Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

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SEC/CORPORATE

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SEC/Corporate

SEC Amends Procedures for Payment of Fees

The Securities and Exchange Commission has amended its procedures for payment of fees imposed under the federal securities laws.

Effective February 4, the SEC amended rules under the Securities Act of 1933, Securities Exchange Act of 1934 and Investment Company Act of 1940 to change its U.S. Treasury Department designated lockbox depository from Mellon Bank, N.A. to U.S. Bank, N.A. The SEC also added an explanatory note to this rule explaining that under current law, the deposit of money by an issuer into a filing fee account does not constitute the payment of a filing fee; rather, the payment of a filing fee occurs at the time a filing is made and the SEC draws down on such account.

The SEC also amended rules under the Securities Act, Exchange Act and Investment Company Act to clarify that payment of fees to the SEC may be made by wire transfer, certified check, bank cashiers check, United States postal money order or bank money order. The amendment eliminated the option of paying fees with cash or by personal check. All payments should include the filer's Central Index Key (CIK) number. The new rules also include specific payment instructions for wire transfers, check or money order, and note that with certain exceptions, a fee must actually be received by the depository at the time of filing of a registration statement or business transaction proxy statement with the Commission.

http://www.sec.gov/rules/final/2008/33-8885.pdf

Smaller Reporting Company Regulatory Relief and Simplification Effective February 4

On December 19, 2007 the Securities and Exchange Commission published a Final Rule amending its disclosure and reporting requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 to expand the number of companies that qualify for its scaled disclosure requirements for smaller reporting companies.

The amendments apply to all "smaller reporting companies." The "smaller reporting company" category includes companies that qualified as "small business issuers" before the new amendments, as well as most companies that qualify as "non-accelerated filers." In general, companies that have less than $75 million in public equity float will qualify for the scaled disclosure requirements under the new amendments. Companies without calculable public equity float will qualify if their revenues were below $50 million in the

previous year. Foreign companies may also qualify as "smaller reporting companies", provided they comply with certain requirements.

The Final Rule moves the scaled disclosure requirements from SEC's Regulation S-B to Regulation S-K.

To aid "smaller reporting companies" during the transition period, the SEC has published a guide for small businesses called the "*Changeover to the SEC's New Smaller Reporting Company System by Small Business Issuers and Non-Accelerated Filer Companies -- A Small Entity Compliance Guide*." The guide provides an overview of the major changes and answers to some of the initial questions registrants may have.

The Final Rule is effective on February 4.

http://www.sec.gov/info/smallbus/secg/smrepcosysguid.pdf

http://www.sec.gov/rules/final/2008/33-8876fr.pdf

Broker Dealer

NYSE Arca Amends LMM Continuous Quoting Obligations

NYSE Arca received approval for its proposal to amend Rule 6.37B to reduce the continuous quoting obligations of Lead Market Makers (LMMs). The rule change will reduce the LMM continuous two-sided quotation requirement from 99% of the time the exchange is open for trading in each issue to 90% of the time the exchange is open in each appointed issue but excluding the time when due to exchange technical failure or limitation of an exchange system prevents the LMM from communicating to the exchange in a timely manner. In addition, the rule change will amend the review period for the continuous quoting obligation from a quarterly basis to a monthly basis.

http://www.sec.gov/rules/sro/nysearca/2008/34-57186.pdf

Banking

Comptroller of the Currency Raises Concerns About Commercial Real Estate

On January 31, Comptroller of the Currency John C. Dugan informed members attending a Florida banking conference that the Office of the Comptroller of the Currency (OCC) is paying increased attention to certain commercial real estate transactions.

In particular, the Comptroller stated problems arising from "high community bank concentrations in commercial real estate at a time of significant market disruptions and declining house and condominium sales and values" were a major concern for the agency.

According to the accompanying press release, in the area of construction and development loans, nonperforming loans in community national banks amounted to 1.96% of the total at the end of the third quarter. This rate was approximately double that of the year before.

The Comptroller stated that the OCC will undertake numerous steps to address this issue, including more frequent interaction between supervisors and banks with concentrations in commercial real estate loans that are declining in quality and increased scrutiny of assets. The Comptroller also

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discussed the agency's expectation that banks with commercial real estate concentrations make realistic assessments of their portfolio based on current market conditions.

http://www.occ.treas.gov/ftp/release/2008-9.htm

United Kingdom Developments

FSA Publishes Its 2008 Financial Risk Outlook

On January 29, the UK Financial Services Authority (FSA) published its latest Financial Risk Outlook warning firms and investors of the risks inherent in a significantly less benign economic environment. The Financial Risk Outlook is focused on the risks arising from the events of the second half of 2007 that have led to tighter financial conditions.

