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Corporate and Financial Weekly Digest

January 19, 2007

SEC/Corporate

FASB Denies Request to Delay Implementation of FIN 48

On January 17, the Financial Accounting Standards Board voted unanimously not to delay the effective date of FASB Interpretation No. 48 Accounting for Uncertainty in Income Taxes (FIN 48). FIN 48, which was designed by the FASB to result in increased relevance and comparability in financial reporting of income taxes, will require companies to evaluate whether tax positions taken or expected to be taken are likely to withstand a challenge by the Internal Revenue Service. Companies will be required to determine whether it is more likely than not that a tax position will be sustained upon examination by the IRS based on the technical merits of the position.

Tax positions that meet the more-likely-than-not threshold must then be measured to determine the amount of benefit to recognize on the company's financial statements. Such tax positions will be measured at the largest amount of benefit that is greater than 50 percent likely of being realized. In addition to the recognition threshold and measurement attribute for financial statement recognition and measurement of tax positions, FIN 48, which is effective for fiscal years beginning after December 15, 2006, also provides guidance on derecognition, classification, interest and penalties, accounting in interim periods, disclosure and transition.

http://www.nytimes.com/2007/01/18/business/18audit.html?pagewanted=print

http://www.fasb.org/pdf/fin%2048.pdf.

SEC Posts Guidance for Restatements Due to Stock Option Backdating

On January 16, the Division of Corporation Finance of the Securities and Exchange Commission posted guidance in the form of a sample letter to companies that plan to restate previously issued financial statements for errors in accounting for grants of stock options to employees, directors and other service providers and that have determined that previously filed reports containing financial statements determined to be materially misstated require amendment. The letter states that the SEC will not raise further comment regarding a company's need to amend prior Exchange Act filings to restate financial statements and related MD&A if the company amends its most recent Form 10-K and includes in that amendment the comprehensive disclosure outlined in the letter, which includes:

- An explanatory note at the beginning of the Form 10-K amendment that discusses the reason for the amendment;
- Selected Financial Data for the most recent five years as required by Item 301 of Regulation S-K, restated as necessary and with columns labeled "restated";
- Audited annual financial statements for the most recent three years, restated as necessary and with columns labeled "restated";
- Footnote disclosure reconciling previously filed annual and quarterly

SEC/CORPORATE

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financial information to the restated financial information, on a line-by-line basis and for each material type of error separately, within and for the periods presented in the financial statements (audited), in selected financial data, and in the interim period information; and

- Audited financial statement footnote disclosure of the restated stock compensation cost in the manner detailed in the letter.

The Division cautions that its guidance relates only to the mechanics of the amendment of prior filings and compliance with such guidance will not preclude comments on the amended Form 10-K or even enforcement action.

http://www.sec.gov/divisions/corpfin/guidance/oilgasltr012007.htm.

Tax Constraints Approved on Compensation to Highly Paid Executives

On January 17, the Senate Finance Committee approved legislation that would limit nonqualified deferred compensation for executives. Specifically, the legislation would amend the Internal Revenue Code to:

- limit the annual accrual of nonqualified deferred compensation to the lesser of $1 million and the executive's average annual compensation over the previous five years. Exceeding the cap would trigger ordinary income tax plus a 20% additional tax; and

  http://www.house.gov/jct/x-5-07.pdf

- Amend Section 162(m), which provides that compensation in excess of $1 million paid by a publicly-held corporation to the corporation's "covered employees" (its chief executive officer and four other most highly compensated employees) generally is not deductible, to treat any former executives who were "covered employees" for any preceding taxable year beginning after December 31, 2006 as continuing to be covered by the deduction limits of Section 162(m)

  http://www.house.gov/jct/x-5-07.pdf

Broker Dealer

NYSE Requests Extension of Implementation Date of Regulation NMS

The New York Stock Exchange has submitted a letter to the Securities and Exchange Commission requesting an extension of the implementation date of SEC Regulation NMS Trading Phase.

The NYSE is currently in the process of completing a rollout of certain aspects of its Hybrid Market implementation. Until such rollout is complete, NYSE quotes would not qualify as automated quotes under Regulation NMS. NYSE expects to complete such rollout by the end of February 2007 and, consequently, has requested an extension of the Hybrid Market implementation date from February 5, 2007 to March 5, 2007.

http://www.sec.gov/rules/petitions/2007/petn4-530.pdf

Rule Changes Proposed to Research Analyst Conflicts of Interest

The New York Stock Exchange proposes to amend certain provisions of NYSE Rules 344 and 472 governing research analyst conflict of interests. These amendments would: (i) eliminate the exception for pre-publication factual verification review of research reports by non-research personnel, (ii) change the quiet periods surrounding securities offerings and the release of lock-up agreements, (iii) allow member organizations to develop policies and procedures if they choose to prohibit research analysts from holding securities for companies they cover, (iv) alter the format for certain disclosures in research reports, and (v) extend the anti-retaliation prohibitions to all

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employees of a member organization, not just investment banking personnel.

The National Association of Securities Dealers is proposing to amend NASD Rules 1050 and 2711 to implement certain changes intended to improve the effectiveness of the research analyst conflict of interest rules and registration requirements by making certain changes to the existing provisions regarding, among other things: (i) disclosure of conflicts, (ii) quiet periods, (iii) restrictions on review of research reports by non-research personnel, and (iv) restrictions on personal trading by research analysts.

The proposed rule changes are drawn from a joint comprehensive report on the operation and effectiveness of the above-referenced rules prepared by NYSE and NASD (together, the SROs) at the request of the Securities and Exchange Commission in 2005. The SROs concluded that certain changes to their rules would further improve their effectiveness "by striking an even better balance between ensuring objective and reliable research on the one hand and permitting the flow of information to investors and minimizing costs and burdens to members on the other."

http://www.sec.gov/rules/sro/nyse/2007/34-55072.pdf

United Kingdom Developments

Assets Recovery Agency to Merge with SOCA in 2008

Under the Serious Crime Bill published on January 17, the UK Government will merge the Assets Recovery Agency (ARA) with the UK's Serious Organised Crime Agency (SOCA). SOCA was set up last year with a view to becoming the UK's equivalent to the FBI. The ARA, which aimed to reclaim ill-gotten gains from criminals, is to be merged with SOCA after disappointing recoveries over four years. This merger is likely to happen in April 2008.

The power to launch civil recovery proceedings will also be extended to England & Wales' three main prosecutors: the Crown Prosecution Service, the Revenue and Customs Prosecutions Office, and the Serious Fraud Office.

http://www.publications.parliament.uk/pa/ld200607/ldbills/027/2007027.pdf

UK DEVELOPMENTS

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Litigation

Securities Act Claims Not Subject to Rule 9(b) Pleading Requirements

Denying, in part, a motion to dismiss claims against individual directors of a loan company, a district court held that the claims against the directors were not grounded in fraud and, therefore, not subject to the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure. Plaintiffs alleged that the individual defendants were liable under Sections 11 and 12 of the Securities Act of 1993 based upon their having signed materially false and misleading registration statements. Defendants argued that the claims against them needed to satisfy the particularity requirements of Rule 9(b) because they were based on fraud, as evidenced by the numerous allegations in the complaint of intentional misconduct by their company.

Because the allegations of intentional misconduct were not directed at the individual defendants, but only against the company, the Court found that the allegations against the directors were not grounded in fraud and, accordingly, did not require the specificity mandated by Rule 9(b). The Court sustained the claims after ruling that they adequately alleged that the defendants were negligent in signing the registration statements and in failing to investigate and correct the allegedly material misstatements. (*In re American Business Financial Services, Inc. Securities Litigation*, 2007 WL 81937 (E.D. Pa. Jan. 9, 2007))

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District Court Sustains Federal Securities Claim in Contest for Spanish Company

The United States District Court for the Southern District of New York found

that it had subject matter jurisdiction over claims brought by German plaintiffs against Spanish defendants pursuant to Section 14 of the Securities Exchange Act of 1934 and denied a motion to dismiss them. Plaintiffs alleged that defendants' purchase of 13% of a Spanish issuer's stock from investors in the United States and elsewhere in the world constituted a "tender offer" under the United States' securities laws and that defendants violated those laws by failing, among other things, to file the requisite schedule disclosing their tender offer.

The Court found that the conduct challenged did not constitute a "tender offer" under Spanish securities law. Nevertheless, after (i) finding, among other things, that the defendants worked directly and intensively with a U.S. investment bank, that a significant number of U.S. investors were involved in the stock purchase and that more than 10% of the issuer's shares were allegedly held by U.S. investors, and (ii) applying the SEC's 2000 amendments to Regulation 14D (which expressly concern cross-border tender offers), the Court held that it had subject matter jurisdiction over plaintiffs' claims and that they could not be dismissed at the pleading stage. (*E.ON AG v. Acciona, S.A.*, 2007 WL 62713 (S.D.N.Y. Jan. 9, 2007))

CFTC

CFTC Requires CPOs and CTAs to File Certain Notices Electronically

The Commodity Futures Trading Commission has amended Commission Rules 4.5, 4.7, 4.12(b), 4.13 and 4.14(a)(8) to require that notices of exemption or exclusion from registration as a commodity pool operator and/or commodity trading advisor must be filed electronically with the National Futures Association. Prior to these amendments, which are effective February 15, all notices of exemption or exclusion from registration as a CPO and/or CTA were required to be filed with NFA in paper form.

The CFTC also noted that Advisory 18-96, which makes available to CPOs exemptions from disclosure and reporting requirements under Rules 4.21 and 4.22, as well as certain recordkeeping requirements under Rule 4.23, will remain in effect and is not impacted by these amendments. CPOs therefore may continue to claim relief under Advisory 18-96 by filing a notice with NFA in paper form.

http://www.cftc.gov/files/foia/fedreg07/foi070116a.pdf

CFTC

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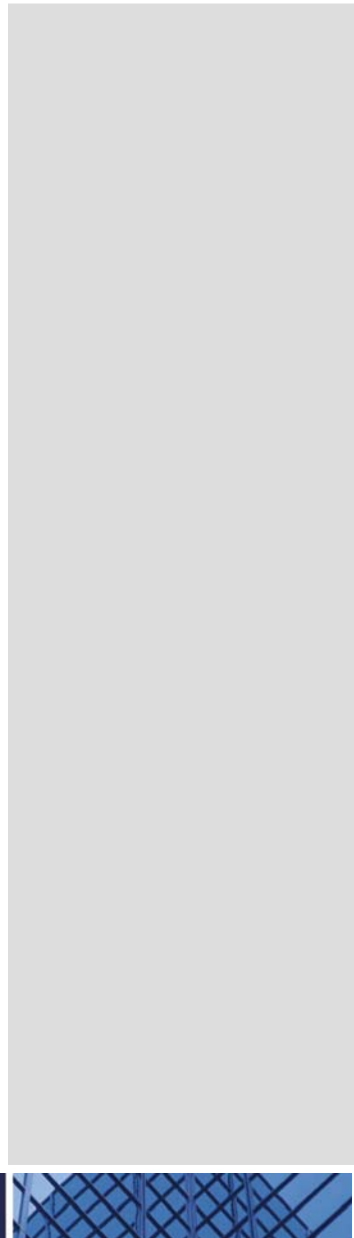

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