

Corporate and Financial Weekly Digest

Business/Financial News in Brief
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SEC/Corporate

SEC Extends Deadline for Companies to Join Interactive Data Test Group

On February 13, the Securities and Exchange Commission announced that the deadline for companies to join the Commission's interactive data test group has been extended until March 10, 2006. Since it was first announced January 11, several companies have signed up to participate in the test group. According to the SEC's press release, the extension responds to numerous requests from the filing community for additional time for filers and service providers to investigate and prepare for participation and also recognizes the demands of year end reporting requirements.

Under the test program, Commission staff will offer expedited reviews of registration statements or annual reports to registrants that participate in the test group as part of the Commission's interactive data initiative. According to the SEC, interactive data holds the promise of transforming the static, text-only documents companies file with the SEC into dynamic financial reports that can be quickly and easily accessed and analyzed. Information about participating in the test group can be found in the SEC's press release:

<http://www.sec.gov/news/press/2006-20.htm>

Nasdaq Announces Creation of New Market Tier

On February 15, The Nasdaq Stock Market, Inc. announced plans to create a new market tier for public companies. The new tier, the Nasdaq Global Select Market, is expected to be launched July 1, 2006. In addition, the Nasdaq National Market will be renamed the Nasdaq Global Market and the Nasdaq Small Cap market has been renamed the Nasdaq Capital Market.

Under the new three-tier structure, Nasdaq estimates that approximately 1,000 Nasdaq companies currently qualify for the Global Select tier; 1,650 companies will meet the standards for the Global Market; and 550 companies will qualify for the Capital Market. "We have created a blue chip market for blue chip companies," said Bob Greifeld, Nasdaq President and Chief Executive Officer. "Nasdaq is raising its financial listing standards above that of any other market globally to attract and retain companies that want to trade on the market with the highest listing standards."

Nasdaq also released the following additional details about the three-tier market:

- Nasdaq will assign qualified Global Market companies to the Global Select Market;
- The continued listing standards will be the same for the Global Select and the Global Markets;
- Qualified Capital Market companies can elect to be included in the Global Select Market;
- All members of the Nasdaq-100 will automatically qualify for Global Select;
- Nasdaq will continue to calculate and disseminate the Nasdaq Composite Index; and
- Nasdaq will launch indexes based on the two new segments.

http://www.nasdaq.com/newsroom/news/pr2006/ne_section06_019.stm

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Banking

FDIC Issues Guidance on Fraudulent Activity Related to Recent Hurricanes

On February 14, the Federal Deposit Insurance Corporation provided guidance issued by the Financial Crimes Enforcement Network (FinCEN) regarding benefit fraud related to the recent hurricanes. FDIC noted that the Hurricane Katrina Fraud Task Force, as part of the Department of Justice, has been prosecuting fraud cases related to the hurricanes. The Task Force has also identified possible signs of fraudulent activity, which are included in the FDIC's guidance to assist financial institutions in identifying hurricane-related benefit fraud. Finally, FDIC notes that FinCEN requested that specific words be used in the narrative portion of all Suspicious Activity Reports filed by financial institutions in connection with hurricane-related benefit fraud.

<http://www.fdic.gov/news/news/financial/2006/fil06015.html>

FDIC Changes Delivery Method of Financial Institution Letters

On April 1, 2006, the Federal Deposit Insurance Corporation will begin using the electronic delivery of Financial Institution Letters (FILs) – through its online subscription service (which is free) – as its primary method of distribution. Institutions that are unable to receive FILs electronically, must complete and return a paper-delivery request form to the FDIC by March 24, 2006.

