Katten
KattenMuchinRosenman LLP
Corporate and Financial Weekly Digest

FEBRUARY 12, 2010

LITIGATION

Court Denies Request for Preliminary Injunction to Delay Shareholder Meeting

The U.S. District Court for the Southern District of New York recently denied a request by a co-founder and director of Enzo Biochem, Inc. for a preliminary injunction to delay the company's shareholder meeting by 45 days. In support of its motion, the plaintiff alleged that Enzo and certain of its directors violated Section 14(a) of the Securities Exchange Act and several rules promulgated thereunder by: (1) filing a proxy statement containing material misstatements of fact; (2) failing to file a preliminary proxy statement; and (3) soliciting shareholder votes prior to the filing of the proxy statement. Plaintiff's claims were primarily based on Enzo's failure to include a reference in its proxy statement to a letter plaintiff had written in which he informed Enzo's board that he would be nominating several candidates for election to the board and on several related allegations concerning his efforts to nominate an alternate slate of directors.

The district court held that even if the proxy statement was required to disclose that the plaintiff was proposing an alternative slate of directors based solely on his letter to the board, because Enzo filed a supplement to the proxy statement 16 days prior to the shareholder meeting (after plaintiff filed his own proxy statement), any omission was cured. The court also found that Enzo was not required to file a preliminary proxy statement because the limited matters to be addressed at the shareholder meeting triggered an exception to the filing requirement and that plaintiff's letter to the board did not constitute a "solicitation" of shareholders that would have rendered the exception inapplicable. Finally, the district court found that while certain directors of Enzo met with two major shareholders prior to the filing of the proxy statement, there was insufficient evidence that any solicitation of the shareholders' votes occurred during the meetings. (*Rabbani v. Enzo Biochem, Inc.,* No. 10 Civ. 170, 2010 WL 343511 (S.D.N.Y. Feb. 1, 2010))

District Court Limits the Sarbanes-Oxley Act's Whistleblower Protections

The U.S. District Court for the Western District of Washington has dismissed on summary judgment whistleblower claims brought by two former compliance auditors of the Boeing Company, Inc. The district court found that Boeing did not violate Section 806 of the Sarbanes-Oxley Act, which prohibits publicly traded companies from discriminating against their employees for disclosing information regarding certain alleged illegal conduct undertaken by the employer to their supervisors, federal regulatory or law enforcement agencies or Congress. The district court found that the act that served as the basis for the auditors' termination—the leaking of confidential information to the media—was not a protected act under the Sarbanes-Oxley Act.

The Boeing employees in question were auditors who performed testing on information technology controls at the company. The tests being performed by the auditors were undertaken in compliance with the Sarbanes-Oxley Act's mandate that publicly traded companies review their controls over financial reporting. After making several complaints to supervisors about perceived auditing deficiencies, the auditors provided information and documentation regarding the alleged deficiencies to a reporter at the Seattle Post-Intelligencer. The auditors were fired soon thereafter.

In arguing in favor of whistleblower protection, the auditors claimed that they were fired not because of the media leak as Boeing asserted, but rather in response to their frequent complaints to their supervisors regarding Boeing's Sarbanes-Oxley Act non-compliance—complaints that fall within the Sarbanes-Oxley Act's protections for whistleblowers. The district court rejected the auditors' argument on the ground that even if they did engage in protected activity, it was clear that leaking information to the media is not protected activity under the Sarbanes-Oxley Act, and Boeing was within its rights to terminate the auditors on this ground. (*Tides v. The Boeing Co.*, C08-1601-JCC (W.D. Wa. Feb. 2, 2010))

BROKER DEALER

NASDAQ Amends Order Routing Rules

The NASDAQ Stock Market submitted a rule filing to amend its rules governing order routing processes. The amendments to NASDAQ Rule 4758, among other things, include changes that provide additional detail in the rules regarding existing routing options, modify certain aspects of current routing functionality and add one new routing option. Among the changes are new definitions that make clear that NASDAQ reserves the right to modify routing tables at any time without notice. In the filing, NASDAQ certifies that all routing processes comply with the requirements of Rule 611 of Regulation NMS.

Read more.

Filing of FINRA's New Customer Margin Balance Form Required Next Month

The Financial Industry Regulatory Authority has issued a Regulatory Notice to remind members that are subject to FINRA Rule 4521(d) to file certain customer margin account information beginning March 1. Under new FINRA Rule 4521(d), members carrying margin accounts for customers must file a report electronically using FINRA's new Customer Margin Balance Form, on a settlement date basis. The information in the monthly report must be as of the last business day of each month, and the reports are due at such time, but in no event later than the sixth business day of the following month. The Form is not yet available. For this March, a report covering the February 2010 reporting period would need to be filed by March 8. Rule 4521(d) replaced old Incorporated NYSE Rules 421(2) and 421.40, became effective on February 8, and applies to all FINRA members that carry customer margin accounts.

Click here to read FINRA Regulatory Notice 10-08.

