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Corporate and Financial Weekly Digest

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SEC/Corporate

Foreign Private Issuers May Be Permitted to Exclude US GAAP Reconciliation Prior to Effective Date of New Rule

On December 21, 2007, the Securities and Exchange Commission published final rules adopted on November 15, 2007 regarding the acceptance in SEC filings by foreign private issuers of financial statements prepared in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) without reconciliation to U.S. Generally Accepted Accounting Principles (GAAP).

In response to questions, the SEC staff has advised companies that until this new rule is effective on March 4, 2008, they are subject to the existing rules regarding the inclusion of GAAP information in filings with the SEC. However, the SEC staff is aware that some foreign private issuers with a fiscal year ending after November 15, 2007 that prepare their financial statements using IFRS, as issued by the IASB, will want to file their annual report on Form 20-F before March 4, 2008 and exclude GAAP information from that filing. The SEC staff does not want to discourage companies from filing their 20-F before March 4, 2008. Accordingly, these companies are encouraged to contact the staff in the Division of Corporation Finance to discuss this issue. These companies can contact either Craig Olinger – Deputy Chief Accountant (202-551-3547) or Wayne Carnall — Chief Accountant (202-551-3107) to discuss their particular facts or circumstances.

The SEC staff also noted that these final rules provide similar relief from the requirement to provide GAAP information if the financial statements are filed under Rules 3-05, 3-09, 3-10 and 3-16 of the Securities Exchange Act of 1934. Similarly, companies that intend to file financial statements with a fiscal year ending after November 15, 2007 that are prepared using IFRS, as issued by the IASB, that exclude GAAP information in a filing under the Exchange Act before March 4, 2008 are encouraged to discuss their fact pattern with the SEC staff.

Those companies seeking relief from the existing rules will need to make the request in writing. Companies are encouraged discuss any other implementation issue with the SEC staff.

http://www.sec.gov/divisions/corpfin/guidance/cf20fgaap.htm

SEC/CORPORATE

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E-Proxy Usage Statistics Compiled

As reported in the June 22, 2007 edition of *Corporate and Financial Weekly Digest*, the Securities and Exchange Commission on June 20, 2007 adopted rule changes that would permit registrants to choose between transmitting annual proxy materials on paper or electronically beginning in 2008.
The latest E-Proxy statistics reported by Broadridge (as of December 31, 2007) of voluntary, early-adopting issuers and voting participation have been released. Some of the data reported is as follows:

- 69 companies have used e-proxy on a voluntary basis, with another 40 having committed to do so;
- there is a range of companies using e-proxy, large and small;
- most companies using e-proxy had only routine matters on their meeting agenda; another 30% had non-routine matters proposed by management and only 6% had non-routine matters proposed by shareholders;
- participation by individual shareholders declines significantly using e-proxy(based on 51 meeting results), with such participation declining from 17.1% to 4.0% (over a 75% drop) and the number of retail shares voting declining from 28.0% to 13.3% (over a 50% drop);
- Aggregate savings of $17.5 million were reported for the 69 companies using e-proxy.

http://www.thecorporatecounsel.net/blog/index.html

Broker Dealer

SEC Approves OCC — ICE Clear Cross-Margining Agreement

The Securities and Exchange Commission has approved the establishment of a program for the cross-margining of certain securities options contracts cleared by The Options Clearing Corporation (OCC) in its capacity as a Commission-registered clearing agency with certain futures and options on such futures cleared by ICE Clear in its capacity as a CFTC-registered derivatives clearing organization. The OCC/ICE cross-margining agreement is substantially similar to the cross-margining agreement between OCC and the Chicago Mercantile Exchange as it pertains to bilateral cross-margining; however some sections contain differing provisions. In addition, at OCC's request the SEC terminated its existing notice requirement mandated when OCC adds new options classes to a cross-margining program. In approving the rules changes on an accelerated basis, the SEC noted that cross-margining enhances clearing member liquidity and systemic liquidity both in times of normal trading and in times of market stress.

http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E8-630.pdf

SEC Chairman Cox Speaks: "International Business – An SEC Perspective"

In a January 10 speech to the American Institute of Certified Public Accountants' International Issues Conference, SEC Chairman Christopher Cox addressed three major global markets regulation topics: International Financial Reporting Standards (IFRS); universal use of XBRL - Extensible Business Reporting Language - as the corporate reporting data application; and Mutual Recognition. The recent decision by the SEC to accept IFRS financial statements in SEC filings by foreign private issuers was the first step in U.S.

