Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

December 7, 2007

SEC/Corporate

Risk Metrics Group 2008 Updates to US Corporate Governance Policy

RiskMetrics Group (formerly ISS) has published for 2008 policy updates and clarifications to ISS Governance Services US benchmark guidelines. These guidelines are utilized by institutional and other investors in connection with voting their shares in public companies.

Two of the key topics addressed in this update are "Poor Pay Practices" and "Product Safety."

With respect to poor pay practices, the current policy position for ISS is the recommendation of a withholding/against vote on compensation committee members, CEO's and potentially the entire board of directors if the company has poor compensation practices, as well as a vote against equity plans if the plan is a vehicle for poor compensation practices.

The new policy position adds additional clarifications including the recommendation of withholding/against votes in cases where cautionary language has previously been applied but such poor pay practices have not been remedied. Examples of poor pay practices are expanded to include guaranteed multi-year base salary increases as part of an employment contract and perquisites for former executives such as car allowances, personal use of corporate aircraft or other "inappropriate" arrangements. Finally, a category of "poor disclosure" has been added, and base salary will now be used as a relative measure to determine if certain perks are deemed excessive.

ISS's current policy position for product safety is to support resolutions requesting companies to disclose its policies related to toxic materials, unless substantial information is already provided by the company. ISS does not support resolutions requiring a company to reformulate its products.

The new ISS policy position will recommend a "FOR" vote on a proposal requesting the company to report on its policies, initiatives/procedures and oversight mechanisms related to toxic materials (including certain product line toxicities and/or product safety in its supply chain) unless the company already disclosed similar information or the company has formally committed to such initiatives and the Company has not been involved in any recent violations or controversies. (RiskMetrics Group, *US Corporate Governance Policy, 2008 Updates*, 11/19/07)

http://www.riskmetrics.com/pdf/2008ISS_USPolicyUpdates.pdf

SEC/CORPORATE

For more information, contact:

Robert L. Kohl
212.940.6380
robert.kohl@kattenlaw.com

Mark A. Conley
310.788.4690
mark.conley@kattenlaw.com

Jarrod N. Weber
212.940.6317
jarrod.weber@kattenlaw.com

SEC Release on Exemption from Registration Requirements for Compensatory Employee Stock Options

On December 3, the Securities and Exchange Commission released final rules (effective upon publication in the *Federal Register*), adopting two exemptions for registration under the Securities Exchange Act of 1934 of compensatory employee stock options. The first exemption will apply to private non-reporting issuers and the second to issuers that have registered a class of securities under Exchange Act Section 12 or are required to file reports pursuant to Exchange Act Section 15(d). The exemptions apply only to the options themselves, not to the underlying stock.

Under Section 12(g) of the Exchange Act, an issuer with 500 or more holders of record of a class of equity securities and assets in excess of $10 million at the end of its most recently ended fiscal year must register that class of equity securities, unless there is an available exemption from registration. Stock options are a separate class of equity securities for purposes of the Exchange Act and there previously was no exemption from registration resulting solely from the issuance of compensatory employee stock options. The new Rule 12h-1(f) exemption is available, among other limitations, only for options issued to a limited class of optionees, pursuant to a written plan, subject to written, enforceable transfer restrictions and subject to certain information requirements. The exemption terminates once the issuer otherwise becomes subject to reporting requirements of the Exchange Act.

Initially, the proposed Exchange Act registration exemption for certain options of public reporting issuers (Rule 12h-1(g)) would have been available only for an issuer that had registered the class of equity security underlying the compensatory employee stock options under the Exchange Act Section 12; however, the eligibility for this exemption has been expanded to include any issuer required to file periodic reports under Exchange Act Section 13 or 15(d).

http://www.sec.gov/rules/final/2007/34-56887.pdf

Various SEC Rulemakings

On December 6, the Securities and Exchange Commission published its final rule on shareholder proposals relating to the election of directors, amending Rule 14a-8(i)(8) under the Securities Exchange Act of 1934, as described in the November 30, 2007 edition of *Corporate and Financial Weekly Digest.*

The SEC has also announced that at its open meeting on December 11, it will consider the adoption of its proposed revisions to the eligibility requirements for Form S-3 and Form F-3 of the Securities Act of 1933 to allow companies that do not meet the current public float requirements of the forms to nevertheless register primary offerings of their securities, subject to certain restrictions, including the amount of securities those companies may sell pursuant to the expanded eligibility standard in any one-year period. It will also consider at that meeting whether to adopt amendments to mandate electronic filing of Form D and revise the information requirements of such Form.