FINRA Extends Effective Date to Identify Related Market Center in Non-Tape Reports

The Financial Industry Regulatory Authority is extending to May 3 the effective date of rule amendments that require firms to identify the "Related Market Center" in non-tape reports submitted to a FINRA trade reporting facility.

Click here to read the FINRA Trade Reporting Notice.
See also the September 18, 2009, edition of *Corporate and Financial Weekly Digest* for a discussion of the amendments.

EXECUTIVE COMPENSATION AND ERISA

IRS 409A Audits Have Begun; Corrections Made Now May Prevent Penalties

The Internal Revenue Service announced in November of 2009 that in February 2010, it would begin its first Employment Tax National Research Project since the 1980s. This Tax Project will include audits of 6,000 companies over the next three years, and is expected to focus review on (among other issues) executive compensation, including deferred compensation arrangements subject to Section 409A of the Internal Revenue Code of 1986, as amended.

In addition, employers are now reporting that the IRS has begun to audit deferred compensation plans for compliance under Section 409A. These audits are being conducted by the IRS as a separate audit project quite apart from the Tax Project. The IRS has been issuing "Information Document Requests" (IDRs) requiring disclosure of specific information on deferred compensation arrangements subject to Section 409A. These IDRs will be used to determine whether these arrangements are in compliance with Section 409A.

Section 409A contains complex rules relating to the timing and form of payment of deferred compensation. Arrangements providing deferred compensation must be in a writing that conforms to 409A requirements (i.e., documentary compliance) and operated in compliance with the plan document and Section 409A. An operational and/or documentary violation of Section 409A can subject the recipient of the compensation to immediate income inclusion of deferred amounts (even before the amounts are paid to the recipient) as well as an additional 20% tax and interest (409A Penalties).

Documentary compliance with Section 409A was required as of January 1, 2009. Failure to meet this deadline would normally result in the imposition of 409A Penalties. However, compliance with Section 409A continues to be a "work in progress" as companies and their advisors continue even now to struggle to understand the complexities of some of these new rules.

In recognition of this fact and as an incentive for employers to revisit their earlier good faith efforts to comply, the IRS issued recently Notice 2010-6 (Correction Notice) which sets forth methods for correcting certain documentary failures. Normally, even where the Correction Notice is followed, the payment of a partial 409A Penalty is required. However, the special "transition relief" offered under the Correction Notice provides that certain corrections to non-conforming plan documents may be made by the end of 2010 (and in some cases by the end of 2011) without the imposition of any 409A Penalty.

Sponsors of deferred compensation plans should review their plans now to determine whether documentary corrections are indicated. This is true even for plans that have already been amended under 409A by the January 1, 2009, deadline. Much has happened in the world of 409A since that time, and new understandings of the rules may require additional changes to plan documents. The Correction Notice offers for a brief period the possibility of making corrections without the imposition of 409A Penalties. But it is important to act before a plan comes under audit. Transition relief without penalties is generally not available with respect to identified 409A failures under examination by the IRS.

Read more.

EU DEVELOPMENTS

CESR Publishes Proposals to Extend Disclosure of Major Shareholding Regime

On February 9, the Committee of European Securities Regulators (CESR) published its proposals for extending the disclosure of major shareholdings regime under the European Transparency Directive.

The current regime requires investors to make disclosures of holdings of voting rights attached to shares and voting rights an investor is entitled to acquire when certain thresholds are crossed. There is no current disclosure requirement for instruments with a similar economic effect, such as cash settled contracts for difference. The UK and some other countries address this in national legislation.

CESR has recognized that instruments of this kind could be used to acquire or exercise influence in a company, and in its proposals it cites a number of examples of where this has happened. To ensure greater transparency in situations such as these, CESR is proposing that the regime for notification of major shareholding should be extended to include all instruments that give a similar economic effect to holding shares and entitlements to acquire shares in the broadest sense. In CESR's opinion this approach balances the need for legal certainty with the potential for avoidance.

CESR notes that, where appropriate, its proposals are consistent with its approach to the European short selling regime. However, it makes it clear that CESR considers these are two separate regimes and serve different purposes.

In its proposals, CESR also makes it clear that these instruments are an important source of liquidity to the market and that it is not seeking to discourage their use but only to make their resulting economic exposure transparent.

To read the proposals in full, click here.

For more information, contact:

LITIGATION		
Steven Shiffman	212.940.6785	steven.shiffman@kattenlaw.com
Jonathan Rotenberg	212.940.6405	jonathan.rotenberg@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Daren R. Domina	212.940.6517	daren.domina@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Robert M. McLaughlin	212.940.8510	robert.mclaughlin@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
William B. Duff	212.940.8532	william.duff@kattenlaw.com
EU DEVELOPMENTS		
Martin Cornish	44.20.7776.7622	martin.cornish@kattenlaw.co.uk
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

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.

©2009 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London affiliate: Katten Muchin Rosenman Cornish LLP.