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SEC/CORPORATE

PCAOB Proposes to Change Form and Content of Audit Reports

On June 21, the Public Company Accounting Oversight Board (PCAOB) issued a Concept Release in which it proposed potential alternatives for changing the content of audit reports in order to "provide investors with more transparency into the audit process and more insight into the company's financial statements or other information outside the financial statements." The proposed alternatives (which are not mutually exclusive) include:

- *Auditor's Discussion and Analysis* – A revised auditor reporting model could include a supplement to the auditor's report in which the auditor would be required to provide additional information about its audit and the company's financial statements in a so-called "Auditor's Discussion and Analysis" (AD&A). The AD&A could include information regarding audit risk identified in the audit, audit procedures and results, auditor independence and a discussion of the auditor's views regarding the company's financial statements, such as management's judgments and estimates, accounting policies and practices and difficult or contentious issues, including "close calls" reflected in the financial statements. The AD&A could also highlight areas where the auditor believes management could have applied different accounting or disclosures.

- *Emphasis Paragraphs* – Another alternative could require and expand the use of emphasis paragraphs in the auditor's report in order to emphasize a matter regarding the financial statements. Emphasis paragraphs could be required with respect to financial statement disclosure involving significant management judgments and estimates, significant measurement uncertainty and other areas that the auditor determines are important for a better understanding of the financial statements.

- *Auditor Assurance on Information Outside the Financial Statements* – Another alternative could require auditors to provide assurance on information outside the financial statements, such as Management's Discussion and Analysis or non-Generally Accepted Accounting Principles financial information disclosed in earnings releases.

- *Clarification of the Standard Auditor's Report* – The final proposed alternative would involve clarifying language in audit reports by requiring audit reports to include a description of the "reasonable assurance" auditing standard, statements as to the scope of the auditor's responsibilities under applicable auditing standards and clarification of management's responsibilities in preparing the financial statements.

Although the PCAOB noted that the proposals were not intended to change the fundamental role of the auditor in performing an audit, "depending on the nature and extent of additional information to be communicated by the auditor in the auditor's report, new auditing requirements and coordination with the Securities and Exchange Commission would likely be necessary." Further, certain alternatives might result in an increase in the scope of audit procedures beyond those currently required, which in turn would require new auditing standards.

The PCAOB is soliciting comments regarding the proposed alternatives (and other potential alternatives) for changing the current audit report model and expects to hold a public roundtable in the third quarter of 2011 to discuss the alternatives addressed in the Concept Release and other alternatives.

Click here to view the complete text of the PCAOB Concept Release.

BROKER DEALER

CBOE Announces New WebCRD Registration Categories

Effective June 20, three new registration categories, including (1) Proprietary Trader – PT, (2) Proprietary Trader Compliance Officer – CT, and (3) Proprietary Trader Principal – TP, became available to Chicago Board Options Exchange (CBOE) and CBOE Stock Exchange (CBSX) Trading Permit Holders (TPH) on WebCRD (CRD). All of the new registration categories are subject to certain qualification and examination requirements. Individuals may request a waiver from a qualification examination, which will be reviewed on an individual basis. Due to rule changes passed in November 2010, all individual TPHs and individual associated persons who did not actively maintain a registration in CRD and engaged in the securities business of a CBOE or CBSX TPH or TPH organization were required to register in CRD in the Approved Person (AP) category. Now, individual TPHs and/or individual associated persons engaged in a TPH's securities business that do not conduct a public customer business on behalf of the TPH must register and qualify in the new applicable registration categories. Individual TPHs and individual permit holders that register in one or more of the new registration categories will no longer have to maintain registration as an AP. Individuals must register and pass any appropriate qualification examination(s) for their appropriate registration category by August 12. CBOE is continuing to work with the staff from the Division of Trading and Markets at the Securities and Exchange Commission and will announce any changes to the deadline via a Regulatory Circular.

Click here to read Regulatory Circular RG11-077.

