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Corporate and Financial Weekly Digest

A Note from the Editor

Please note that next week's issue of *Corporate and Financial Weekly Digest* will be distributed on Thursday, December 20 rather than Friday.

Robert Kohl

December 14, 2007

SEC/Corporate

SEC Amends Eligibility Requirements for Forms S-3 and F-3

On December 11, the Securities and Exchange Commission approved changes to the eligibility requirements of Forms S-3 and F-3 under the Securities Act of 1933 to allow companies that do not meet the Forms' current public float criteria ($75 million) to utilize Forms S-3 and F-3 to register primary offerings of their securities, subject to certain limitations.

Specifically, the amendments permit issuers, without regard to the size of their public float, to register primary offerings on Forms S-3 and F-3, provided they:

- Meet all other eligibility requirements of the relevant form;
- Are not currently shell companies and have not been shell companies for at least 12 calendar months before filing the registration statements;
- Have a class of common equity securities listed and registered on a national securities exchange; and
- Do not sell more than the equivalent of one-third (up from 20% in the SEC's proposal) of their public float in primary offerings pursuant to the new instructions in any period of 12 calendar months.

The effective date for these amendments will be 30 days after publication in the *Federal Register*.

http://www.sec.gov/news/press/2007/2007-259.htm

SEC/CORPORATE

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SEC Issues Final Rule Amending Rules 144 and 145

On December 6, the Securities and Exchange Commission issued its final rule amending Rules 144 and 145 of the Securities Act of 1933. The effective date for the Rule 144 and 145 amendments will be February 15, 2008, but the new rules, once effective, will apply to securities acquired before that date.

The amendments to Rule 144 of the Securities Act include:

- Shortening the holding period for restricted securities of reporting companies from one year to six months where the issuer is subject to Security Act reporting obligations for at least 90 days before the sale of the restricted securities.

- Simplifying compliance with Rule 144 for non-affiliates by allowing them to resell restricted securities after meeting the six month holding period, subject (for six additional months) to compliance by the reporting company with the current public information requirements under Rule 144(c) and provided that such non-affiliates have not been affiliates of the reporting company for at least three months before the sale.

- Permitting affiliates to resell restricted securities of a reporting company after a six month holding period, subject to compliance by the reporting company with the current public information requirements and by the selling affiliate with volume limitations, manner of sale requirements and filing of Form 144.

- Revising the manner of sale requirements that apply to the resale of equity securities by affiliates and eliminating the manner of sale requirements set forth in Rule 144(f) with respect to affiliate resales of debt securities.

- Raising the volume limitations for debt securities to permit the resale of debt securities in an amount that does not exceed 10% of the tranche (or class when the securities are non-participatory preferred stock) in any three month period.

- Increasing the Form 144 filing threshold for affiliates' sales and eliminating the Form 144 filing requirement for non-affiliates.

- Simplifying and clarifying the Preliminary Note to Rule 144, incorporating plain English principles and codifying several interpretive positions issued by the staff of the Division of Corporate Finance.

The SEC did not adopt the proposed tolling provision under Rule 144 which would have tolled the holding period during any period the restricted security holder's position in the restricted securities was hedged.

In addition, Rule 145 has been amended to:

- Eliminate the presumptive underwriter provision except with respect to transactions involving shell companies; and

- Revise the resale provisions of Rule 145(d).

http://www.sec.gov/rules/final/2007/33-8869.pdf

SEC Announces Electronic Filing and Revisions of Form D

On December 11, the Securities and Exchange Commission adopted provisions that will mandate electronic filing of Form D information. Form D is one of the SEC's few remaining paper filings, the second most common paper filing made with the SEC after Form 144. The voluntary phase-in period for electronic filing of Form D will begin on September 15, 2008 and become mandatory on March 16, 2009. Information will be filed through an online filing system accessible from any computer that has Internet access and the filed information will be available on the SEC's website in an easy to read format. John White, the Director of the SEC's Division of Corporate Financing noted that the SEC's launch of this online filing of Form D was created with the intent of facilitating one-stop filing for both federal and state Form D filings which will ultimately reduce filing burdens for small companies.

The SEC also voted to adopt amendments to revise and update the information requirements of Form D. Specific revisions will include, among other changes: deleting the current requirement to identify as "related persons" owners of 10 percent or more of a class of equity securities; replacing the current requirement to provide a business description with a requirement to provide industry group information from a pre-established list; replacing the current requirement to disclose information on a wide variety of expenses and use of proceeds items with a requirement to disclose expenses only as to amounts paid for sales commissions and, separately stated, finders' fees and disclose use of proceeds only as to the amount of gross proceeds used or proposed to be used for payments to related persons; and permitting a limited amount of free writing to the extent necessary to clarify responses.
The changes in information requirements will become effective on September 15, 2008.

http://www.knowledgemosaic.com/Gateway/Rules/PRE.2007-259.121107.htm

http://www.knowledgemosaic.com/Gateway/Rules/SP.spch121107caj.121107.htm

Chairman Cox Proposes Additional SOX 404(b) Delay

In testimony on December 12 before the Committee on Small Business of the US House of Representatives, Securities and Exchange Commission Chairman Cox stated that he will propose to the full Commission a further one year delay in the implementation for "non-accelerated filers" of the external audit firm attestations required under Section 404(b) of the Sarbanes-Oxley Act. Under the current schedule, such companies would be expected to begin compliance with SOX 404(b) for fiscal years ending after December 15, 2008. In order to provide time to evaluate an SEC survey of costs and benefits of SOX 404 compliance under new Auditing Standard No. 5, expected to take place in early 2008, the implementation of SOX 404(b) for such non-accelerated filers is now proposed to begin for fiscal years ending after December 15, 2009.

www.house.gov/smbiz/hearings/hearing-12-12-07-sox/testimony-12-12-07-SEC.pdf

Broker Dealer

NYSE Arca Proposes Changes to Index-Linked Security Listing Rules

NYSE Arca has proposed amending current listing rules in equity index-linked, commodity index-linked and linked currency securities (Index-Linked Securities) to eliminate a requirement prohibiting the number of components underlying an Equity Index-Linked Security from increasing or decreasing by more than 33 $^{1}/_{3}$ from the original number of index components at the time of

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listing. NYSE Arca states that investors in Equity Index-Linked Securities purchase these securities on the belief that the underlying index methodology is accurately described and maintained in order for the index to continue to represent the sector, geographic region or other investment characteristics the index is designed to track. With terms running up to thirty years in duration, it is likely that some of these indexes will change in ways that will bring them out of compliance with the "33 $^{1}/_{3}$ Requirement."

NYSE Arca has also proposed changing its rules to list Index-Linked Securities that provide for payment at maturity based on a multiple of the direct or inverse performance of an underlying reference asset, with any negative payment at maturity limited to a multiple of twice the underlying reference asset. This listing standard for Index-Linked Securities will make them more analogous to exchange-traded funds like the Short Funds and UltraShort ProShares Trust and the Inverse Funds and Leveraged Inverse Funds of the Rydex ETF Trust, each of which trade on NYSE Arca pursuant to unlisted trading privileges.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-24033.pdf

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-23971.pdf

SEC Approves NYSE Arca Equity Listing Index-Linked Securities Based on Closed End and ETF Funds

The Securities and Exchange Commission has approved a proposed NYSE Arca rule change that will permit the listing and trading of Equity Index-Linked Securities where the underlying index consists in whole or in part of (i) closed end mutual funds or (ii) ETF Securities which, in each case, are registered under the Investment Company Act of 1940. NYSE Arca stated that trading in these types of securities is subject to the same level of regulation as trading in exchange-listed equity securities. Also, closed-end fund securities and ETF securities trade on the same exchange platforms as equities registered under the Securities Exchange Act of 1934 and are subject to the same exchange trading rules.

NYSE Arca proposed an exception to the requirement that 90% of the index's numerical value and at least 80% of the total number of component securities underlying an equity reference asset must meet then current NYSE Arca criteria for standardized options trading for situations where no underlying component security represents more than 10% of the dollar weight of such index, and such index has a minimum of 20 component securities.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-23750.pdf

NASDAQ to List and Trade Commodity-Linked Securities

The NASDAQ Stock Market LLC has been granted accelerated approval to change its listing rules to permit the listing and trading of Commodity-Linked Securities, defined as securities that provide for payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options or other commodity derivatives, commodity-related securities or a basket or index of the same. The reference asset to which the security is linked must have been reviewed and approved for the trading of commodity-related securities or options or other derivatives by the Securities and Exchange Commission under the Securities Exchange Act of 1934, and pricing information for the reference asset must be derived from a market which is an Intermarket Surveillance Group Member or affiliate with which NASDAQ has a comprehensive surveillance sharing agreement. In addition, the value of the reference asset must be calculated and disseminated on a 15