BROKER DEALER

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implementation of IFRS standards. Chairman Cox stated unequivocally that, "IFRS is coming," and noted that some 100 nations are working on adopting IFRS and implementing XBRL. XBRL is quickly becoming the standard data application to describe financial information for public and private companies alike. Chairman Cox noted that XBRL is being adopted at a rapid pace across the globe, including in the United States where the application is now available for U.S. reporting companies' use and has been the subject of a recently concluded two-year study. He also stated that the Commission will consider, this year, whether to require public company reporting to include XBRL data tags. Finally, Chairman Cox addressed the issue of Mutual Recognition to permit U.S. investors to have the benefit of direct access to foreign markets or even broker-dealers, provided those entities are supervised in a foreign jurisdiction with high standards under a securities regulatory regime substantially comparable to that in the U.S. He noted that U.S. trading in foreign securities is over $7.5 trillion, and foreign trading in U.S. securities is over $33 trillion.

http://www.sec.gov/news/speech/2008/spch011008cc.htm

Investment Companies and Investment Advisors

SEC Investment Management Director Addresses Mutual Fund Directors' Institute

In his January 15 remarks at the Mutual Fund Directors Forum Second Annual Directors' Institute, the Securities and Exchange Commission's Director of the Division of Investment Management, Andrew J. Donohue, discussed the role of investment company fund directors in fund advisory contracts approvals (known as the 15(c) process). Section 15(c) of the Investment Company Act of 1940 (the 1940 Act) requires independent directors to engage in a detailed and thoroughly documented analysis of the advisory contract.

Mr. Donohue emphasized that the 15(c) process not only benefits the fund and its investors, but directly benefits the adviser and the independent directors. Mr. Donahue noted that an adviser's potential liability under Section 36(b) of the 1940 Act gives advisers a strong incentive to fully disclose information about its compensation and services. Further, a court is more likely to rely upon the independent directors' business judgment where their decision and rationale is documented extensively.

Mr. Donohue concluded by stating that the SEC's staff is currently analyzing Rule 12b-1 fees, soft dollars in the mutual fund context, and delegation of director responsibilities to others (e.g., chief compliance officers) to allow directors more time for substantive issues.

http://sec.gov/news/speech/2008/spch011508ajd.htm

OCIE Director Addresses Frequently Asked Questions About SEC Examinations

On January 17, Lori Richards, Director of the Securities and Exchange Commission's Office of Compliance Inspections and Examinations, discussed the top five most frequently asked questions about the SEC's examination program. The five areas discussed were:

- Will my firm be examined?
- What issues are SEC examiners focused on now?
- If my firm is examined, what kind of information and documents are

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examiners likely to request?

- What are the possible outcomes of an SEC examination? and
- What can I do to ensure that the examination goes smoothly?

Speaking at a monthly luncheon, Ms. Richards noted that SEC examiners are currently focused on controls over valuation and the use of non-public information, and on marketing and sales processes in dealing with senior citizens.

http://www.sec.gov/news/speech/2008/spch011708lar.htm

Banking

OCC Announces Community Bank Directors Workshops

The Office of the Comptroller (OCC) announced its 2008 schedule of workshops for national community bank directors. The workshops are offered throughout the United States and are focused on meeting the needs of outside directors of national community banks with assets of less than $1 billion. Space in each workshop is limited to 50 participants.

The titles of the three one-day workshops are as follows: "Directors: Where is the Risk in Your Bank"; "Compliance Risk: What Directors Need to Know"; and "Credit Risk: A Director's Focus." In addition, the OCC will host a two day workshop following the completion of the other three topics for national bank directors with fewer than three years of experience or for directors who would like to review important information. That seminar is entitled "A New Director's Challenge: Mastering the Basics."

For more information and to see the list of cities where the workshops will be offered, see

http://www.occ.treas.gov/ftp/release/2008-2.htm.

United Kingdom Developments

FSA Reviews Listing Regime Structure

On January 14, the UK Financial Services Authority published DP 08/1 *A review of the Structure of the Listing Regime*, continuing a long running consultation that commenced at the end of 2006, as discussed in the December 14, 2007 edition of *Corporate and Financial Weekly Digest*. The new discussion paper is focused on clarifying the obligations on issuers of various types of listed securities in the UK.

The paper sets out a proposed structure in which securities subject to higher standards will be more clearly separated from directive minimum standards. The proposals include re-labeling Primary Listings (the most stringent form of listing in terms of requirements) as "Tier One Listings" and Secondary Listings and Global Depository Receipts (GDRs) (both only available to overseas companies) as "Tier Two Listing". Secondary Listings and GDRs would continue to be admitted to trading, but they would not be "Officially Listed".

The discussion paper explores proposals to relax requirements on UK companies in order to promote a level playing field for both overseas and UK issuers. UK companies are currently only eligible for a Primary Listing and not a Secondary Listing. The paper also seeks views on whether overseas

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companies should “comply or explain” in respect of the UK’s Combined Code on Corporate Governance.

The deadline for comments is April 14.

www.fsa.gov.uk/pubs/discussion/dp08_01.pdf

Litigation

Supreme Court Holds Third Party Suppliers Were Not Liable Under Section 10(b)

In a highly anticipated decision, the United States Supreme Court affirmed the decision of the Eighth Circuit dismissing claims under Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 against two third party customer/suppliers of an issuer who materially misrepresented its financial performance. Plaintiffs alleged that the issuer’s misleading disclosures were based upon transactions it entered into with the two third parties that had no economic substance and were designed, with the third parties’ knowledge, to enable the issuer to publish fraudulent financial statements that inflated its revenues and cash flow. Plaintiffs alleged that “but for” the third parties’ participation in the scheme, the issuer could not have defrauded them.