FINRA Revises Treatment of Non-Margin Eligible Equity Securities and Delays Effective Date

The Financial Industry Regulatory Authority announced in Regulatory Notice 11-30 that it is deferring the effective date for treatment of non-margin eligible equity securities to October 3. In April, FINRA issued Regulatory Notice 11-16, which clarified margin requirements for both long and short non-margin eligible equity securities in Regulation T and portfolio margin accounts. In addition, the Notice provided that a member firm must issue a day-trade call if a customer day traded a non-margin eligible equity security whose special maintenance margin requirement of 100% exceeded one times the regulatory maintenance excess. If the resulting day-trade call was not satisfied within five business days, a member firm would be required to cancel any day-trade transaction of such securities. FINRA has stated that it understands that the requirement to cancel day-trade transactions may cause operational issues and therefore is revising the cancellation requirement to require that for customers who fail to meet a day-trade call issued as a result of day-trading of a non-margin eligible equity security, member firms will be required to restrict all day-trading activity for such customers to one times the regulatory maintenance excess for a period of 90 calendar days.

Click here to read Regulatory Notice 11-30.

Click here to read a summary of FINRA's treatment of non-margin eligible equity securities in Regulatory Notice 11-16.

FINRA Provides Interpretive Guidance Concerning Acceptance of Market Orders under Rule 5131

The Financial Industry Regulatory Authority received several interpretive questions about the market orders provision of Rule 5131 and has issued interpretive guidance in Regulatory Notice 11-29 (Notice) to facilitate member firm compliance with the Rule. For example, FINRA provides that the market orders provision of Rule 5131 applies to both over-the-counter (OTC) equity securities and National Market System (NMS) stocks. In addition, for the purposes of the market orders provision, the "commencement of trading" in the secondary market of shares of a new issue (1) that is an NMS stock would be evidenced by the first trade on the national securities exchange listing the security (as indicated by the dissemination of an opening transaction in the security by that exchange), and (2) that is an OTC equity security would be evidenced by the first regular way, disseminated trade reported to the OTC Reporting Facility during normal market hours. The Notice also reconfirmed September 26 as the new implementation date for paragraphs (b) and (d)(4) of FINRA Rule 5131.

Click here to read Regulatory Notice 11-29.

Click here to read a summary of the SEC's approved rule changes to FINRA Rule 5131 as reported in the May 20 edition of *Corporate and Financial Weekly Digest*.

CFTC

CFTC Approves Final Rules under Dodd-Frank

At a July 7 meeting, the Commodity Futures Trading Commission approved five final rulemakings under the Dodd-Frank Wall Street Reform and Consumer Protection Act: (1) large trader reporting for physical commodity swaps; (2) anti-manipulation and anti-fraud requirements; (3) the definition of an "agricultural commodity;" (4) protection of consumer information under the Fair Credit Reporting Act; and (5) the scope of consumer privacy protections under the Gramm-Leach-Bliley Act.

- **Large Trader Reporting for Physical Commodity Swaps:** The CFTC approved rules governing position reporting for physical commodity swaps (i.e., swaps for which the underlying interest is a physical commodity) that are deemed economically equivalent to regulated futures contracts. These rules are intended to implement a system for the collection of swap position data until such time as the registered swap data repository system established by the Dodd-Frank Act becomes fully operational. The new rules will apply to 46 physical commodities (which include agricultural commodities, soft commodities, metals and energy contracts) and will require clearing organizations, clearing members and swap dealers to report economically equivalent swap positions in excess of a specified size to the CFTC on a daily basis. Under the new rules, a swap transaction may be deemed economically equivalent to a regulated futures contract because the swap transaction either (1) references the settlement price of the regulated futures contract, or (2) is priced on the same commodity at the same location(s) as that of the regulated futures contract. A swap position would be deemed reportable under the new rules if it is, in any one futures equivalent month, comprised of 50 or more economically equivalent swaps (on a futures equivalent basis) based on the same commodity underlying any of the regulated futures contracts identified in the rules.

  Clearing organizations will be required to make daily reports with respect to the aggregate proprietary and aggregate customer accounts of each of their clearing members, while clearing members and swap dealers will be required to make daily reports regarding their reportable principal (proprietary) and counterparty positions. The new rules will also require clearing organizations, clearing members, swap dealers and other market participants with reportable positions to maintain certain records relating to their transactions in economically equivalent swaps governed by the rules and to submit to CFTC special calls for information with respect to any reportable positions.

- **Anti-Manipulation and Anti-Fraud Requirements:** The CFTC also approved rules to implement Section 753 of the Dodd-Frank Act, which prohibits manipulation and fraud in connection with any swap or contract of sale of a commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity. Specifically, Section 753 expands the CFTC's power to prosecute manipulative and fraudulent behavior, including price manipulation (even in the absence of fraud) and manipulation by false reporting. Final Rule 180.1 is modeled after Securities and Exchange Commission Rule 10b-5 and prohibits manipulative and deceptive devices and contrivances, employed intentionally or recklessly, whether or not the conduct at issue created, or was intended to create, an artificial price. Failing to disclose information prior to entering into a transaction, either in an anonymous market setting or in bilateral negotiations, will not alone violate Rule 180.1, although trading based on material nonpublic information that was obtained either through fraud or deception or in breach of a pre-existing duty may. Rule 180.2 makes it unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap or any commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity. The four-part test for manipulation developed by case law (under former Commodity Exchange Act (CEA) Sections 6(c) and 9(a)(2)) will guide the application of Rule 180.2. Rules 180.1 and 180.2 take effect 30 days after their publication in the *Federal Register*.

- **Definition of Agricultural Commodity:** The CFTC adopted a definition of the term "agricultural commodity" comprised of the following four categories:

  1) the enumerated commodities listed in CEA Section 1a (e.g., wheat, cotton, corn, livestock);

  2) a general operational definition that covers "[a]ll other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal

feed, or natural fiber." This category distinguishes between products derived from living organisms used for human food, shelter, animal feed or natural fiber (which are covered by the definition) and products that are produced through processing plant or animal-based inputs to create products largely used as industrial inputs (which are not covered by the definition);

3) a catch-all category for commodities that would generally be recognized as agricultural in nature, but that do not satisfy the general operational definition: "Tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation, or order designate after notice and opportunity for hearing;" and

4) a provision applicable to "[c]ommodity-based indices based wholly or principally on underlying agricultural commodities."

- **Protection of Consumer Information Under the Fair Credit Reporting Act:** The CFTC also approved rules permitting consumers to prohibit entities that are subject to CFTC jurisdiction (regardless of whether such entities are required to register with the CFTC) from using certain consumer information obtained from an affiliate to make "solicitations" to consumers for marketing purposes. Further, such entities maintaining or possessing consumer information in connection with their business activities are required to develop and implement written programs and procedures for the proper disposal of such information. Under the rules, "solicitation" means the marketing of financial products or services to a particular consumer based on certain information communicated by the entity's affiliates. The term does not include communications to the general public without regard to consumers' personal information, even if the communications are intended to encourage consumers to purchase final products and services from the entity initiating the communications.

  The final rules also present a variety of measures that an entity may use to satisfy the "reasonable disposal" requirement. An entity subject to the adopted regime can make solicitations to a consumer based on the consumer's information if (1) the consumer is given clear, conspicuous, and concise notice, (2) the consumer is given a reasonable opportunity to opt out of such use of the information, and (3) the consumer does not opt out. Should a consumer opt out, the opt-out period is for a period of at least five years. The final regulations take effect 120 days after the date of their publication in the *Federal Register*.

- **Scope of Consumer Privacy Protections Under the Gramm-Leach-Bliley Act:** Finally, the CFTC approved rules expanding the scope of existing Part 160 regulations, pertaining to privacy of consumer financial information, to include swap dealers and major swap participants (regardless of whether such entities are required to register with the CFTC). The final rules become effective 120 days after the date of their publication in the *Federal Register*.

Information regarding these final rules, including the fact sheets and Q&As regarding each of the rules, is available here.

