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Corporate and Financial Weekly Digest

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SEC/Corporate

SEC Unveils New Online Interactive Tool to Compare Executive Compensation

On December 21, the Securities and Exchange Commission launched the Executive Compensation Reader, an online interactive tool that enables investors to compare the compensation of top executives as reported in proxy statements for the fiscal year ended 2006 by 500 of the largest U.S. public companies.

The SEC's new online tool allows investors to view Summary Compensation Table information such as total annual pay as well as dollar amounts for salary, bonus, stock, options and company perks, and certain other data in the proxy statements of large companies. Investors can also compare those executive compensation figures with other companies by sorting according to industry or size. Selected comparisons can be depicted in both table and graph form allowing shareholders to compare how executives are paid at companies according to industry, public market cap, or revenue. The new tool also includes direct links to companies' proxy statements, including footnotes and the companies' explanation of their compensation decisions.

The taxonomy is being provided for use by investors in the XBRL format. By tagging the executive compensation information in XBRL, the SEC is demonstrating the value of XBRL and computer tagged data as an interactive tool. The tagged data is being provided for public use without restriction.

The data also can be downloaded into Microsoft Excel so that users can further devise their own programs and tables.

The Executive Compensation Reader is available at http://www.sec.gov/xbrl.

http://www.sec.gov/news/press/2007/2007-268.htm

Broker Dealer

Proposed Rule Change Creating Principal Approval Requirement Exception

Financial Industry Regulatory Authority, Inc. (FINRA) filed a proposed rule change to NASD Rule 2210 (Communications with the Public) to create a new exception to the general principal review and approval requirements. The rule currently requires that a registered principal of a FINRA member firm approve in writing all advertisements, sales literature, and independently prepared reprints (collectively, sales material) prior to use. For any sales material

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concerning mutual funds and variable insurance products that are sold through intermediary firms, FINRA rules require registered principals at each of the intermediary firms that use the underwriter's sales material to re-approve in writing each of these items used by their firms. Based on recommendations made by its Small Firms Rules Impact Task Force, and to eliminate what FINRA regards as a "compliance redundancy," FINRA is proposing to create an exception to Rule 2210's registered principal approval requirements for intermediary firms that use the sales material of another firm. This exception would apply only to sales material that another firm has filed with FINRA's Advertising Regulation Department and for which the Department has issued a review letter finding that the material appears to be consistent with applicable standards.

http://www.sec.gov/rules/sro/finra/2007/34-57010.pdf

AMEX Proposes Rule Change Concerning Remote ROT Quoting and Orders

The American Stock Exchange LLC filed proposed rule changes to Amex Rule 958 that will allow Registered Options Traders (ROTs) to submit electronic quotations and orders from a location off the Amex's trading floor on a limited basis. ROTs will be allotted 20 days each calendar year to quote remotely and they must notify the Amex's Division of Regulation and Compliance immediately following the days on which he or she chooses to submit quotes and orders from off the Amex's trading floor. The proposal is aimed at accommodating ROTs who are unable to be present on the Amex's trading floor but nevertheless wish to quote and submit orders. The Securities and Exchange Commission is currently soliciting comments on the proposed rule change.

http://www.sec.gov/rules/sro/amex/2007/34-57011.pdf

SEC Approves CBOE's Proposed Rule Change Regarding the Hybrid Opening System

The Securities and Exchange Commission has approved a rule change proposed by the Chicago Board Options Exchange, Incorporated pertaining to its Hybrid Opening System (HOSS), as well as related rules concerning the obligations of designated primary market-makers, electronic designated primary market-makers and lead market-makers during opening rotations.

HOSS is the CBOE's automated system for initiating trading at the beginning of each trading day. The approved change to CBOE Rule 6.2B modifies the HOSS procedures to allow the parameters to be configured so that an option series will open: (i) if at least one market maker has submitted an opening quote; or (ii) if a designated primary market-maker or lead market-maker has already submitted an opening quote. Determinations on the particular configuration will be made on a class-by-class basis by the appropriate Exchange Procedure Committee.