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second basis during NASDAQ's regular market session

As part of the same release, NASDAQ proposed several conforming rules changes concerning Linked Securities. Changes include increasing the maximum term for Linked Securities to 30 years; modifying rebalancing requirements for indexes underlying Equity Index-Linked Securities based on the equal-dollar or modified equal-dollar weighting method; establishing an exception to the requirement that 90% of the index's numerical value and at least 80% of the total number of component securities underlying an Equity Reference Asset must meet then current NYSE Arca criteria for standardized options trading in the event that no underlying component security represents more than 10% of the dollar weight of such index and such index has a minimum of 20 component securities; clarifying the eligibility requirements of components underlying Equity Index-Linked Securities; modifying NASDAQ rules to clarify that the payment at maturity may or may not provide for a multiple of the direct or inverse performance of any underlying index, indexes, or Reference Asset subject to some limitations. Further, Index Linked Securities trading in $1,000 denominations or that are redeemable on a weekly basis are no longer subject to the minimum number of holder rule.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-23973.pdf

FINRA Issues Guidance on Review and Supervision of Electronic Communications

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 07-59, Final Guidance Regarding Review and Supervision of Electronic Communications. The guidance permits review and supervision of electronic communications on a risk based approach. However, communications required by rule or law to be reviewed individually cannot use this random method, such as, communications subject to the research analyst rule, customer complaints, order error or account designation changes, and communications between the proprietary trading desk and other parts of the firm. Supervisory policies must (i) identify correspondence that will be subject to pre or post-review, (ii) identify positions in the firm responsible for reviewing different types of correspondence, (iii) periodically re-evaluate the procedures' effectiveness, (iv) prohibit employees' use of electronic communication systems not subject to supervisory and review procedures, and (v) train and educate personnel with respect to these obligations.

Members should provide employees quick and easy access to electronic communication policies and procedures , e.g. use of the member's intranet; a statement that non-listed means are prohibited; the potential consequences of non-compliance; and training on a regular and as-needed basis. Member policies must include the types of electronic communications that require review and utilize risk-based principles to determine the exact extent to which additional supervisory policies and procedures are required.

In the case of external communications, members may prohibit use of other than the members' communication system and require employees to periodically confirm compliance with this policy. Alternatively, members may block access through the firm's computer system. Another approach is to require employees to obtain pre-approval for use of outside systems by filing a written detailed business justification and annual re-certification. Use of message boards should be prevented, and e-faxes are communications subject to this guidance. In the case of internal communications, members should consider (i) is there an adequate barrier in place to deal with potential conflicts of interest, (ii) reviews of communication regarding internal or regulatory examinations or investigations, (iii) review of communications in connection with transaction reviews, and (iv) review of communication related to issues arising from a review of external electronic communication.

The member policy must identify the persons responsible for the review of electronic communications although delegation is permitted if there are procedures for escalation. All supervisors, including delegated reviewers, must have sufficient knowledge, experience and training to conduct reviews. There should be a developed review process that is reasonably designed to achieve compliance with applicable securities laws, regulations and FINRA rules and appropriate to the member's business and structure.

Three random review methods include: (i) a Lexicon review based on specified words or phrases may be used, but the Lexicon must be kept confidential and periodically updated (adds and deletes), and if selected messages are reviewed on a random basis, the rationale for such review must be part of the member's policies; (ii) a random review sampling of a percentage of all electronic communication that is a reasonable amount is permitted. Members should consider such factors as percentage to be reviewed, the business line, branch office, or individuals to be reviewed; and (iii) a combination Lexicon and random sample review. Any review process should be periodically evaluated.