The Financial Risk Outlook notes that risks have increased considerably in the last year and that the recent tightening in financial conditions may have exposed some firms' business models as being potentially unsuitable in more stressed financial conditions.

The FSA has identified five priority risks for 2008: (i) existing business models may be under strain as a result of adverse market conditions; (ii) increased financial pressures may lead to firms shifting efforts away from conduct of business requirements and from maintaining and strengthening business-as-usual processes; (iii) market participants and consumers may lose confidence in financial institutions and in the regulatory authorities' ability to safeguard the financial system; (iv) a significant minority of consumers could experience financial problems because of high levels of borrowing; and (v) tighter economic conditions could increase the incidence or discovery of some types of financial crime or lead to firms' resources being diverted away from tackling financial crime.

The Financial Risk Outlook's conclusions are a key element in the FSA's priority-setting arrangements which will be set out in its business plan due to be published on February 5.

http://www.fsa.gov.uk/pubs/plan/financial_risk_outlook_2008.pdf

UK Launches Consultation on Changes to Banking Regulation

On January 30, HM Treasury, the UK Financial Services Authority and the Bank of England published a consultation on proposals for strengthening the current framework for banking regulation. The consultation, *Financial stability and depositor protection: strengthening the framework,* sets out proposed action, both in the UK and internationally, to achieve five key objectives: (i) strengthening the stability of the financial system; (ii) reducing the likelihood of banks facing difficulties; (iii) reducing the impact where a bank gets into difficulties; (iv) providing effective compensation arrangements in which consumers have confidence; and (v) strengthening the Bank of England and ensuring effective coordinated actions by appropriate authorities.

The deadline for comments is April 23. The UK Government intends to introduce legislation to give effect to the new regulatory scheme later in 2008.

www.hm-treasury.gov.uk/media/3/5/banking_stability_pu477.pdf

FSA Publishes Financial Crime Newsletter

On January 30, the UK Financial Services Authority (FSA) published its tenth

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Financial Crime Newsletter dealing with issues such as changes to the UK's regime to fight money laundering and terrorist finance from the implementation of the Money Laundering Regulations 2007, the introduction of new FSA enforcement powers related to the EU Wire Transfer Regulations and a summary of recent FSA enforcement actions.

Of particular note were details of initiatives being led by HM Treasury which holds the presidency of the Financial Action Task Force (FATF) and changes by the Serious Organized Crime Agency (SOCA) in respect of Suspicious Activity Reports (SARs).

The UK is currently part way through a 12-month term in the Presidency of FATF, the global standard-setting body which aims to develop and promote national and international policies to combat money laundering and terrorist financing. The newsletter sets out the UK's strategic objectives for its Presidency which include: (i) enhancing the capability of FATF to undertake more strategic surveillance of emerging trends and threats; (ii) enhancing engagement between FATF and the private sector; (iii) examining how FATF can reinforce the effective implementation of the FATF recommendations in low capacity countries; and (iv) enhancing the accountability of FATF to all member jurisdictions.

The newsletter also highlights that SOCA is introducing changes to the way firms submit SARs. Presently, SARs may be made in any format. The changes, which are expected to take effect on April 1, will require reports to be received in a prescribed form.

www.fsa.gov.uk/pubs/newsletters/fc_newsletter10.pdf

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Plaintiff Adequately Pleaded Scienter Under *Tellabs* Standard

The District Court denied defendants' motion to dismiss plaintiffs' class action complaint asserting claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, holding, among other things, that plaintiff adequately pleaded scienter under the standard established by the Supreme Court in *Tellabs Inc. v. Makor Issues & Rights, Ltd.* Plaintiff alleged the corporate defendant made material misstatements by stating in documents filed with the Securities and Exchange Commission that employment contracts it entered into with its CEO and President were "designed to insure their long-term employment" when, in fact, the defendants knew at the time that the two executives were facing "financial ruin" based upon their efforts to avoid paying more than $100 million in taxes by investing in tax shelters the IRS determined to be invalid. The complaint alleged that defendants' also failed to disclose anything about the executives' financial difficulties, their impending bankruptcy and the likelihood that their employment would terminate as a result.

After holding that, under *Tellabs*, a plaintiff must allege facts giving rise to at least as strong an inference of scienter as an inference of a defendant's innocent intent, the Court ruled that plaintiff's complaint met this standard. Defendants argued that the most reasonable inference to draw from plaintiff's complaint was that at the time the defendants executed the employment contracts, they did not believe that the executives' tax problems would impair their continued employment. The Court disagreed, characterizing defendants' argument as a flawed attempt to reframe the scienter question to require plaintiffs to allege that defendants acted with scienter when signing the employment agreements. The Court ruled that plaintiffs simply needed to allege defendants acted with scienter in making the alleged material misstatements.