Finally, as we go to press, the SEC made available its amendments to Rules 144 and 145 under the Securities Act of 1933. Next week's edition of *Corporate and Financial Weekly Digest* will provide details.

http://www.sec.gov/rules/final/2007/34-56914.pdf

http://www.sec.gov/news/digest/2007/dig120507.htm

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

Broker Dealer

Extension of Manning to OTCBB Delayed Until January 14, 2008

In a recent rule filing, Financial Industry Regulatory Authority (FINRA) once again delayed the implementation date of its expansion of the "Manning" rule to over-the-counter (OTC) equity securities. OTC equity securities include any non-exchange-listed security (e.g., OTCBB, ADRs, pink sheets, etc.) and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting. Currently, the Manning interpretation places restrictions on trading ahead of customer limit orders only with respect to exchange-listed securities. The new implementation date has now been set for January 14, 2008. The rule changes were previously scheduled to take effect first in July, 2007 and then in November, 2007, but were delayed to allow firms to make necessary systems changes.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-23113.pdf

Amendments to CBOE Continuous Quoting Obligations of DPMs

The Chicago Board Options Exchange, Incorporated (CBOE) is proposing to amend CBOE Rule 8.85 relating to the continuous quoting obligations of Designated Primary Market-Makers (DPMs). The CBOE proposes to modify the continuous electronic quoting obligation of DPMs in multiply-listed option classes by reducing the continuous electronic quoting obligation from 100% of the series of each appointed option class to 90% of the series of each appointed option class. This modification would make the continuous quoting obligations of DPMs consistent with the continuous quoting obligations of e-DPMs (see CBOE Rule 8.93) and Lead Market-Makers in Hybrid option classes (see CBOE Rule 8.15A).

http://www.sec.gov/rules/sro/cboe/2007/34-56824.pdf

Investment Companies and Investment Advisers

Commissioner Atkins: Formal SEC Guidance Needed on Valuation and Rule 12b-1 Plans

In Security and Exchange Commissioner Paul Atkins' speech at the November 28 Independent Directors Council meeting in San Francisco, Atkins stated that Securities and Exchange Commission formal guidance for independent fund directors is needed. Valuation is cited as an area in need of such formal guidance, which is achieved through the SEC's rulemaking and public comment process. Pending such guidance, "boards should use the events in the subprime market as a reminder of the importance of having robust valuation procedures and monitoring them to make sure they are working." Atkins also asserted that the SEC should also formally update the factors a board needs to consider in approving or continuing a Rule 12b-1 plan.

Atkins also highlighted the recent summary prospectus proposal of the SEC. In addition, Atkins discussed the SEC's efforts in mitigating the costs of Sarbanes-Oxley Section 404 internal control evaluations and audits, an upcoming SEC roundtable on the application of International Financial Reporting Standards in the fund industry, and balancing the benefits and costs of class action securities litigation.

http://www.sec.gov/rules/proposed/2007/33-8861.pdf#appendix

http://www.sec.gov/news/speech/2007/spch112807psa-2.htm

BROKER DEALER

For more information, contact:

James D. Van De Graaff
312.902.5227
james.vandegraaff@kattenlaw.com
Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

Patricia L. Levy
312.902.5322
patricia.levy@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Janet M. Angstadt
312.902.5494
janet.angstadt@kattenlaw.com

Lance A. Zinman
312.902.5212
lance.zinman@kattenlaw.com

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

Marybeth Sorady
202.625.3727
marybeth.sorady@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

Peter J. Shea
704.444.2017
peter.shea@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Kathleen H. Moriarty
212.940.6304
kathleen.moriarty@kattenlaw.com

Banking

Proposed Rules and Guidelines Regarding Consumer Report Information Issued

On November 29, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision (collectively, the Agencies) issued proposed regulations and guidelines to help ensure the accuracy and integrity of information provided to consumer reporting agencies and to allow consumers to directly dispute inaccuracies with financial institutions and other entities that furnish information to consumer reporting agencies.

The proposal is designed to implement Section 312 of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act) which amended the Fair Credit Reporting Act. It includes "guidelines for use by furnishers regarding the accuracy and integrity of the information about consumers that they furnish to consumer reporting agencies" and proposes regulations requiring entities that furnish such information to craft reasonable policies and procedures with respect to their implementation of the guidelines. In addition, the Agencies also proposed regulations implementing the direct dispute provisions of the FACT Act which would require a furnisher of information to a consumer reporting agency to reinvestigate disputes about the contents of a consumer report based upon a direct request by the affected consumer.
Comment on the proposed rules is due within 60 days of publication in the *Federal Register*.

http://www.federalreserve.gov/newsevents/press/bcreg/20071129a.htm

Litigation

Market Manipulation May Be Proved by Manipulative Intent

A New York District Court has denied a defendant's motion for summary judgment and held that a showing of an investor's intent to manipulate the market in violation of Section 10(b) of the Securities Exchange Act of 1934 could be enough to prove market manipulation without any additional deceptive or fraudulent conduct.