<http://www.fdic.gov/about/subscriptions/index.html>

Note: FDIC Financial Institution Letters may be accessed from the FDIC's Web site at <http://www.fdic.gov/news/news/financial/2006/index.html>

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Broker Dealer

NASD Amends Anti-Money Laundering Rule and Issues Interpretations

The National Association of Securities Dealers, Inc. issued Notice to Members 06-07 summarizing amendments to its anti-money laundering rule (Rule 3011) and adoption of two interpretations thereof (IM-3011-1 and IM 3011-2). The amendment to Rule 3011(c) clarifies that the independent examination of the anti-money laundering program (AML program) should be conducted annually, on a calendar year basis, by an independent person. In the case of firms that do not execute transactions for customers or hold customer accounts, and act as an introducing broker, the review need be done once every two years. IM 3011-1 requires that the person conducting the testing have a working knowledge of the applicable requirements under the Bank Secrecy Act and implementing regulations. It cannot be conducted by the AML compliance person designated under Rule 3011. However, it may be conducted by persons who report to the AML compliance person if the firm has no other qualified personnel, has written policies and procedures to address potential conflicts that can arise, the results of the testing are reported to a person senior to the AML officer and the firm documents its rationale for determining it has no other qualified personnel. IM 3011-2 requires the firm to update the information regarding the identity of its AML compliance person within 17 days after the end of each calendar quarter.

http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_015967.pdf

NYSE Amends Disciplinary Action Rules

In Information Memo 06-05 the New York Stock Exchange, Inc. announced amendments, effective April 1, 2006, to Rules 475, 476 and Article IX of its Constitution. Rule 475 will allow a summary suspension hearing to prohibit or limit a person's access to NYSE services, and a call up for review by members of the Board of Directors and certain members of the Board of Executives. All Hearing Panels will now have to include two persons in the securities business, at least one of whom must be involved in securities activities different from those of the respondent. Recently (within five years) retired members and registered and non-registered personnel may be appointed to the Hearing Panel. The Hearing Officer may order pre-hearing discovery from both sides and dispose of motions to dismiss and motions for summary judgment. Hearing officers will be authorized to sanction contemptuous conduct by a party during a hearing. Presently the Hearing Board does not assume jurisdiction until an answer to a Charge Memorandum is filed, but the amendment will grant jurisdiction to the Hearing Panel at the time a Charge Memorandum is served upon the respondent. The right to call up a disciplinary action for review will be allocated to the Board of Directors and those members of the Board of Executives that represent the trading floor and members of the Regulation, Enforcement and Listing Standards Committees.

[http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E885257115007C93D6/\\$FILE/Microsoft Word - Document in 06-5.pdf](http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E885257115007C93D6/$FILE/Microsoft Word - Document in 06-5.pdf)

SEC Appoints Tax Administrator for Settlement Funds

In release No. 34-53279 (February 14, 2006) the Securities and Exchange Commission appointed Damasco and Associates, a San Francisco based certified public accounting firm, as tax administrator for funds deposited in a qualified settlement fund (QSF) where the QSF may incur tax-related obligations under Treasury Regulation Section 1.468B-1(c). The tax administrator will file all required tax reports and disburse or cause the disbursement to the U. S. Treasury of all taxes owed. This appointment is for 2006.

<http://www.sec.gov/litigation/admin/34-53279.pdf>

Nasdaq sets Parameters for Order Rejection

Nasdaq announced in Release No. 34-53233 (February 6, 2006) that orders submitted that are 10% or more off the best bid or best offer will be given a warning. Orders 20% off the best bid or best offer will be rejected.

<http://www.sec.gov/rules/sro/nasd/34-53233.pdf>

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Litigation

Failure to Include Basic Details of Transactions Involved Requires Dismissal

Plaintiff's federal securities law class action complaint alleged that defendant Chief Financial Officer caused AstroPower, a solar electric power company now in Chapter 11 proceedings, to issue press releases and make Securities and Exchange Commission filings that fraudulently overstated its revenue, resulting in an artificial inflation in the price of AstroPower's stock. According to the complaint, Astropower booked revenue both for unordered products and for ordered products not shipped, and booked receivables with no expectation of collectibility. In granting the CFO's motion to dismiss, the court held that the complaint failed to satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA) because, among other things, it failed to include "basic details" as to the transactions involved, such as the approximate amounts of any overstatements and identification of the products, employees and customers involved. (*In re AstroPower, Inc. Securities Litigation*, 2005 WL 288120 (D. Del. Feb. 7, 2006))

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CFTC

Financial Crimes Enforcement Network and CFTC Provide Guidance Regarding Customer Identification Programs for Futures Commission Merchants

The Financial Crimes Enforcement Network and the Commodity Futures Trading Commission issued an interpretive notice that confirms that a futures commission merchant (FCM) that engages in transactions through omnibus accounts and subaccounts established by financial intermediaries does not need to treat the beneficial owners of such accounts as "customers" for purposes of the Customer Identification Program Rule (CIPR), 31 C.F.R. 103.123. FinCEN and the CFTC reasoned that the financial intermediary (not the beneficial owner) should be treated as the "customer" for purposes of the CIPR because (i) paragraph (a)(5) of the CIPR defines a "customer" as "[a] person that opens a new account"; and (ii) the CIPR's preamble states that a "customer" is the "person identified as the account holder." Therefore, "[i]f the intermediary is the account holder, such as in the case of an omnibus account, an FCM is not required to look through the intermediary to the underlying beneficiaries." FinCEN and the CFTC added, "[e]ven if the futures commission merchant has some information about a beneficial owner of assets in an omnibus account (e.g., batch execution account) or a sub-account, under the circumstances described

above, the financial intermediary (not the beneficial owner) should be treated as the customer for purposes of the rule.”

<http://www.cftc.gov/files/opa/financial02142006.pdf>

NFA Petitions CFTC to Amend CFTC Regulation 4.7 to Modify Annual Reporting and Notice of Exemption Requirements Currently Imposed upon Commodity Pool Operators

The National Futures Association (NFA) has petitioned the Commodity Futures Trading Commission to amend CFTC Regulation 4.7 to modify the annual reporting and notice of exemption requirements currently imposed upon commodity pool operators (CPOs). The NFA petition would make it unnecessary for CPOs that operate funds pursuant to a notice of exemption under Regulation 4.7 to file an annual report if the fund does not trade futures or futures options during the preceding year. The proposed amendment would require CPOs to instead file a statement with NFA confirming that it did not trade futures or futures options and notify pool participants that the CPO is not required to file an annual report for the preceding fiscal year because the fund did not trade futures or futures options.

The NFA petition also would change the timing for filing notices of exemption for pools claiming relief under Regulation 4.7. In particular, the NFA proposal would allow a CPO to file the notice of exemption prior to the first trade, as opposed to the current requirement which generally requires the CPO to file its claim of exemption prior to any offer or sale of pool participations.

<http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=1538>

NFA Petitions CFTC to Amend CFTC Regulations 4.7, 4.13 and 4.22 to Modify Reporting Requirements Currently Imposed upon Commodity Pool Operators

The National Futures Association (NFA) has petitioned the Commodity Futures Trading Commission to amend CFTC Regulations 4.7, 4.13 and 4.22 to modify many of the commodity pool operators (CPOs) reporting requirements. First, NFA proposed that Regulation 4.7(b)(3) be amended to encourage CPOs to file unaudited financial reports within 90 calendar days of a pool’s fiscal year end by eliminating the required footnote disclosures, Statement of Cash Flows, and Schedule of Investments. The NFA’s petition acknowledges that CPOs operating under Regulation 4.7 generally provide certified reports to pool participants, but not within the 90 days required under the rule. By eliminating the requirement that the report filed with NFA include required footnote disclosures, Statement of Cash Flows, and Schedule of Investments, CPOs would be able to prepare the unaudited report for NFA without incurring the costs of a CPA.

NFA separately proposed amending CFTC Regulation 4.13(d) to eliminate the annual report requirement for pools operated by a CPO which claims an exemption from registration under Regulation 4.13 after the pool begins operating. The proposed amendment would require the CPO to provide a written notice to current pool participants that it will not file an annual report for that fiscal year and all subsequent fiscal years.

Finally, the NFA proposed to amend Regulations 4.7 and 4.22 to permit CPOs that make a final distribution of funds held by a pool to distribute to participants and file unaudited financial statements for the fiscal year during which the pool made the final distribution. The proposed amendments to Regulation 4.22 would require CPOs to obtain from pool participants a statement that they have waived their right to receive an audited annual report. By comparison, the proposed amendments to Regulation 4.7 would not require CPOs to obtain such a waiver from participants. However, CPOs would be required to provide a certified annual report if requested by holders of a majority of the units of participation in the pool.

<http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=1539>

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