CFTC Publishes Request for Information in Connection with Review of CFTC Rules

In compliance with Executive Order 13563, "Improving Regulation and Regulatory Review," the Commodity Futures Trading Commission has developed a Plan to review its existing regulations to evaluate their continued effectiveness in achieving the objectives for which they were adopted. Under the Plan, after the CFTC has substantially finished promulgating rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFTC intends to conduct reviews of those regulations not examined in connection with the Dodd-Frank Act, to determine whether any such regulations should be modified or repealed in order to make the CFTC's regulatory program more effective and less burdensome. The CFTC has requested comments on the Plan by interested parties. Comments must be received by August 29.

The *Federal Register* release of the CFTC's request for information regarding the Plan can be found here.

LITIGATION

Investors in Argentine Bonds Entitled to Millions in Additional Interest

The New York Court of Appeals held that, under the terms of bond documents requiring biannual interest payments "until the principal…is paid," Argentina was contractually obligated to make biannual interest payments to bondholders even after the bonds' scheduled maturity date in 2005 and after certain bondholders accelerated the maturity date following Argentina's default in 2001. Because the bond documents required interest payments "until the principal…is paid," Argentina's obligation continued until it repaid the principal in full or until its obligation was "merged" into a final judgment.

In 1998, Argentina issued $200 million worth of Floating Rate Accrual Notes scheduled to mature in April 2005. Under the terms of the bond documents, Argentina assumed the obligation to pay bondholders interest-only payments twice a year until the principal was paid at a floating interest rate that would rise or fall based on changes in Argentina's financial condition. Bondholders were permitted to accelerate the due date of the principal in the event of a default.

During a 2001 financial crisis, Argentina defaulted on the bonds by announcing that it would no longer service its external debt and by ceasing to make the biannual payments on the Floating Rate Accrual Notes due to mature in April 2005. As a result of the defaults, the floating interest rate on the bonds soared to 50.5% per biannual period (from a normal range of 9% to 14%).

The bondholders sued in the U.S. District Court for the Southern District of New York to recover lost principal and interest. Argentina conceded its obligation to repay principal, but argued that its obligation to make biannual interest payments terminated when the bonds matured or when the bondholders accelerated the maturity date following Argentina's default. The bondholders argued that they were entitled to both the contract interest rate and an award of 9% statutory prejudgment interest under Civil Practice Laws and Rules Section 5001.

The case proceeded through the federal courts until the U.S. Court of Appeals for the Second Circuit certified the key issues to the New York Court of Appeals.

The New York Court of Appeals noted the general rule that, in the absence of express agreement on the issue, New York courts will apply the 9% statutory interest rate from the date of default. Where, however, the parties' contract expressly provides for payment of interest at a specified rate "until the principal shall be repaid," such a provision will be enforced. The Court of Appeals found that the plain text of the bond documents (which were negotiated by sophisticated parties) made clear that Argentina's obligation to pay interest did not cease at maturity or acceleration, but only at payment of principal.

The Court of Appeals also found that the bondholders were entitled to the 9% statutory interest rate. In rejecting Argentina's contention that such an award provided an unwarranted windfall or "interest on interest," the Court of Appeals found that the award of contract interest compensated the bondholders for Argentina's failure to repay principal, and the award of statutory interest compensated the bondholders for the separate injury cased by Argentina's failure to make the contractual biannual interest payments. (*NML Capital, et al. v. Republic of Argentina*, Civ. Action No. 128 (N.Y. June 30, 2011))

Facebook Profile Subject to Discovery

The U.S. District Court for the Middle District of Pennsylvania recently considered whether information contained within a party's Facebook account is properly subject to discovery.

The case arose from a November 2008 car accident that, according to the plaintiff, caused severe injuries limiting his ability to sit, walk, stand, bend, stoop, push, pull and lift. Plaintiff specifically claimed that he could not drive for any period of time and was physically limited with regard to riding his bicycle or motorcycle. In addition, Plaintiff alleged that the accident caused decreased sociability and lack of intimacy.

Defendants requested information from plaintiff's social media accounts during discovery. Both parties invited the judge to examine the plaintiff's Facebook profile to determine the extent to which information in the account was subject to discovery under Federal Rule of Civil Procedure 26(b)(1).

After an *in camera* review of the plaintiff's Facebook account, the court found that much of the information was irrelevant, but that postings suggesting that plaintiff engaged in certain activities subsequent to the car accident were discoverable. Specifically, the court found that various postings showing the plaintiff had taken post-accident motorcycle rides, mule rides and hunting trips were relevant and discoverable in light of plaintiff's impaired mobility claims. (*Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D.Pa. June 22, 2011))

BANKING

FDIC Issues Final Rule under Orderly Liquidation Authority Provisions of Dodd-Frank Act

In a long awaited action, the Federal Deposit Insurance Corporation (FDIC) issued a final rule on July 6 which addresses the FDIC's rights and powers as receiver of a nonviable systemic financial company under the orderly liquidation authority provisions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Chairman Sheila Bair, conducting her last meeting before leaving the agency, stated that, "A fair amount of the goal of the orderly liquidation authority is to convince investors in large financial institutions that their money is at risk if the institution fails." The final rule will adopt with certain changes the proposed rule set forth in the Notice of Proposed Rulemaking (NPR) approved by the FDIC's Board on March 15 and also will incorporate, with certain changes, the Interim Final Rule (IFR) issued by the Board on January 18. Of particular interest is the so-called "claw-back" rule, which will allow the FDIC to recoup certain earnings of senior executives for mere negligence, as opposed to a higher standard of gross negligence. The final rule did not finalize the criteria for determining whether a company is predominantly engaged in activities that are financial in nature or incidental thereto, which will determine in part whether a company needs to write and submit for approval a "living will."

The final rule is divided into three subparts: A, B, and C. Subpart A, among other things, provides that (1) services rendered by employees to the FDIC as receiver for a covered financial company will be compensated according to the terms and conditions of any applicable personal service agreements, and that such payments will be treated as an administrative expense; (2) in the event that the FDIC acts as receiver for a direct or indirect subsidiary of an insurance company and that subsidiary is not an insured depository institution or an insurance company itself, the value realized from the liquidation of the subsidiary will be distributed according to the order of priorities set forth in the Dodd-Frank Act; (3) the FDIC will avoid taking a lien on some or all of the assets of a covered financial company that is an insurance company or a subsidiary that is an insurance company unless it determines that taking such a lien is necessary for the orderly liquidation of the covered financial company and will not unduly impede or delay the liquidation or rehabilitation of the insurance company or the recovery by its policyholders; (4) the FDIC as receiver of a covered financial company may recover from senior executives and directors who were substantially responsible for the failed condition of the company any compensation they received during the two-year period preceding the date on which the FDIC was appointed as receiver, or for an unlimited period in the case of fraud. Subpart A also clarifies the interpretation of provisions of the Dodd-Frank Act authorizing the FDIC as receiver of a covered financial company to avoid fraudulent or preferential transfers in a manner comparable to the relevant provisions of the Bankruptcy Code, so that transferees will have the same treatment in a liquidation under the Dodd-Frank Act as they would have in a bankruptcy proceeding.

Subpart B provides additional context and definition with respect to claims arising out of "amounts owed to the United States," and includes Section 380.24, which confirms the statutory treatment of claims arising out of the loss of setoff rights at a priority ahead of other general unsecured creditors if the loss of the setoff is due to the receiver's sale or transfer of an asset. Section 380.25 would finalize provisions addressing the determination of post-insolvency interest on unsecured claims. Section 380.26 clarifies the payment of obligations of bridge financial companies and the rights of receivership creditors to any remaining value upon termination of a bridge financial company. Subpart B also now includes at Section 380.27 the rule originally found at Section 380.2 of the IFR, clarifying that the FDIC would not use its discretion to differentiate among similarly situated creditors under Section 210 of the Dodd-Frank Act to give preferential treatment to certain long-term senior debt with a term longer than 360 days and that subordinated debt and equity never will qualify for preferential treatment.