The Securities and Exchange Commission brought an action against defendant for market manipulation related to a single-day purchase of 200,000 shares of stock traded on the New York Stock Exchange near the close of the market. This purchase represented 75% of the trading in the stock for the day and brought the closing price of the stock over the level needed for defendant to avoid being required to purchase 860,000 shares of stock.

The Court first noted that other Circuits were split regarding whether an investor's manipulative intent alone could prove market manipulation without any fraudulent or deceptive conduct. Although the Court noted that liability based solely on the intent of the actor alone is rarely imposed, it held that if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation. It further stated that "the only definition [of market manipulation] that makes any sense is subjective – it focuses entirely on the intent of the trader." Therefore, because the SEC had raised a material issue of fact with respect to defendant's intent, the Court denied defendants' summary judgment motion. (*S.E.C. v. Masri*, 2007 WL 4126773 (S.D.N.Y. Nov. 20, 2007))

BANKING

For more information, contact:

Jeff Werthan
202.625.3569
jeff.werthan@kattenlaw.com

Christina J. Grigorian
202.625.3541
christina.grigorian@kattenlaw.com

Adam Bolter
202.625.3665
adam.bolter@kattenlaw.com

LITIGATION

For more information, contact:

Bruce Sabados
212.940.6369
bruce.sabados@kattenlaw.com

Alexis L. Cirel
212.940.6639
alexis.cirel@kattenlaw.com

Sarbanes-Oxley Act Does Not Apply Retroactively

Finding that the Sarbanes-Oxley Act of 2002 does not apply retroactively to revive an expired statute of limitations, an Alabama District Court has dismissed plaintiffs' complaint against defendant for violations of Section 12(a) and 15 of the Securities Act of 1933.

Plaintiffs brought claims against defendant in connection with the issuance of municipal bonds. Plaintiffs alleged that defendant made numerous false statements and omissions of material fact prior to their purchase of the bonds in May 1998. The Complaint was filed in March 2003, after the expiration of the 3 year statue of limitations imposed by the Securities Act.

The Court joined other courts in holding that the Sarbanes-Oxley Act's 5 year statute of limitations could not be applied retroactively to revive stale claims. The Court found that plaintiffs' claims expired in May 2001, over a year prior to the enactment of the Sarbanes-Oxley Act. The Court held that because plaintiffs' claims expired prior to the Sarbanes-Oxley Act and because the Act did not apply retroactively, plaintiffs' claims were time-barred and must be dismissed. (*Berman v. Blount Parrish & Co.*, 2007 WL 4172064 (M.D.Ala. Nov. 26, 2007))

CFTC

FERC Jurisdiction Reaffirmed

On December 4, the Federal Energy Regulatory Commission (FERC) issued an order reaffirming FERC's authority to sanction manipulation of natural gas prices. In doing so, FERC rejected the argument that had been made by Amaranth Advisors, L.L.C. and its affiliates that the Commodity Futures Trading Commission has exclusive jurisdiction over natural gas futures trading, and found that both agencies have enforcement authority when manipulation of futures trading affects markets overseen by FERC.

http://uaelp.pennnet.com/display_article/313833/22/ARTCL/none/none/1/FERC-reaffirms-anti-manipulation-jurisdiction/

ICE Requests Exemption for Clearing of Agricultural Swaps

The Commodity Futures Trading Commission is seeking public comments on requests by ICE Clear U.S., Inc. (ICE Clear) for exemption (i) under section 4(c) of the Commodity Exchange Act (Act), to permit ICE Clear to clear OTC coffee, sugar and cocoa swaps, and (ii) under section 4(d) of Act, to commingle collateral deposited by customers for such swaps with funds segregated on behalf of futures customers. In a related filing, ICE Futures U.S., under section 4(c) of the Act, is requesting the CFTC to classify as "eligible contract participants" registered floor brokers and floor traders entering into these swaps for their own accounts.

http://www.cftc.gov/newsroom/generalpressreleases/2007/pr5419-07.html

NFA Reduces Fees

The National Futures Association has announced that it will reduce its fee on futures contracts and options on futures contracts traded on behalf of public customers to $0.01 per side, effective January 1, 2008.

http://www.nfa.futures.org/news/newsRel.asp?ArticleID=2022

CFTC

For more information, contact:

Kenneth Rosenzweig
312.902.5381
kenneth.rosenzweig@kattenlaw.com

William Natbony
212.940.8930
william.natbony@kattenlaw.com

Fred M. Santo
212.940.8720
fred.santo@kattenlaw.com

Kevin Foley
312.902.5372
kevin.foley@kattenlaw.com

Krassimira Zourkova
312.902.5334
krassimira.zourkova@kattenlaw.com

Lance A. Zinman
312.902.5212
lance.zinman@kattenlaw.com

CIRCULAR 230 DISCLOSURE: Pursuant to Regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

Charlotte
401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

Chicago
525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

Irving
5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

London
1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

Los Angeles
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

New York
575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

Palo Alto
260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

Washington, DC
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax