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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC Publishes Interpretations Relating to New Proxy Disclosure Rules

On January 20, the Securities and Exchange Commission published Compliance and Disclosure Interpretations (C&DIs) providing further guidance as to transition dates and other clarifications for the new rules on corporate governance disclosures. Click here for a Katten *Client Advisory* on the final rules.

Transition Issues

The C&DIs clarified that voting results for annual meetings prior to February 28 should be reported in the "Other Information" Item of a Form 10-K or 10-Q due on or after February 28 rather than in the "Submission of Matters to a Vote of Security Holders" Item. The C&DIs also clarified that if a company with a fiscal year ending on or after December 20, 2009, files a Securities Act or Exchange Act registration statement on or after December 20, 2009, in general, the registration statement would have to be in compliance with the Regulation S-K amendments in order for it to be declared effective on or after February 28.

Click here for the transition C&DIs.

Interpretations Under Regulation S-K Items 401 and 402

- ***Directors' skills and qualifications.*** The SEC clarified that the specific experience, qualifications, attributes or skills that led the board to conclude that a person should serve as a director must be disclosed on an individual basis for each director rather than as a group for those sharing similar attributes. The SEC also indicated that this disclosure is required for all members of classified boards, regardless of whether a director is up for re-election in a particular year.
- ***Executive Compensation.*** The SEC clarified that the grant date fair value for an equity award granted in 2009 to an executive officer that is forfeited due to the executive's separation from the company is required to be included for the purpose of determining the 2009 total compensation. The SEC also stated that the grant date value of an award subject to time-based vesting should exclude the effect of estimated forfeitures.
- ***Narrative Disclosure of Compensation Practices and Policies.*** The SEC indicated that although the location of the narrative disclosure of compensation practices and policies as they relate to risk management is not specified in the new Item 402(s) of Regulation S-K, the SEC recommends that the disclosure be presented together with the other Item 402 disclosures.
- ***Consulting Fees.*** The SEC stated that the "additional services" provided by executive compensation consultants that are subject to disclosure are not limited to services for non-executives. The SEC also clarified that fees for consulting on broad-based, non-discriminatory plans in which executive officers or directors participate and for providing information relating to executive and director compensation, such as survey data (in each case, that would otherwise qualify for the exclusion from disclosure if they are the *only* services provided), are considered to be fees for "determining or recommending the amount or form of executive and director compensation" for purposes of reporting fees under the rule. Services such as benefits administration, human resources services, actuarial services and merger integration services are "additional services" subject to the disclosure requirements. In addition, if non-customized information relates to matters other than executive and director compensation, then the fees for such information would be for "additional services."

Click here for the C&DIs.

SEC Corrects Interpretation Regarding Item 2.02 of Form 8-K

On January 15, the Securities and Exchange Commission's Division of Corporation Finance replaced a Compliance and Disclosure Interpretation (C&DI) published last week related to the disclosure of information under Item 2.02 of Form 8-K with a prior interpretation from its 2003 Frequently Asked Questions. The issuance of the C&DI was previously reported in the January 15 edition of *Corporate and Financial Weekly Digest*.

Question 105.07 of the SEC's C&DIs on the use of non-generally accepted accounting principles (GAAP) financial measures now states that if material non-public information is disclosed on a conference call which was not included in a previously published earnings release furnished on Form 8-K prior to the conference call, then the company must furnish such information required by Item 2.02 of Form 8-K by attaching as an exhibit to the Form 8-K a transcript, slides or other relevant presentation material containing the previously non-public information. Superseded Question 105.04 had omitted a fact (namely, that the earnings release had not been furnished on a Form 8-K prior to the conference call) necessary to the SEC's interpretation. This omission resulted in an inadvertent change in guidance.

Click here to view the complete C&DIs with respect to the use of non-GAAP financial measures.

LITIGATION

DC Circuit Overturns SEC Restitution Award

The U.S. Court of Appeals for the District of Columbia strongly rejected a decision by the Securities and Exchange Commission, calling its decision affirming a National Association of Securities Dealers (NASD) restitution award "whimsical", "incomprehensible" and "entirely unacceptable."

The case arose from a disciplinary action brought by the NASD against a registered general securities representative. Four of the petitioner's clients invested in a speculative start-up that later collapsed, resulting in a total loss of the clients' investments. Petitioner failed to review any of the offering documents and later conceded that deficiencies in the documents rendered the investment "unsuitable" because the offering documents failed to set forth basic information regarding the proposed debt investments, including but not limited to the interest rate and the maturity date.

The NASD charged that petitioner, among other things, violated an NASD conduct rule by recommending the investment without having a reasonable basis for his decision. The NASD initially imposed fines and concurrent suspensions, but declined to impose restitution. On appeal to the NASD's National Adjudicatory Council, the penalty was increased to consecutive suspensions and restitution was ordered. The SEC, reviewing the final NASD determination, affirmed on all counts.

The D.C. Circuit analyzed the level of causation required to impose restitution under General Principle No. 5 of the Financial Industry Regulatory Authority Sanction Guidelines, which provides that restitution may be ordered where an investor suffered a quantifiable loss "as a result of" a member's misconduct. The court reviewed the SEC's written opinion and found no guidance on or analysis of the nature of the causation requirement under Principle No. 5 (e.g., whether "but for" cause is sufficient or whether some variation of "proximate cause" or "loss causation" is required). The issue was critical because petitioner's violation—failure to review facially deficient offering documents—may not have caused the loss of the client's investment in a highly speculative start-up venture.

Because the SEC's approach to the causation issue "clearly fail[ed] for want of reasoned decision making," the court looked to see whether controlling precedent provided guidance. Finding none in the case of sophisticated investors willingly seeking to invest in highly speculative ventures, the court vacated the restitution order and held that the SEC abused its discretion. (*Siegel v. SEC*, No. 08-1379, 2010 WL 87610 (D.C.Cir. Jan. 12, 2010))

Corporate Veil Allegations Survive Motion to Dismiss in Embezzlement Case

The U.S. District Court for the Northern District of Illinois denied defendants' motion to dismiss, ruling that, among other things, plaintiff properly pled the elements for piercing the corporate veil where there were particular allegations demonstrating a "unity of interest" between the individual and corporate defendants.

The key corporate defendant managed properties owned and operated by federal and municipal housing authorities. Defendant entered into a contract that delineated the appropriate uses of funds—defendant was explicitly prohibited from funneling government money for personal purposes. Plaintiff, during the course of her employment by the defendant corporation, began to notice a series of accounting irregularities and was asked by her employer on numerous occasions to reconcile bank accounts "as if the [missing] money were there." Plaintiff

eventually left her employment and later filed a *qui tam* action to, among other things, recover the misappropriated government funds.

Defendants moved to dismiss plaintiff's claims, including a veil piercing count, on the ground that the piercing allegations in the complaint were "purely formulaic." Defendants relied primarily on the Supreme Court's recent pleading decisions in *Ashcroft v. Iqbal,* 556 U.S. ---, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The court denied the motion to dismiss the veil piercing cause of action, finding sufficient factual allegations in "several portions" of the complaint, including that the corporate defendant had transferred funds to a third-party corporation that was owned by the individual defendants, and that the individual defendants were part of a small group that exercised control over the missing funds. (*US ex rel Howard v. Urban Investment Trust, Inc., et al.*, No. 03 C 7668, 2010 WL 148643 (N.D.Ill. Jan. 14, 2010))

BROKER DEALER

SEC Approves Consolidated FINRA Rules Governing Clearly Erroneous Transactions

On December 1, 2009, the Securities and Exchange Commission approved the Financial Industry Regulatory Authority's proposed rule change to adopt a new set of rules governing clearly erroneous transactions in the consolidated FINRA rulebook. The new FINRA Rule 11890 Series will replace National Association of Securities Dealers Rule 11890, Interpretive Material 11890-1 and Interpretive Material 11890-2. FINRA has amended these rules as part of a market-wide effort among multiple self-regulatory organizations to provide transparency and finality with respect to clearly erroneous executions. Among other things, the new rule series includes a new general rule defining "clearly erroneous" transactions, separate provisions for the determination of clearly erroneous transactions (depending upon whether the transaction involves an exchange-listed security or an over-the-counter equity security), procedures for appealing FINRA clearly erroneous determinations and minimum numerical criteria necessary for a transaction to qualify as clearly erroneous. The effective date of the new rule series is February 15.

Click here to read FINRA Regulatory Notice 10-04.

NYSE Amex Amends Obvious and Catastrophic Errors Rules

On January 8, 2009, New York Stock Exchange Amex Options Regulation filed with the Securities and Exchange Commission a proposed rule change amending Rule 975NY, which governs obvious errors and catastrophic errors. Presently, under Rule 975NY(a)(1), an obvious error will be deemed to have occurred when the execution price of an electronic transaction is above or below the theoretical price for the affected series by a specified amount. As amended, an obvious error determination may be made in situations where the bid/ask differential of the national best bid and offer for the affected series just prior to the erroneous transaction was at least two times the permitted bid/ask differential, pursuant to guidelines contained in the rule. The rule change became effective on filing.

Click here to read the NYSE Amex Options Regulation Regulatory Information Bulletin.

PRIVATE INVESTMENT FUNDS

Obama Proposes to Limit Size and Activities of Banks

On January 21, President Barack Obama called for new restrictions on the size and activities of U.S. banks. Included among the proposed restrictions is the so-called "Volcker Rule," named for Paul Volcker, former Chairman of the Federal Reserve Board and current chairman of the President's Economic Recovery Advisory Board. The Volcker Rule would prohibit a bank or bank holding company from owning, investing in, or sponsoring hedge funds or private equity funds, or engaging in proprietary trading operations for its own profit unrelated to serving its customers. President Obama stated that "firms should not be allowed to run these hedge funds and private equities funds while running a bank backed by the American people." In addition, the President also proposed to limit the consolidation of the financial sector by placing broader limits on the excessive growth of the market share of liabilities at the largest financial firms, to supplement existing caps on the market share of deposits. The President chastised the financial industry further for "an army of industry lobbyists from Wall Street descending on Capitol Hill to try and block basic and common sense rules of the road that would protect our economy and the American people." The administration said it wants to include these new restrictions in the pending comprehensive financial reform legislation and exhorted members of Congress of both parties to adopt financial reform.

Reportedly, the proposed limit on the consolidation of the financial sector reflects a desire by the administration to expand the coverage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Interstate Banking Act). The Interstate Banking Act essentially bars a bank from acquiring another bank in an interstate transaction if the resulting bank on a *pro forma* basis would hold more than 10% of the nation's insured deposits. There are some indications that the administration may also try to expand the Interstate Banking Act to cover other types of funding and put a limit on the share of assets that any one banking organization could hold.

The Volcker Rule and the limit on the consolidation of the financial sector advocated by the President would need to be passed into law by Congress. Until such passage, it is unclear whether the U.S. Treasury Department and the other banking agencies would endeavor to put some or all of these restrictions into place via regulatory fiat.

To read the White House press release, click here.
To read the remarks by the President on financial reform, click here.

OTC DERIVATIVES

New IRS Audit Guidelines Target Equity Total Return Swaps with Non-U.S. Persons

On January 14, the Internal Revenue Service issued swap audit guidelines (Guidelines) in an industry director directive to its field agents identifying the factors that the agents should apply in determining when dividend-equivalent payments made to a non-U.S. person under a total return swap (TRS) should be subject to U.S. withholding tax. The general rule is that payments to a non-U.S. person under a "notional principal contract" (which would include most TRSs), including "dividend equivalent payments," are not subject to U.S. withholding tax, while payments of dividends to such non-U.S. persons are subject to withholding at a 30% rate (unless the rate has been reduced by bilateral treaty). The IRS previously announced that it was concerned TRSs were being used improperly to circumvent U.S. withholding tax on dividends paid to non-U.S. persons.

The Guidelines confirm that, in general, no withholding tax is imposed on payments, including "dividend equivalent payments," made under a qualifying TRS to a non-U.S. person, where such person did not own the underlying stock before entering into the TRS and does not acquire the underlying stock after terminating the TRS. The Guidelines, however, specify the following transaction fact patterns as requiring additional audit scrutiny and potential imposition of withholding tax:

- a non-U.S. person sells its stock position to a U.S. financial institution, enters into a TRS with that financial institution indexed to such stock position, and then re-acquires the stock from the U.S. financial institution after terminating the TRS (a "cross-in/cross-out transaction");
- an indirect cross-in/cross-out transaction where a non-U.S. affiliate of a U.S. financial institution acts as an intermediary between the non-U.S. customer and the U.S. financial institution by entering into a TRS with the non-U.S. customer and then entering into a mirror TRS with the U.S. financial institution, the U.S. financial institution purchases the underlying stock to hedge the exposure under the TRS, and the non-U.S. customer re-acquires the stock from the U.S. financial institution or its non-U.S. affiliate; and
- an indirect cross-in/cross-out transaction where a non-U.S customer re-acquires the stock underlying a TRS from an independent third-party broker-dealer that is not affiliated with the U.S. financial institution counterparty on the TRS after termination of the TRS and the surrounding facts indicate that there was a side agreement between the independent broker-dealer and the non-U.S. customer or the U.S. financial institution arranging such purchase.

The Guidelines also identified TRSs on equity of privately held U.S. corporations and TRSs entered into with a U.S. financial institution if the non-U.S. customer is using an automated trading program offered by the U.S. financial institution as transactions warranting additional audit scrutiny. They further direct field agents to seek the assistance of industry specialists within the IRS in the case of TRSs that reference a basket of U.S. stocks, but give no guidance as to the specific factors that would cause payments under such equity basket swaps to be subject to withholding tax.

To read the industry director directive click here.

BANKING

Agencies Issue Final Rule for Regulatory Capital Standards Related to Statements of Financial Accounting Standards Nos. 166 and 167

The federal banking and thrift regulatory agencies on January 21 announced the final risk-based capital rule

related to the Financial Accounting Standards Board's adoption of Statements of Financial Accounting Standards Nos. 166 and 167. These new accounting standards make substantive changes to how banking organizations account for many items, including securitized assets, that had been previously excluded from these organizations' balance sheets. Banking organizations affected by the new accounting standards generally will be subject to higher risk-based regulatory capital requirements. The agencies believe that the rule better aligns risk-based capital requirements with the actual risks of certain exposures. It also provides an optional phase-in for four quarters of the impact on risk-weighted assets and tier 2 capital resulting from a banking organization's implementation of the new accounting standards. The delay and subsequent phase-in periods of the implementation will apply only to the agencies' risk-based capital requirements, not the leverage ratio requirement. The rule also provides a reservation of authority to permit the agencies to require a banking organization to treat entities that are not consolidated under accounting standards as if they were consolidated for risk-based capital purposes, commensurate with the risk relationship of the banking organization to the structure.

The final rule, issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of Thrift Supervision, will take effect 60 days after publication in the *Federal Register*, which is expected shortly. Banking organizations may choose to comply with the final rule as of the beginning of their first annual reporting period after November 15, 2009.

Read more.

Please see "Obama Proposes to Limit Size and Activities of Banks" in **Private Investment Funds** above.

STRUCTURED FINANCE AND SECURITIZATION

Revised TALF Documents Issued by NY Federal Reserve

On January 15, the Federal Reserve Bank of New York (NY Fed) issued revised versions of its Term Asset-Backed Securities Loan Facility (TALF) documents and forms and TALF frequently asked questions (FAQs). The updated FAQs include additional details relating to Nationally Recognized Statistical Rating Organizations (NRSROs) in accordance with a recent NY Fed final rule on designating NRSROs as TALF-eligible. The updated master loan and security agreement (MLSA) provides that settlements on releases of collateral should be made on a "delivery versus payment" basis, and the updated conflicts of interest guidance for TALF agents provides details on the requirement that TALF agents must designate a person or committee independent of sales and trading to conduct conflicts of interest oversight and mitigation.

Please click here for the updated FAQs, here for changes from the previous version of FAQs, here for more information on the updated MLSA, here for updated conflicts of interest guidance, and here for changes from the previous version of conflicts of interest guidance.

ANTITRUST

Bill to Overturn *Leegin* Decision Goes to House Floor

In *Leegin Creative Leather Prods. v. PSKS Inc.*, the U.S. Supreme Court held that vertical price-fixing agreements were subject to the rule of reason, overruling a century-old decision that found that such agreements were *per se* illegal. Since *Leegin* was decided, efforts have been made in Congress to overturn the Supreme Court's decision and reinstate a *per se* ban on vertical price-fixing. Such legislation recently was sent to the House of Representatives, which will now consider H.R. 3190, known as the Discount Pricing Consumer Protection Act of 2009. The House Judiciary Committee gave its approval to the bill on January 13. The House bill, introduced July 13, 2009, by Rep. Henry Johnson (D-Ga.), mirrors a similar bill introduced in January 2009 by Sen. Herb Kohl (D-Wis.), which is still under consideration in the Senate Judiciary Committee.

Read more.

FTC Reduces New Hart-Scott-Rodino Filing Thresholds

For the first time in history, the Federal Trade Commission has reduced the thresholds governing premerger notification filings that must be made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR, or the Act). Effective February 22, transactions valued above $63.4 million will require HSR filings. This is a reduction from the previous threshold of $65.2 million. The filing thresholds for larger transactions have been reduced as well. The old $130.3 million threshold has been decreased to $126.9 million, and the old $651.7 million threshold has been reduced to $634.4 million.

Under the new thresholds, the filing fee for transactions valued above $63.4 million but less than $126.9 million remains at $45,000. Transactions valued above $126.9 million but below $634.4 million will require a filing fee of $125,000. Transactions valued above $634.4 million will require a filing fee of $280,000.

For transactions valued between $63.4 million and $253.7 million under the HSR Rules, the HSR "size of person" test must also be met for the Act to apply. The size of person thresholds have also been reduced. Under the new thresholds, one party to the transaction must have net sales or total assets of at least $12.7 million, and another party to the transaction must have net sales or total assets of at least $126.9 million. Transactions valued greater than $253.7 million under the HSR rules will require a filing regardless of the size of the persons involved.

The above changes to the HSR thresholds have been published in the *Federal Register*, available here.

EXECUTIVE COMPENSATION AND ERISA

DOL Issues Safe Harbor Rule for Timely Deposit of Contributions to Small Plans

Last week, the Department of Labor (DOL) published a final rule which allows employee benefit plans with fewer than 100 participants to comply with time limits for the segregation and deposit of participant contributions to employer-sponsored pension and welfare benefit plans. An employer's failure to promptly deposit contributions into a plan account is a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA) and certain provisions of the Internal Revenue Code (the Code), which potentially exposes the employer (or plan sponsor) to excise tax and other liability. The final rule amends the existing regulation by establishing a safe harbor period to provide small plan sponsors a higher degree of certainty with respect to the required timing of such deposits.

The previous rule was issued by the DOL in 1988 and, for purposes of ERISA and the Code, defined "plan assets" as amounts withheld from or paid by a participant for contribution to an employee benefit plan. Under the 1988 rule, plan assets were required to be deposited "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets," but no later than 90 days from the date on which contribution amounts are received or withheld from a participant. The DOL amended the existing rule in 1996 to reduce the outer limit for deposit of participant pension plan contributions to the 15th business day of the month following the month in which such contributions are received or withheld from a participant. Under the 1996 amendment, participant contributions to welfare plans still became plan assets on the earliest date they could reasonably be segregated from the employer's assets, but the 90-day outer limit was retained.

The DOL tried to clarify that the 15-day (in the case of pension plan contributions) and 90-day (in the case of welfare plan contributions) maximum time periods were intended to apply in limited circumstances and were not safe harbors, but plan administrators and employers remained uncertain and mistakenly applied the law and/or interpreted DOL guidance to mean that they had until the applicable 15th or 90th day to make such deposits. Last week's final rule mirrors a 2008 DOL proposed safe harbor, under which eligible employers with small plans would be considered to have made timely deposits within 7 business days. Specifically, participant contributions to a pension plan will be treated as having been made to the plan in accordance with the general rule if contributions are deposited by the 7th business day following the day on which an amount is received by the employer (where the plan participant or beneficiary remits payments to the employer) or on the 7th business day following the day on which such amount would have been payable to the employee (where the employer withholds amounts from a participant's wages). Contributions will be considered "deposited" upon remittance into any account of the plan without regard to allocation to specific participants or participant investments. The final rule does not apply to plans with more than 100 participants. As a result, contributions to such plans must still be made as soon as they can be segregated from the employer's general assets.

The final rule was published in the January 14 edition of the *Federal Register* and was immediately effective on the date of publication.

The final rule can be found here.

UK DEVELOPMENTS

FSA Fines Standard Life £2.45M for Systems and Controls Failures

On January 20, the UK Financial Services Authority (FSA) announced that it had fined Standard Life Assurance Limited (SLAL) £2.45 million (approximately $3.9 million) for systems and control failures which had led to SLAL

circulating misleading marketing material about one of its funds.

The FSA ruled that SLAL had breached two of the FSA's Principles for Businesses—Principle 3 (management and control) and Principle 7 (communications with clients). The FSA concluded that:

- marketing material regarding the fund was not "clear, fair and not misleading"—it referred to the fund being wholly invested in cash despite the majority of the fund's investments being in floating rate notes; and
- there were no adequate systems and controls in place at SLAL to ensure that marketing material that was issued accurately reflected relevant investment strategies, and as a result, in this case customers were given misleading information.

The fine was discounted from £3.5 million (approximately $5.6 million), since SLAL had cooperated fully with the FSA and had agreed to settle at an early stage in the investigation. Margaret Cole, the FSA Director of Enforcement and Financial Crime, said, "The FSA takes the issue of misleading financial promotions very seriously and the fine announced today demonstrates our commitment to the principle of credible deterrence. It is critical that consumers are given an accurate understanding of the nature of investment products and the risks involved."

To read the decision in full, click here.

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