Moreover, the approved rule change amends the opening quote obligations of market makers to require them to ensure a timely initiation of an opening trading rotation of each allocated class by entering opening quotes as necessary (usually where no other market maker has entered an opening quote). Previously, market makers were under an obligation to enter opening quotes even where another market maker had already entered an opening quote.

The rule change is aimed at affording more flexibility towards how HOSS conducts opening rotations in order to allow for more competitive, efficient and

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orderly openings with sufficient liquidity in particular classes.

http://www.sec.gov/rules/sro/cboe/2007/34-57067.pdf

Options Exchanges Request Permanent Approval and Expansion of $1 Strike Price Program

The Chicago Board Options Exchange, Incorporated, the Philadelphia Stock Exchange and the International Securities Exchange recently filed rule proposals requesting permanent approval and expansion of current $1 Strike Price Pilot Programs. Under these current programs, the exchanges are permitted to select five qualifying stocks on which option series may be listed at $1 strike price intervals (exchanges are also allowed to list $1 strikes on any other option class designated by another options exchange employing a similar program). In addition to requesting permanent approval of the programs, the exchange rule filings request amendments to allow them to select ten individual stocks on which option series may be listed at $1 strike price intervals and also request certain other changes to existing qualifying criteria.

http://www.sec.gov/rules/sro/phlx/2008/34-57111.pdf

http://www.sec.gov/rules/sro/cboe/2007/34-57049.pdf

http://www.sec.gov/rules/sro/ise/2007/34-56956.pdf

MSRB Proposes Pilot to Allow Internet Access to OSs and ARDs

The Municipal Securities Rulemaking Board filed a proposed rule change to establish a pilot program to provide free public, internet-based access to official statements and advance refunding documents received by current MSRB systems pursuant to MSRB Rule G-36. The proposed internet-based portal would operate as a bridge until MSRB transitions to another permanent system that would be implemented in conjunction with its expected adoption of an "access equals delivery" standard. MSRB expects the pilot portal to become operational on the later of March 10 or five business days after receiving approval from the Securities and Exchange Commission.

http://www.sec.gov/rules/sro/msrb/2007/34-57004.pdf

Banking

FDIC Issues Article Related to Subprime Loan Modifications

On January 10, the Federal Deposit Insurance Corporation released the latest *FDIC Quarterly* publication covering the third quarter 2007. Included is an article entitled *The Case for Loan Modification: With a Foreword by Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation.* The article summarizes the current situation in the subprime mortgage market and describes loan modifications as a "straightforward strategy the mortgage industry can undertake on its own to minimize unnecessary foreclosures and return some measure of stability to housing markets."

According to the article, the subprime mortgage problem began after 2003 with the rapid growth of 2- and 3-year adjustable rate subprime loans. The article further states that, between the end of 2003 and mid-2007, five million of these loans were originated and that approximately 2.5 million of such loans still exist, representing $526 billion of mortgage debt.

In addition to compiling data on the current status of subprime borrowers, the article also addresses "misconceptions" related to loan modifications. It states that mortgage modifications are intended to be an attempt by servicers to

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restructure loans on their own in the interest of their investors, thereby benefiting, in the authors' words, all interested parties.

Notably, the U.S. Treasury proposed a plan in December aimed at averting foreclosure for certain subprime borrowers.

http://www.fdic.gov/bank/analytical/quarterly/index.html

United Kingdom Developments

FSA Publishes Quarterly Consultation

On January 4, the UK Financial Services Authority (FSA) published its 15th quarterly consultation (CP 08/1) setting out various proposed changes to its handbook. The proposals include miscellaneous changes to the General Prudential sourcebook in respect of the calculation of solo capital resources for entities at the head of financial conglomerates, amending the Supervision manual to reflect changes to the FSA's approved persons regime and its integrated regulatory reporting requirements, as well as amendments to the UK Listing Rules for investment entities listing depositary receipts. The consultation also includes miscellaneous changes proposed to the FSA's Market Conduct and Collective Investment Schemes sourcebooks.