Members must consider the frequency of reviews which may vary depending on the type of business conducted, the type of customers involved, the scope of the activities, the geographical location of the activities, the disciplinary record of the covered persons and the volume of the communications subject to review. Reviews should be completed within a reasonable time frame. Finally, Members must document reviews, whether electronically or on paper, and be able to reasonably demonstrate that such reviews were conducted. In conclusion, FINRA notes that this is only guidance and is not all-inclusive, does not represent all areas of inquiry that a member should consider and does not establish any safe harbor protections.

http://www.finra.org/web/groups/rules_regs/documents/notice_to_members/p037553.pdf

Banking

Federal Reserve Releases Study Regarding Noncash Payments

On December 10, the Board of Governors of the Federal Reserve System released its 2007 study of noncash payments covering the period from 2003 until 2006. For purposes of its study, "noncash payments" included check, automated clearinghouse (ACH), credit card, debit card (both signature and PIN-based) and electronic benefits transfer transactions. The study revealed that, during the study period, all types of electronic payments grew while check payments decreased.

According to the study, the highest rate of growth during the study period was in ACH payments, which grew about 19% per year during the term covered by the study. Debit card payments grew at a rate of approximately 18% per year during the same term. Check use declined approximately 6.4% per year since 2003.

The study also looked at the process of converting paper checks into electronic payments. During 2006, almost 3 billion consumer checks were converted and cleared as ACH payments rather than check payments. This represented an eight-fold increase from 2003. In total, the study estimates that 33 billion checks were written in 2006.

http://www.federalreserve.gov/newsevents/press/other/20071210a.htm

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UK Developments

FSA Issues Policy Statement on Listing Investment Entities

On December 7, the UK Financial Services Authority (FSA) published its policy statement PS07/20 containing its final rules following three rounds of consultations in connection with its Investment Entities Listing Review.

The FSA is modernizing the UK listing rules for investment entities and introducing a more principles-based regime. This will allow the listing of investment entities with alternative investment strategies, while retaining appropriate levels of investor protection.

The existing Chapter 14 of the listing rules (which deals with EU Prospectus Directive-minimum listings of equity securities) will be limited and not be available to investment entities. Additional amendments will be made to the new Chapter 15 of the listing rules and the new rules will create a unitary listing system for investment entities.

The changes to the Listing Rules will take effect on March 6, 2008.

www.fsa.gov.uk/pubs/policy/ps07_20.pdf

FSA Launches Consultation on Changes to Close Links Reporting

On December 10, the UK Financial Services Authority published *Close Links* (consultation paper CP 07/21) calling for submissions on its proposals to remove the annual close links reporting requirement and providing more detail on event driven and monthly close links notifications and currently applicable to FSA regulated entities.

The paper also sets out proposed changes to close links notifications associated with temporary investments and includes proposals to change FSA's threshold condition 3 for obtaining authorization.

The consultation closes on March 14, 2008.

www.fsa.gov.uk/pubs/cp/cp07_21.pdf

FSA Publishes Regulatory Simplification Plan

On December 11, the UK Financial Services Authority published its Simplification Plan that outlines improvements to the UK regulation of the financial services industry.

The 2007 Simplification Plan updates its FSA 2006 Simplification Plan and reflects the latest position on each of the FSA's current initiatives and identifies the main EU legislative initiatives that impact upon the UK financial services industry. The FSA plans to identify further simplification measures in February 2008.

www.fsa.gov.uk/pubs/other/simplification_update.pdf

FSA and Treasury Issue Joint Discussion Paper on EU Regulation of Commodity and Exotic Derivatives

On December 13, the UK Financial Services Authority and the UK's Treasury issued a discussion paper in respect of the European Commission's review of the framework for regulating commodity and exotic derivatives. The Commission's review is linked to implementation of the EU Market in Financial Instruments Directive (MiFID) and the EU Capital Adequacy Directive (CAD).

UK DEVELOPMENTS

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The paper seeks to clarify the UK's objectives, identify market failures, examine policy options and to assist the UK in formulating its policy position. The FSA and UK Treasury believe that specialist commodity derivatives firms do not pose the same market risks as firms active across a wider range of financial markets.

The review includes sections (i) examining the regime for prudential capital supervision of specialist commodity derivative firms, (ii) clarifying the scope of the exemptions and instruments under MiFID, (iii) addressing conduct of business issues, and (iv) considering market conduct issues.

The deadline for comments on March 14, 2008 and a final report is expected from the European Commission in October 2008.

www.fsa.gov.uk/pubs/discussion/hmt_fsa_derivatives.pdf

Litigation

District Court Dismisses Securities Fraud Claim Against Company's Executives

Granting defendant executives' motion to dismiss plaintiffs' class action securities fraud claims, a federal district court held that plaintiffs failed to allege with the requisite particularity that defendants knowingly made any materially false statements. The crux of plaintiffs' complaint was that the now-bankrupt company's top executives misled investors in their public statements about the prospects of the company's return to financial health. Relying on the recent Supreme Court decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S.Ct. 2499, 2509 (June 21, 2007), the Court found, among other things, that vague allegations that the executives were present at meetings in where they were advised that certain "numbers forecasts" failed to meet projected results were insufficient to raise a sufficiently strong inference that defendants acted recklessly or with the intent to defraud investors. (*In re Winn-Dixie Stores, Inc. Securities Litigation*, 2007 WL 4287545 (M.D.Fla. Dec. 4, 2007))

Federal Court Finds No Private Right of Action to Assert SOX §304 Claims

Dismissing plaintiff shareholders' derivative action, a district court held, among other things, that §304 of the Sarbanes-Oxley Act, which allows for the disgorgement of profits and bonuses from top corporate executives implicated in accounting violations, did not provide plaintiffs with a private right of action. Following a corporate restatement in connection to the backdating of company stock options, plaintiffs sought to disgorge the profits and bonuses awarded to the company's CEO and CFO pursuant to §304. Joining other federal courts that reached similar decisions, the district court rejected plaintiffs' argument that §304 provides private litigants with the right to bring a cause of action for disgorgement. In reaching its decision, the Court reasoned that because Congress expressly provided for a private right of action pursuant to §306 of the Act, but did not include such a provision in §304, Congress intended that disgorgement pursuant to §304 should be exclusively reserved for the government. (*In re iBasis, Inc. Derivative Litigation*, 2007 WL 4287591 (D.Mass. Dec. 4, 2007))

CFTC

CFTC Reauthorization Bill Approved by House Agriculture Committee

The House Committee on Agriculture has approved for consideration by the full House a bill that would reauthorize the Commodity Futures Trading Commission until fiscal year 2013. Among the amendments to the Commodity

LITIGATION

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Exchange Act (CEA) contained in the bill are amendments to clarify and expand the CFTC's authority over retail OTC foreign exchange transactions, including the creation of a new category of registrant, "retail foreign exchange dealers," that would be subject to CFTC regulation. The amendments also would make clear that unlawful actions in principal-to-principal transactions (in addition to brokered transactions) are subject to the CFTC's antifraud authority and would increase the minimum civil monetary penalties for a number of CEA violations. The bill also would extend the CFTC's jurisdiction over so-called "significant price discovery contracts," that would be designated as such by the CFTC based upon criteria set forth in the bill, that are traded on exempt commercial markets.

http://www.house.gov/apps/list/press/agriculture_dem/pr_121207_CFTC_reauth.html

http://agriculture.house.gov/inside/Legislation/110/CFTC.pdf

http://agriculture.house.gov/inside/Legislation/110/sbsCFTC.pdf

Joint Audit Committee Issues Reminder Regarding Investment Policies

On December 12, the Joint Audit Committee issued a Regulatory Update entitled "Investments – Due Diligence Reminder." The update reminds futures commission merchants of their duty to employ prudent investment policies (including monitoring concentration risks) and to perform their own due diligence with respect to alternative investments, particularly in light of recent market events.

http://www.wjammer.com/jac/jacUpdates/jac0703.pdf

Circuit Court Declines Stay of Amaranth Fine

On December 13, the U.S. Circuit Court of Appeals for the D.C. Circuit rejected a motion by Amaranth Advisors LLC (Amaranth), a hedge fund currently involved in litigation regarding alleged energy futures market manipulation, to stay the Federal Energy Regulatory Commission's (FERC) $256 million order to show cause against Amaranth. The FERC's jurisdiction to pursue price manipulation claims against Amaranth has been called into question by Amaranth and a number of other futures market participants, which have argued that the Commodity Futures Trading Commission has exclusive jurisdiction over the claims. In its motion, Amaranth argued that responding to the FERC order would prejudice its case in other litigation, most notably the pending CFTC enforcement action relating to similar allegations of manipulation. (*Amaranth Advisors L.L.C. v. Federal Energy Regulatory Commission*, No. 07-1491 (D.C. Cir. Dec. 13, 2007))

Not yet available on Westlaw or Lexis.

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