Subpart C sets forth the administrative process for the determination of claims against a covered financial company by the receiver. This process will not apply to any liabilities or obligations assumed by a bridge financial company or other entity or to any extension of credit from a Federal reserve bank or the FDIC to a covered financial company. Similarly, the claims process will not modify any of the provisions of the Dodd-Frank Act regarding qualified financial contracts. Under the claims procedures, the receiver will publish and mail a notice

advising creditors to file their claims by a bar date that is not less than 90 days after the date of the initial publication. Upon receipt, the receiver will have up to 180 days to determine whether to allow or disallow the claim, subject to any extension agreed to by the claimant. The claimant will have 60 days from the earlier of any disallowance of the claim or the end of the 180-day period (or any agreed extension) to file a lawsuit in federal court for a judicial determination. No court has jurisdiction over any claim, however, unless the claimant has complied with the requirements of the claims process. Subpart C also includes provisions concerning contingent claims and secured claims.

Read more.

Federal Banking Agencies Issue Guidance on Management of Counterparty Credit Risk

On July 5, the federal banking agencies jointly issued guidance on the effective management of counterparty credit risk (CCR). CCR is the risk that the counterparty to a transaction defaults or deteriorates in creditworthiness before the final settlement of the transaction. The guidance, issued by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, builds on existing supervisory guidance and outlines effective industry practices for CCR management. CCR management guidelines and supervisory expectations are delineated in various individual and interagency policy statements and guidance, which remain relevant and applicable. This guidance offers further explanation and clarification, particularly in light of developments in CCR management. However, this guidance is not all-inclusive, and banking organizations should reference sound practices for CCR management, such as those advanced by industry, policymaking and supervisory forums.

The guidance is intended primarily for use by banking organizations with large derivatives portfolios, as well as for supervisors as they assess and examine such institutions' CCR management. The guidance emphasizes that banking organizations should use appropriate reporting metrics and exposure limits systems, have well-developed and comprehensive stress testing, and maintain systems that facilitate measurement and aggregation of CCR across the organization. The guidance also includes sound practices for risk control functions including, but not limited to, validating models and systems, ensuring independent risk management and internal audit processes, and managing legal and operational risks.

Read more.

Federal Reserve Issues Final Debit Interchange Rule

On June 29, the Board of Governors of the Federal Reserve System (Federal Reserve) issued its long-awaited rule establishing standards for debit card interchange fees and prohibiting network exclusivity arrangements and routing restrictions (Debit Card Rule). The issuance of the Debit Card Rule was required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Pursuant to the Debit Card Rule, the maximum permissible interchange fee that an issuer may receive for an electronic debit transaction will be 21 cents per transaction and 5 basis points multiplied by the value of the transaction. The Federal Reserve also approved an interim final rule that allows for an upward adjustment of no more than 1 cent to an issuer's debit card interchange fee if the issuer develops and implements policies and procedures reasonably designed to achieve the fraud-prevention standards set out in the interim final rule. Eligibility for the assessment of this fee must be certified by the issuing bank.

As set forth in the issuing release, when the maximum interchange fee is combined with fraud-prevention assessment, an issuing bank could receive an "interchange fee of up to approximately 24 cents for the average debit card transaction, which is valued at $38."

In accordance with the provisions of the Dodd-Frank Act, issuers that, together with their affiliates, have assets of less than $10 billion are exempt from the debit card interchange fee standards.

Finally, the Debit Card Rule prohibits all issuers and networks from restricting the number of networks over which electronic debit transactions may be processed to less than two unaffiliated networks.

The provision of the rule regarding debit card interchange is effective on October 1, 2011.

For more information, click here.

ANTITRUST

Important Changes to Hart Scott Rodino Premerger Notification Program Announced

On July 7, the Federal Trade Commission (FTC), with the concurrence of the U.S. Department of Justice, announced significant amendments to the Hart-Scott-Rodino (HSR) Premerger Notification Program. A special Katten *Client Advisory* will be distributed in the next several days describing the changes in detail. The changes will significantly affect private equity funds, hedge funds and other investors who use multiple investment funds as acquisition vehicles and employ common managers for those funds. The amendments will go into effect 30 days after their publication in the *Federal Register*. The key changes are summarized below.