The deadline for comments is March 4. Comments related to proposed amendments to the FSA's Collective Investment Schemes sourcebook are requested by February 4.

http://www.fsa.gov.uk/pubs/cp/cp08_01.pdf

FSA Clarifies Expectations for Authorized Collective Investment Scheme Managers

On January 10, the Financial Services Authority published *Treating Customers Fairly and UK Authorized Collective Investment Scheme Managers*. The document includes examples of UK good practice for authorized collective investment scheme managers and clarifies the FSA's expectations of scheme managers in complying with their responsibilities as set out in the FSA's policy statement, *Guidance on Responsibilities of Providers and Distributors for the fair treatment of customers* (PS 07/11). The document specifically focuses on identifying target markets and selecting distribution channels.

http://www.fsa.gov.uk/pubs/other/TCF_CIs_managers.pdf

Litigation

No Control Person Liability Pursuant to Terms of Merger Agreement

The U.S. Court of Appeals for the Fourth Circuit, in an "unpublished" decision (which is not binding precedent under the Court's rules), affirmed the dismissal of state law securities and fraud claims brought by Sherwood Brands, Inc. against a candy cane manufacturer's (Asher) Chairman and his sister, who was Asher's majority shareholder, over a failed merger and acquisition deal. The dispute arose when, following execution of the Merger Agreement, Sherwood discovered adverse information about Asher's financial condition.

Sherwood alleged that representations and warranties made by Asher in the Merger Agreement were false and that the Chairman and his sister violated Maryland's securities laws which impose liability on (i) any person selling securities by means of an untrue statement or omission of material fact, and (ii) persons who control sellers who are directly liable under Maryland law.

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The Court affirmed the lower court ruling that no liability existed as to either defendant. With respect to the majority shareholder, the Fourth Circuit agreed that there was no evidence that the Chairman's sister personally made any representations to Sherwood. With respect to the claims against Asher's Chairman, the Court first found that he did not own, and, thus, did not sell, any securities pursuant to the Merger Agreement. The Court ruled that, as a result, the Chairman could not be directly liable as a seller. The Court then considered whether the Chairman was liable as a control person based upon Sherwood's allegations that he controlled the company and was actively involved in the negotiations leading to the merger. The Court held that these allegations did not suffice as a matter of law because, under the terms of the Merger Agreement, Asher's shareholders – rather than the company – were the sellers. (*Sherwood Brands, Incorporated v. Leonard Levine*, No. 06-1509 (Oct. 30, 2007 4th Cir.))

Court Dismisses Derivative Suit for Failure to Plead "Demand Futility"

A shareholder derivative suit alleging that a majority of the Board of Directors of Aspen Technologies (Aspen) abdicated their fiduciary duty by awarding backdated stock options was dismissed because the plaintiff failed to adequately plead "demand futility," i.e., that plaintiff was excused from demanding that the Board assert the backdating claim because, under the circumstances, making such a demand would have been futile.

The plaintiff argued that the demand requirement was excused because, among other things, (i) a majority of the Board participated in the award of the backdated option grants, and (ii) a majority of the Board faced a substantial likelihood of liability based on their service on the Audit Committee at a time when, based on Aspen's subsequent admissions, the Company acknowledged having issued mistaken financial statements arising from their treatment of the backdated options.

The Court first found that, to avoid the demand requirement, the plaintiff must allege particularized facts creating a "reasonable doubt" that, at the time the Complaint was filed, a majority of a board of directors could have exercised independent and disinterested business judgment in responding to a litigation demand. The Court then rejected Plaintiff's claim of "demand futility." The Court ruled that rather than comply with its burden to allege facts showing that a majority of the directors were on the Board at the time of the backdated grants, the complaint asked the Court to "assume" this to be the case. Similarly, the Court found that the mere fact that the members of the Board on the Audit Committee did not detect errors in the financial statements sooner failed to establish that such directors faced "a substantial likelihood of liability" if the proposed claims were litigated – a standard required by the Court to establish that a director was not "disinterested." (*Aspen Technology, Inc. v. McArdle*, 2008 WL 54815 (Jan. 4, 2008 D. Mass.))

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.

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