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Corporate and Financial Weekly Digest

January 16, 2009

SEC/Corporate

SEC Issues List of Rules to Be Reviewed

On January 14, the Securities and Exchange Commission released a list of rules and forms scheduled for review by its staff during the next 12 months. Under the Regulatory Flexibility Act (RFA), independent agencies are required to review rules that have a significant economic impact upon a substantial number of small entities within 10 years of the publication of such rules as final rules. The idea is to determine whether the rules should continue without change, be amended, or be rescinded. Under the RFA, the criteria that must be addressed by the independent agency include the continued need for the rule; the nature of complaints or comments received concerning the rule; the complexity of the rule; and the degree to which technology, economic conditions or other factors have changed in the area affected by the rule. The SEC, in its January 14 release, notes that its list of rules to be reviewed is somewhat broader than that mandated by the RFA.

The list of rules to be reviewed by the staff of the SEC's Division of Corporation Finance include its Plain English disclosure rules (adopted in 1998), Regulation S (offshore offerings, adopted in 1997), 1933 Act Rule 135e (offshore press conferences, adopted in 1997), Item 305 of Regulation S-K (quantitative and qualitative disclosures about market risk, adopted in 1997) and Exchange Act Rule 15c2-8 (requirements for brokers and dealers to deliver a prospectus, adopted in 1995).

Various rules originally recommended for adoption by the SEC's Divisions of Investment Management and Trading and Markets as well as by the SEC's Office of the Chief Accountant will also be reviewed over the next 12 months.

The SEC has requested comments on this review agenda, due 30 days after publication in the Federal Register, particularly as to whether the rules to be reviewed affect small business in new or different ways than when they were first adopted.

http://www.sec.gov/rules/other/2009/33-9000.pdf

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Litigation

CEO Granted Partial Summary Judgment on SEC's Sarbanes-Oxley Claims

Defendant was the CEO and Chairman of Engineered Support Systems, Inc. (Engineered Support). Engineered Support issued stock options to employees and non-employee directors, including defendant, under shareholder-approved stock option plans. Between 1997 and 2002, defendant was responsible for authorizing the company's stock option awards, and he personally signed

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stock option award letters from 1997 through 2001. Under the terms of the plans, awarded options vested immediately and were exercisable at the closing price on the date of the award.

The Securities and Exchange Commission alleged that between 1997 and 2002, with the defendant's knowledge, participation and consent, the company repeatedly issued backdated stock options that contained a lower exercise price than its closing stock price on the date the options were actually awarded. The SEC asserted that, as a result, option recipients improperly received increased compensation of approximately $20 million, of which defendant received nearly $9 million.

The SEC sought relief against defendant under various provisions of the securities laws, including Section 304 of Sarbanes-Oxley Act, which provides that if a company issuing stock "is required to prepare an accounting restatement" due to its material non-compliance with any financial reporting requirement under the securities laws, the company's CEO and CFO must reimburse the company for any bonus, incentive-based and equity-based compensation received during a statutorily specified period together with any profits realized from the sale of company securities during such period.

Defendant moved to dismiss the Section 304 claim on the ground that Engineered Support never filed an accounting restatement. The SEC countered that, though never filed, restatements were required under general accounting principles because the company's financial statements contained material errors. After noting that the Eighth Circuit had yet to rule on this issue, the court found that the ordinary meaning of the words in the statute required that a financial restatement actually have been ordered and a restatement actually have been filed before penalties could be imposed under Section 304. Accordingly, the court granted defendant's motion to dismiss the Sarbanes-Oxley claim. (*SEC v. Shanahan*, 2008 WL 5211909 (E.D. Mo. Dec. 12, 2008))

Court Upholds "Asset Freeze" Against Non-Parties' Property

Simultaneous with the Securities and Exchange Commission's filing of a complaint alleging massive securities fraud perpetrated by Joseph Shereshevsky and companies with which he was associated, the SEC obtained an order freezing the defendants' assets. Among the assets covered by the order was a house occupied by Joseph's brother and sister-in-law (intervenors). Thereafter, intervenors filed a motion to release their house from the freeze.

As described by the court, Mr. Shereshevsky's sister purchased the house in question in 1991 "exclusively for the benefit and use of" the intervenors. In 2004, Mr. Shereshevsky's sister deeded the house to Elka Shereshevsky, his wife, with the understanding that the house "would continue to be the property of [intervenors]". Thereafter, Mrs. Shereshevsky refinanced the house with a mortgage that included a rider requiring that she use the house as her second home and not enter into any shared ownership arrangements. According to the receiver appointed to oversee defendants' assets, at least some of the funds used to pay the mortgage on the house were drawn from accounts defendants allegedly used as part of their fraud. One month before the SEC filed its complaint against the defendants, Mrs. Shereshevsky purportedly conveyed the house, subject to the outstanding mortgage, to intervenors for $1.00. Notwithstanding the purported conveyance, Mrs. Shereshevsky made the mortgage payment on the house in the month following the purported conveyance.

In denying intervenors' motion, the court first ruled that it had authority to freeze the assets of a third party who was not accused of wrongdoing if such third party (i) had received ill-gotten funds, and (ii) did not have a legitimate claim to such funds. The court then concluded that the SEC had satisfied both prongs. With respect to the first prong, the court ruled that evidence in the record that some of the mortgage payments on the house were made from accounts involved in the defendants' alleged fraud was sufficient. With respect to the second prong, the court ruled that the "suspicious circumstances" relating to the intervenors obtaining title to the house sufficed to raised an inference that intervenors did not have a legitimate claim to such title. (*SEC v. Byers*, 2009 WL 33434 (S.D.N.Y. Jan. 7, 2009))

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FTC Announces New Hart-Scott-Rodino 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 12, the various HSR notification thresholds will increase. Transactions valued under the HSR Rules at less than $65.2 million will no longer require HSR filings. The filing thresholds for larger transactions have increased as well. The old $126.2 million threshold has been increased to $130.3 million, and the old $630.8 million threshold has been increased to $651.7 million.

The filing fee for transactions that exceed the new $65.2 million threshold but are valued under the HSR Rules at less than $130.3 million remains at $45,000. Transactions valued under the HSR Rules at greater than $130.3 million but less than $651.7 million will require a filing fee of $125,000. Transactions valued under the HSR Rules at greater than $651.7 million will require a filing fee of $280,000.

For transactions valued under the HSR Rules between $65.2 million and $260.7 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 $13.0 million and another party to the transaction must have net sales or total assets of at least $130.3 million. Transactions valued greater than $260.7 million under the HSR Rules will require a filing regardless of the size of the persons involved.

http://www.ftc.gov/os/2009/01/P859910sect7aclaytonact.pdf

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FINRA Addresses Unregistered Resales of Restricted Securities

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 09-05 to remind member firms of their responsibility to avoid becoming participants in the illegal, unregistered resale of restricted securities into public markets. Firms that accept delivery of large quantities of low-priced over-the-counter securities, in either certificate form or by electronic transfer, and effect sales in these securities, should have written procedures and controls in place to prevent participation in an illegal, unregistered distribution of securities. Recent FINRA investigations and enforcement actions have shown that problems can arise when firms fail to recognize or take appropriate steps when confronted with "red flags" that signal the possibility of an illegal, unregistered distribution.

Before reselling restricted securities, firms must take reasonable steps to ensure that the transaction complies with SEC Rule 144 (which was recently the subject of substantial changes by the Securities and Exchange Commission) or another available exemption. There are several SEC Rule 144 factors a member firm should consider in determining what questions to ask its customers before engaging in an unregistered resale of securities. Firms should be aware that there are limitations on their ability to discharge their obligations by relying on others, and also must ensure that anti-money laundering compliance programs adequately address red flags that may be associated with unregistered resales conducted through the firm.

http://www.finra.org/Industry/Regulation/Notices/2009/P117713

FINRA Requests Comments on Front Running Policies

The Financial Industry Regulatory Authority (FINRA) has proposed broadening its Front Running Policy by adopting NASD Rule IM-2110-3 as FINRA Rule 5270. First, FINRA proposes to expand the scope of the Front Running Policy to cover trading in an option, derivative or other financial instrument overlying a security that is the subject of an imminent block transaction. The proposed expansion is intended to capture those financial instruments that could be used to take advantage of knowledge of an imminent block transaction in an underlying security (or vice versa), including, for example, equity swaps, convertible debt, and any other type of financial instrument the value of which is materially related to, or otherwise acts as a substitute for, an underlying security.