The Court rejected the claim, holding that the customer/suppliers could not be liable under Section 10(b) since their actions were not publicly disclosed and, therefore, were not relied on by the investors. The Court rejected the plaintiffs’ attempt to extend the efficient market theory beyond public statements relating to an issuer to also reach all transactions underlying those statements. In the Court’s view, adopting such a broad concept of reliance, which would include the realm of ordinary business operations, would result in the Section 10(b) implied cause of action “reach[ing] the whole marketplace in which the issuing company does business.”

The Court viewed this as unwarranted for multiple reasons, including the remoteness of the third parties’ actions – since nothing the customer/suppliers did made it “necessary or inevitable” that the issuer would record the transactions in a fraudulent manner. The Court also reasoned that extending the Section 10(b) implied right of action in the broad manner requested by plaintiff would amount to an end run around the limited circumstances in which Congress restored aider and abettor liability in the PSLRA following the Court’s Central Bank decision. (*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* --- S. Ct. ----, 2008 WL 123801 (Jan. 15, 2008))

Common Law Fraud Claim Adequately Alleged Loss Causation

The District Court denied defendants’ motion to dismiss, holding, among other things, that plaintiffs adequately pleaded loss causation to support their common law fraud claim based upon materially misleading statements allegedly made to inflate the defendant-company’s stock price. Defendants included the company, which was engaged in the research and development of treatments to fight HIV, and several of its officers and directors. Plaintiffs alleged that defendants’ misstatements and omissions concealed material risks which, when disclosed, caused a sharp decline in the stock price.

In January 2000 defendants made public statements which, plaintiffs alleged, led the market to anticipate the announcement of the imminent opening of multiple clinics and FDA approval of a drug that would cure HIV. Plaintiffs alleged that the dramatic stock price decline that occurred three months later resulted from defendants’ failure to make any follow up announcements of clinic openings or FDA approvals. According to plaintiffs, the absence of any such announcements constructively disclosed to the market that the

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defendant's announced plans would not come to fruition, thereby causing the stock price decline.

After observing that not all stock declines are "caused" by constructive or actual corrective disclosures of prior misrepresentations – and finding that changed economic circumstances, investor expectations, industry-specific facts, etc. could account for such declines – the Court, nonetheless, ruled that plaintiffs had adequately pled the loss causation element of their fraud claim. The Court ruled that the risk of the clinics not being opened and of FDA approval not being granted "was 'within the zone of risk' concealed by defendants' alleged misrepresentations." The Court then concluded that it was reasonable to infer that defendants' failure to make any follow up announcements regarding clinic openings or drug approval was, at least at the pleading stage, the cause of the plaintiffs' investment loss. (*Hunt v. Enzo Biochem, Inc.*, 2008 WL 111014 (S.D.N.Y. January 9, 2008))

CFTC

CFTC to Expand Registration Exemption for Foreign Intermediaries

The Commodity Futures Trading Commission has proposed to adopt a regulatory exemption that would allow certain foreign firms to introduce institutional U.S. customers to registered futures commission merchants (FCMs) for trading on U.S. exchanges. The proposed exemption would be available solely to foreign affiliates of FCMs that have obtained an exemption from registration under Rule 30.10 of the CFTC's foreign futures and foreign options rules, subject to the FCM agreeing to be jointly and severally liable for violations of the Commodity Exchange Act or CFTC regulations committed by its foreign affiliate. The foreign affiliate would not be allowed to solicit U.S. customers or handle U.S. customer funds for trading on U.S. markets. The CFTC proposal would codify a series of staff no-action letters that have granted similar relief on a case-by-case basis to the Part 30 affiliates of U.S. FCMs.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5436-08.html

CFTC Seeks Intervention in Amaranth-FERC Case

On January 7, the Commodity Futures Trading Commission filed with the U.S. Court of Appeals for the District of Columbia Circuit a motion for leave to intervene in an action filed by Amaranth Advisors, L.L.C. and others against the Federal Energy Regulatory Commission (FERC), in which Amaranth challenges FERC's authority to initiate a proceeding alleging manipulation in the trading of natural gas futures contracts. The CFTC seeks to intervene for the purpose of addressing the scope of the CFTC's exclusive jurisdiction with respect to the trading of futures on registered futures exchanges.

http://www.kattenlaw.com/files/Publication/992abe94-2c10-4cf3-96dd-0009a67e7123/Preview/PublicationAttachment/cbe0635a-8c0c-492e-a85a-067c1580291b/Motion_to_Intervene_in_Amaranth.pdf

Foreign Currency Transactions Not 'Futures Contracts'

On January 9, the U.S. Court of Appeals for the Sixth Circuit held that the forward currency transactions at issue were "forward contracts" as opposed to "futures contracts" and were not subject to CFTC jurisdiction. The Court noted that the transactions in question were not fungible and standardized and were instead individual agreements with agreed-upon prices, quantity and settlement dates.

http://www.ca6.uscourts.gov/opinions.pdf/08a0008p-06.pdf

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