented using funds from the Troubled Asset Relief Program (TARP). Assistant Secretary Kashkari primarily addressed concerns expressed by the Government Accountability Office (GAO) and others about the program's results and the level of oversight of financial institutions receiving TARP funds through the CPP.

In addition, on December 12, Assistant Secretary Kashkari and GAO Acting Comptroller General of the U.S. Gene Dodaro testified at a House Financial Services Committee hearing titled "Oversight Concerns Regarding Treasury Department Conduct of the Troubled Asset Relief Program." Assistant Secretary Kashkari and Comptroller General Dodaro were questioned at length by members of the Committee who have significant concerns about the Treasury's implementation of the Emergency Economic Stabilization Act of 2008.

http://www.treasury.gov/press/releases/hp1314.htm
http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr121008.shtml

CFTC

CFTC Seeks Expanded Authority Over Exempt Commercial Markets

The Commodity Futures Trading Commission is seeking public comments on proposed rules and rule amendments that would increase the CFTC's authority to oversee Exempt Commercial Markets (ECMs), as directed by the CFTC Reauthorization Act of 2008. The proposed rules would revise the information submission requirements applicable to ECMs, establish new procedures and standards for a CFTC determination that an ECM contract has a significant price discovery function, provide guidance on compliance with the nine core principles for ECMs with significant price discovery contracts (SPDCs), and amend certain existing regulations applicable to registered entities to clarify that such regulations would be applicable to ECMs with SPDCs. The proposed rules are to be published in the Federal Register on December 12, and comments are due February 10, 2009.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5581-08.html

CFTC Exempts BNP Paribas from Position Limits Following Fortis Acquisition

On December 5, the Commodity Futures Trading Commission issued a no-action letter to BNP Paribas (BNP), exempting BNP, Fortis Bank S.A./N.V. (Fortis) and their respective affiliates from speculative position limits in connection with BNP's acquisition of Fortis. The no-action relief is limited only to aggregated positions created by the acquisition and is conditioned on implementation of prospective compliance measures by BNP and Fortis no later than January 15, 2009.

http://www.cftc.gov/stellent/groups/public/@newsroom/documents/letter/08-21.pdf

CFTC

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Banking

OTS Issues New Assessment Schedule for the Nation's Savings Associations

On December 10, the Office of Thrift Supervision, regulator of the nation's savings institutions, issued a new assessment schedule. Pursuant to Technical Bulleting (TB) 48-25, assessment rates for savings institutions have been adjusted for inflation pursuant to 12 CFR Part 502. TB 48-25 supersedes TB 48-24, dated December 6, 2006. However, the fee schedules and savings and loan holding company assessment schedule in TB 48-21 remain in effect. The OTS imposes semiannual assessments on thrifts based on three components: its size, its condition, and the complexity of its portfolio. TB 48-25 adjusts the size component of the savings association rate schedule. These changes are effective for the January 2008 savings association assessment. A link to the new TB is provided below.

http://files.ots.treas.gov/84294.pdf

OTS Disallows Proposed By-Law

The Office of Thrift Supervision (OTS) ruled on December 5 that certain by-laws proposed by management went too far in excluding certain members from participating in the nomination process for directors. The institution in question sought, via a proposed by-law, to prevent people who fail to pass the OTS' optional "integrity factor" test from nominating a director, and from serving as a director if they had ever been subject to a cease and desist order for conduct involving dishonesty or breach of trust. (OTS permits an institution to adopt an optional by-law imposing an integrity test applicable to those who would serve as directors. Under this test, a person is not qualified to serve as a director if he or she: "(1) is under indictment for, or has ever been convicted of, a criminal offense involving dishonesty or breach of trust and the penalty for such offense could be imprisonment for more than one year, or (2) is a person against whom a banking agency has, within the past 10 years, issued a cease and desist order for conduct involving dishonesty or breach of trust and that order is final and subject to appeal, or (3) has been found either by a regulatory agency whose decision is final and not subject to appeal or by a court to have (i) breached a fiduciary duty involving personal profit or (ii) committed a willful violation of any law, rule or regulation governing banking, securities, commodities or insurance, or any final cease and desist order issued by a banking, securities, commodities or insurance regulatory agency.) In rejecting the proposed by-law, OTS stated that: "There must be a balance between the need for a board of directors of suitable integrity and a provision that would tend to entrench management. In weighing that balance, OTS concludes that the proposed by-law would not promote significantly greater integrity among potential board members than the already existing pre-approved optional by-law provision. In addition, OTS concludes that the proposed by-law inappropriately entrenches management."

In so ruling, and with respect to the proposed nomination restriction, the OTS rejected an argument that it had to approve the by-law simply because it had done so in the past for another institution. The OTS indicated that it had reassessed its earlier ruling, and had found that the "views it had [previously] expressed were... overstated." With respect to the proposal to make the 10-year limit last forever, the OTS concluded that such a by-law "precludes the possibility of rehabilitation."

http://files.ots.treas.gov/680047.pdf

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UK Developments

LSE Publicly Censures AIM Listed Company

On December 4, the London Stock Exchange plc (LSE) imposed a public censure on Minmet plc (Minmet) for breaches of Rules 10, 11, 12, 13, 14 and 31 of its Alternative Investment Market (AIM) between October 2006 and January 2008.

The breaches related to various transactions with respect to which Minmet failed to: (i) release announcements without delay regarding a reverse takeover and certain substantial and/or related party transactions; (ii) include material information in certain announcements; (iii) comply with the AIM Rules concerning reverse takeovers; and (iv) properly liaise with its AIM nominated adviser (Nomad).

www.londonstockexchange.com/NR/rdonlyres/85F0A46B-1F13-474C-B9FC-A2B1A022FA30/0/Minmetpubliccensure.pdf

FSA Amends Enforcement Guide

On December 5, the UK Financial Services Authority (FSA) published policy statement PS08/13 *Decision Procedure and Penalties Manual and Enforcement Guide Review 2008*.

The feedback statement summarizes the responses received by the FSA to its consultation paper CP 08/10 on the same subject (see the August 3, 2007, edition of *Corporate and Financial Weekly Digest*). Additionally, the feedback statement sets out the final amendments in the FSA's Decision Procedure and Penalties Manual (DEPP), the Regulated Covered Bonds Sourcebook (RCB) and the Enforcement Guide (EG).

Notably, the FSA has added a leniency factor to its non-exhaustive list of factors that it may take into account when deciding whether to commence a market misconduct prosecution. Where misconduct is carried out by two or more individuals acting in concert and one of those individuals provides the FSA with information and gives full assistance to the FSA, the FSA will take that cooperation into account when deciding whether to prosecute the individual who has provided assistance.

The amendments also introduce a new chapter in the EG describing the FSA's approach to using enforcement powers under UK legislation, including the Money Laundering Regulations 2007, and remove certain restrictions on the FSA's use of Own Initiative Variations of Permissions.

The amendments to the DEPP, RCB and EG came into force on December 11.

www.fsa.gov.uk/pubs/policy/ps08_13.pdf

High Court Confirms FSA Powers to Prosecute Insider Trading

On December 2, the Divisional Court of the High Court confirmed that the UK Financial Services Authority (FSA) may independently commence proceedings for suspected insider trading activities under section 402 of the Financial Services and Markets Act 2000 without obtaining the consent of the Director of Public Prosecutions (DPP) or the Secretary of State. The ruling clears the way for the FSA to continue with three high-profile criminal insider trading cases.

The appeal was brought by the defendant following a ruling in September by District Judge Purdy at the City of Westminster Magistrates Court in which the Judge rejected defense arguments that the FSA needed to obtain the consent

UK DEVELOPMENTS

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of the DPP or the Secretary of State to institute an insider dealing prosecution (as reported in the September 26, 2008, edition of *Corporate and Financial Weekly Digest*).

* Click here to access the *Corporate and Financial Weekly Digest* archive.

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