Second, FINRA proposes replacing existing exceptions in the Front Running Policy for certain transactions in automatic execution systems and for positioning the other side of certain orders. New supplementary material will codify FINRA's position that member firms are permitted to trade ahead of a customer's block order when the purpose of such trading is to fulfill the customer order and when the customer has authorized such trading. A member firm also may engage in hedging and other positioning activity that could affect the market for a security that is the subject of the customer's block order provided that the firm has received the customer's affirmative written consent prior to receipt and/or execution of the order.

Comments are due by February 6.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117629.pdf

CBOE Proposes Changes to Monthly Access Fees

The Securities and Exchange Commission is seeking comments on a December 31 proposal by the Chicago Board Options Exchange (CBOE) to adjust certain access fees charged to temporary members. The proposal, which went into effect on January 1, adjusts the monthly access fee for persons granted temporary CBOE membership status and for Interim Trading Permit holders. The CBOE may, and likely will, further adjust access fees in the future if the CBOE determines that it would be appropriate to do so, taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

http://www.cboe.org/Legal/
http://www.sec.gov/rules/sro/cboe/2009/34-59213.pdf

Investment Companies and Investment Advisers

SEC Releases Final Rule on Enhanced Disclosure and Prospectus Delivery for Mutual Funds and Exchange-Traded Funds

On January 13, the Securities and Exchange Commission issued a release setting forth the adoption of amendments to Form N-1A and new measures for the satisfaction of prospectus delivery obligations by mutual funds and

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exchange-traded funds. The amendments to Form N-1A, the form used by open-end investment companies to register under the Investment Company Act of 1940 and to offer securities under the Securities Act of 1933, are intended to enhance disclosures provided to investors.

Under the rule changes, mutual funds and exchange-traded funds must provide at the front of their prospectus a summary that incorporates key facts in plain English and a clear and concise format. This summary will include information on investment objectives and strategies, risks, costs and performance. For prospectuses detailing several funds in a fund complex, summary sections must be separate for and specific to each fund.

The SEC also amended certain disclosure requirements specific to exchange-traded funds. In particular, disclosure requirements with respect to creation and redemption units have been reduced and replaced with a greater emphasis on secondary sale transactions so as to avoid confusion among investors who typically trade only in the secondary market. An exchange-traded fund must also disclose either in the prospectus or on an Internet website information on premiums and discounts in trading.

Under the new disclosure framework, the SEC will permit funds to satisfy the obligation to provide investors with a prospectus by delivering a summary prospectus while posting the statutory prospectus on an Internet website. Funds selecting the new delivery option must still provide investors with a statutory prospectus on request.

New fund registration statements must comply with the amended disclosure requirements on January 1, 2010. Current funds must amend their registration statements to comply no later than January 1, 2011. A fund may, at its option, prepare documents in accordance with the new requirements at any time after March 1, 2009, the effective date of the amendments. As an incentive to early compliance, a fund may rely on the new option to satisfy prospectus delivery upon implementing the amended disclosures.

http://sec.gov/rules/final/2009/33-8998.pdf

Structured Finance and Securitization

TARP Reform Legislation Introduced in the House

On January 9, House Financial Services Committee Chairman Barney Frank (D-MA) introduced H.R. 384, known as the Troubled Asset Relief Program (TARP) Reform and Accountability Act of 2009. The bill would amend the TARP provisions of the Emergency Economic Stabilization Act of 2008 to increase transparency and accountability and to require the U.S. Treasury Department to act to alleviate foreclosures. The bill's original text would have established conditions to the release of the next $350 billion in TARP funds; however, the Senate voted on January 15 to release the second $350 billion of TARP Funds, rendering such conditions moot. Nevertheless, should the bill ultimately become law it would make a number of significant changes to the original TARP program. For example, a large portion of the TARP funds would be used to help homeowners avoid foreclosure and to stimulate demand for home purchases, new servicer safe harbors overriding contractual provisions would be created, more stringent executive compensation restrictions would apply to new recipients of TARP funds, the Hope for Homeowners refinancing program would be further modified and expanded, and the Treasury's authority under TARP to provide support for the availability of consumer loans, as well as commercial real estate loans and mortgage-backed securities, would be clarified. Debate on that legislation H.R. 384 is still in progress, and House

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Democratic leaders said a vote on the bill and several amendments to it would be postponed until the week of January 19.

http://www.house.gov/apps/list/press/financialsvcs_dem/press0109092.shtml
http://www.opencongress.org/bill/111-h384/show

Senate Votes to Release Second $350 Billion Tranche of TARP Funds

On January 13, President George W. Bush, on behalf of President-Elect Barack Obama, officially requested the release of the second $350 billion tranche of Troubled Asset Relief Program funds. Under Section 115 of the Emergency Economic Stabilization Act of 2008, the remaining $350 billion of funds are automatically released unless both houses of Congress pass a joint resolution of disapproval within 15 days of the President's written certification requesting the funds. On January 15, the Senate voted 42-52 against such a resolution, which effectively results in a release of the remaining funds.

http://www.govtrack.us/congress/bill.xpd?bill=sj111-5

FDIC Loss Sharing/Loan Modification Legislation Introduced in Congress

On January 6, the "Systematic Foreclosure Prevention and Mortgage Modification Act" was introduced in the House of Representatives by Representative Maxine Waters (D-CA) as H.R. 37 and in the Senate by Senator Dianne Feinstein (D-CA) as S. 73. The bills would require the Federal Deposit Insurance Corporation (FDIC) to proceed with the loss sharing plan that it had first proposed on November 13, 2008. As first reported in the November 14, 2008, edition of *Corporate Financial Weekly Digest*, under the loss sharing plan, the FDIC would create a systematic loan modification program in which it would pay servicers $1,000 to cover loan modification expenses and would share up to 50% of losses incurred if modified loans re-default. The program would (i) only cover owner-occupied properties, (ii) reduce the loss sharing percentage for underwater loans, (iii) involve an affordability test based on a 31% borrower mortgage debt-to-income ratio, and (iv) provide for a termination of the loss sharing guarantee after eight years.

http://www.govtrack.us/congress/bill.xpd?bill=h111-37
http://www.govtrack.us/congress/bill.xpd?bill=s111-73

Banking

FDIC Requires Banks to Monitor TARP Funds

On January 12, the Federal Deposit Insurance Corporation (FDIC) notified state nonmember institutions that such banks should institute a program to monitor their use of direct capital injections, federal guarantees and expanded borrowing facilities obtained via recently enacted governmental programs such as the Troubled Assets Relief Program. FDIC-supervised institutions (Banks) are expected to document how the funds received (i) support prudent lending, and/or (ii) assist existing mortgage borrowers to avoid unnecessary foreclosure. Banks should anticipate describing how such funds have been utilized during examinations and are encouraged to summarize such information in published annual reports and financial statements.

http://www.fdic.gov/news/news/financial/2009/fil09001.html

Banking Agencies Issue Risk Management Guidance on Remote Deposit Capture

On January 14, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the

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National Credit Union Administration, the Office of the Comptroller of the Currency and the Federal Financial Institutions Examination Council State Liaison Committee (collectively, the Banking Agencies) released guidance for examiners, financial institutions and technology service providers to identify risks, evaluate controls and assess risk management practices related to remote deposit capture (RDC) systems.

RDC is used to enable financial institution customers to make deposits from their homes or businesses instead of taking such deposits directly to a financial institution. In this process, digital information is captured at the home or business of the customer and transmitted to the financial institution or such institution's service provider for clearing and settlement. RDC may also be used by financial institutions in their branches. While introducing additional risks to financial institutions, RDC benefits financial institutions because it "decreases processing costs, supports new and existing banking products, and improves customers' access to their deposits."

As identified by the Banking Agencies, the essential components of RDC risk management include identifying, assessing and mitigating risk, as well as measuring and monitoring residual risk exposure. The guidance further states that management should ensure that RDC is compatible with the institution's business strategies before implementing the program and understand the return on investment and management's ability to manage the associated risks of such a program.

Interagency RDC examination procedures will be forthcoming in 2009.

http://www.ots.treas.gov/?p=PressReleases&ContentRecord_id=d5cba41c-1e0b-8562-ebbf-43fa30b599fb

UK Developments

FSA Proposes Reduction to Rights Issue Subscription Periods

On January 12, the UK Financial Services Authority (FSA) proposed the reduction of the minimum subscription period for companies undertaking a rights issue to either 14 calendar days or 10 business days. The FSA stated that this measure could help make equity raising more efficient and orderly. The current minimum subscription period is 21 calendar days.

During a rights issue subscription period, existing shareholders of a company may buy new shares in proportion to their existing holdings and these rights can also be bought and sold in the market. The proposed rule change will only apply to the minimum subscription period.

The proposals follow recommendations made by the Rights Issue Review Group report to the UK Chancellor of the Exchequer on November 24, 2008. The Rights Issue Review Group was co-chaired by the FSA and the UK Treasury.

The consultation closes on January 26, and the FSA is planning for the changes to take effect at the beginning of February.

www.fsa.gov.uk/pubs/cp/cp09_04.pdf

FSA Confirms Lifting of Short-Selling Ban

On January 14, the UK Financial Services Authority (FSA) confirmed that it will allow the ban on short selling stocks in UK financial sector companies to lapse with effect from 00:00:01 on January 16.

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The FSA also confirmed that it will extend its disclosure obligation for short selling of stocks in UK financial sector companies until June 30 (see the January 9, 2009, edition of *Corporate and Financial Weekly Digest*). Disclosure of a net short position in the stock of a UK financial sector company will continue to be required once a position reaches 0.25% of a relevant firm's issued share capital and, with effect from January 16, further disclosure will be required if a short position changes by a further 0.10% of issued share capital.

The FSA intends to issue a further consultation paper with longer-term options for a UK short-selling regime shortly.

www.fsa.gov.uk/pubs/policy/ps09_01.pdf

Immunity Powers Proposed for the FSA

On January 14, the UK government announced proposals that would give the UK Financial Services Authority (FSA) new statutory powers. Under the proposals, the FSA would be categorized as a "specified prosecutor" under the UK Serious Organised Crime and Police Act 2005 and would be given power to grant immunity when it investigates criminal cases such as insider dealing. The proposed change is to be made by a provision in the Coroners and Justice Bill.

www.publications.parliament.uk/pa/cm200809/cmbills/009/2009009.pdf

Further Fine for Market Abuse

In the November 14, 2008, edition of *Corporate and Financial Weekly Digest* we reported the UK Financial Services Authority's (FSA's) imposition of fines on Filip Boyen and Richard Ralph for dealing in the shares of Monterrico Metals Plc (Monterrico), an AIM-quoted company, on the basis of inside information. On January 14, the FSA fined Erik Boyen, the brother of Filip Boyen, £49,000 ($71,500) in addition to requiring a disgorgement of profits of £127,254.85 ($185,856).

Richard Ralph, then the executive chairman of Monterrico, was involved in confidential discussions related to a proposed takeover. Before any information became public, he asked Filip Boyen to buy Monterrico shares on his behalf. Filip Boyen then asked his brother Erik Boyen to buy shares on his behalf. Filip Boyen thereby passed on inside information. Erik Boyen was aware that the company was in takeover discussions and knew that Mr. Ralph was a Monterrico insider and had asked his brother to buy shares in the company. Erik Boyen also encouraged a third party to deal in Monterrico shares.

Erik Boyen settled at an early stage of the investigation and qualified for a 30% discount on the fine element of the penalty.

www.fsa.gov.uk/pubs/final/erik_boyen.pdf

EU Developments

European Commission Launches Review of the EU Prospectus Directive

On January 9, the European Commission launched a consultation on the application of the EU Prospectus Directive (2003/71/EC). Following discussions with the Committee of European Securities Regulators and the European Securities Markets Expert Group, the Commission considers that some aspects of the Prospectus Directive (which has been in force since July 2005) now merit a review and has put forward proposals in the consultation to improve and simplify the Directive.

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The Prospectus Directive introduced a "single passport for issuers", making securities available to investors either through a public offer procedure or by admitting their shares to trading. Once approved by the regulatory authority of one EU Member State, a prospectus must be accepted in any other EU Member State. The Directive aims to ensure that investors are provided with clear and comprehensive information when making investment decisions.

Particularly, the Commission suggests measures to address: (i) definition of qualified investors; (ii) revision of exempt offers; (iii) revision of annual disclosure obligation; (iv) time limit for exercise of right of withdrawal; and (v) certain thresholds of the Prospectus Directive.

The consultation also considers issues that have been brought to the Commission's attention such as the effectiveness of the prospectus summary, disclosure requirements for government guaranteed offers and disclosure requirements for small quoted companies and rights issues.

The consultation closes on March 10.

www.ec.europa.eu/internal_market/consultations/docs/2009/prospectus/background_en.pdf

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

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