Finally, based on its finding that defendants "seized on the execution [of the employment agreements] to boast to investors, without disclosing the significant tax problems faced by the executives, that the contracts would, in effect, 'ensure' the long-term employment of the executives," the Court concluded that plaintiff's complaint gave rise to an inference of scienter at least as compelling as defendants' competing innocent inference and denied the motion to dismiss. (*New Jersey v. Sprint Corp.*, 2008 WL 191780 (D. Kan. Jan. 23, 2008))

Plaintiffs' Securities Fraud Claims Dismissed at Pleading Stage

The District Court granted defendants' motion to dismiss various federal and state law claims, including for violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5. The plaintiff-investors alleged, among other things, that the defendant-company, a manufacturer of clear plastic devices designed to straighten teeth, concealed material facts concerning two lawsuits brought against it by a competitor who alleged that the company's use of intellectual property critical to its products infringed upon competitor's rights. Plaintiffs further asserted that the defendants falsely represented that the competitor's claims were "meritless." Plaintiffs filed their lawsuit following the company's announcement that it had resolved the two infringement lawsuits by agreeing to cease all operations and assigning all of its intellectual property rights to its competitor for a payment of $20 million.

The Court found plaintiffs' claims defective for multiple reasons, including the failure to plead sufficient facts that materially misleading statements were made. In contrast to the alleged misrepresentation, the Court noted that defendants disclosed in stock purchase agreements entered into with each plaintiff that the purchase of the shares was "highly speculative" and that if the company did not prevail in the pending infringement litigations "such an outcome could have a substantial adverse effect on the Company and on any investments in the Shares."

Plaintiffs argued that, notwithstanding the disclosures in the purchase agreements, because the defendant settled the infringement litigations, the company knew it had committed infringement when the purchase agreements were executed and, accordingly, omitted material statements from those agreements. The Court disagreed, ruling that settlements can be made for many reasons without any indication of the merit of the allegations in the matter settled. The Court further found that the $20 million payment made to the company as part of the settlement reflected that its opposition to the infringement claims was not without merit. Accordingly, because plaintiffs were, as they acknowledged in the purchase agreements, experienced and sophisticated investors, and because the risks of the investment and of the infringement litigations were disclosed, the Court ruled that plaintiffs had failed to plead any material misrepresentations or omissions to support their securities fraud claims. (*Eshelman v. Orthoclear Holdings, Inc.*, 2008 WL 171059 (N.D. Cal. Jan. 18, 2008))

Antitrust

FTC Increases Hart-Scott-Rodino Notification Thresholds

The Federal Trade Commission recently announced changes to the thresholds governing premerger notification filings that must be made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR). Effective February 28, the various HSR notification thresholds will increase. Transactions valued under the HSR Rules at less than $63.1 million will no longer require HSR filings. The filing thresholds for larger transactions have

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increased as well. The old $119.6 million threshold has been increased to $126.2 million, and the old $597.9 million threshold has been increased to $630.8 million.

The filing fee for transactions that exceed the new $63.1 million threshold but are valued under the HSR Rules at less than $126.2 million remains at $45,000. Transactions valued under the HSR Rules at greater than $126.2 million but less than $630.8 million will require a filing fee of $125,000. Transactions valued under the HSR Rules at greater than $630.8 million will require a filing fee of $280,000.

For transactions valued under the HSR Rules between $63.1 million and $252.3 million, the HSR "size of person" test must also be met for the HSR Act to apply. The size of person thresholds have also increased. Under the new thresholds, one party to the transaction must have net sales or total assets of at least $12.6 million and another party to the transaction must have net sales or total assets of at least $126.2 million. Transactions valued greater than $252.3 million under the HSR rules will require a filing regardless of the size of the persons involved.

http://ftc.gov/os/2008/01/P859910sec7a.pdf.

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CFTC

CFTC Approves Amendments to NFA "Forex Transactions" Interpretive Notice

The Commodity Futures Trading Commission has approved amendments to the National Futures Association's (NFA's) Interpretive Notice entitled "Forex Transactions" (the Notice). NFA had proposed the amendments to the Notice in November 2007, which prescribe additional disclosure intended to make clear to the customers of Forex Dealer Members (FDMs) that an FDM acts as counterparty to its customers when they engage in retail forex transactions, and therefore may profit if the market moves against the customer. The Notice sets out the language of the required disclosure, which must be prominently displayed and separately acknowledged by the customer in accordance with the requirements set out in the Notice. The amendments to the Notice will become effective on June 1. FDMs will not be required to obtain an acknowledgment from persons who become their customers prior to that time, but must provide such customers with the disclosure in a manner designed to ensure its receipt by the customer.

http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=2059

http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=2009

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