First, the new HSR Rules expand an Acquiring Person's reporting obligations by requiring that certain information be provided concerning the holdings of the Acquiring Person's "Associates"—a new defined term created in the HSR amendments. While the concept of "Associate" is quite broad, it covers (among other entities) all funds that are commonly operated or whose investment decisions are made by the same investment manager. In effect, it requires all funds in a family of commonly managed funds to provide certain information for the acquiring fund's HSR filing. Currently, only the fund making the acquisition must provide such information.

Second, the new changes require that the Acquiring Person provide information concerning its Associates' holdings of stock or assets in the Acquired Person and their holdings in other businesses that are in the same North American Industry Classification System (NAICS) classification as the Acquired Person. Essentially, any Associate holdings of the Acquired Entity, or possible competitors of the Acquired Entity, must now be disclosed in the HSR filing. Currently, this information need only be provided for the Acquiring Person itself, not its Associates

Third, the category of documents concerning competition that must be submitted with the filing has been expanded. Currently, documents addressing competitive issues that were prepared by or for officers or directors of the parties in connection with the transaction need be produced. Under a new section that is being added to the HSR Premerger Notification and Report Form, Confidential Information Memoranda, documents prepared by third parties (such as investment bankers and other consultants) that address competition issues related to the acquired entity or assets, and analyses of synergies or efficiencies expected to result from the acquisition, must all be included with the HSR filing.

Finally, the FTC will now require that products manufactured by a filing party outside the United States that are then sold in the United States be reported in the filing and identified by their 10-digit NAICS manufacturing codes. Previously these sales did not have to be reported as manufactured goods.

In sum, the amendments announced by the FTC will materially increase the time and effort required for some acquirers to complete their HSR filings. For firms that make many acquisitions and operate multiple funds, it may be advisable to maintain a filing "on the shelf" that has up-to-date information concerning the firm's "Associates" so that the filing may be prepared quickly once a deal is negotiated and signed. Otherwise, the HSR preparation process may stretch from a few days to a week or more. It may also be advisable in light of the new changes to negotiate longer deadlines for HSR filings in acquisition agreements.

Read more.

EXECUTIVE COMPENSATION AND ERISA

IRS Proposes Regulations Clarifying 162(m) Compensation Deduction Rules

The Internal Revenue Service recently issued proposed changes to the compensation deduction rules under Section 162(m) of the federal tax code. Section 162(m) generally limits a public company's compensation deduction with respect to its top executives to $1 million per executive per tax year. If adopted, the proposed changes would clarify two details related to certain exceptions to the Section 162(m) deduction limit discussed below.

To the extent it is considered "performance-based," compensation is exempt from the $1 million deduction limit of Section 162(m). Stock options and stock appreciation rights (SARs) are only able to be considered "performance-

based compensation" if certain requirements are met. One such requirement dictates that the plan under which an option or SAR is granted must specify the maximum number of options or SARs an employee may receive during a specified period of time. The proposed changes clarify that that the plan must state a *per-employee* limit (e.g., 100,000 shares per any 3-year period) to qualify the options and SARs as "performance-based compensation." If a plan only states an aggregate limit on the maximum number of shares that can be granted under the plan, the options and SARs will not qualify as "performance-based compensation" for purposes of Section 162(m).

The Section 162(m) regulations contain special rules that exempt certain payments from the Section 162(m) requirements if they are paid by a company that transitions from privately held to publicly held. One of these rules generally exempts compensation paid pursuant to a plan or agreement that existed prior to the company becoming publicly held for a limited period of time after the company becomes publicly traded (Transition Period). Under this exemption, compensation stemming from exercise of an option or SAR, or vesting of restricted stock, granted during the Transition Period is also exempt, even if such exercise or vesting occurs after the Transition Period. Practitioners have previously questioned whether this relief is also available for restricted stock units and phantom stock awards. The IRS's proposed changes clarify that such relief would *not* apply to restricted stock units or phantom stock. Thus, only restricted stock units and phantom stock paid during the Transition Period would be exempt from Section 162(m) under the special transition rules. If such an award is granted during the Transition Period, but paid after the Transition Period, it is subject to the $1 million deduction limit of Section 162(m).

The IRS is currently soliciting comments about these proposed changes and indicated that they will be effective following publication of final changes. The proposed rules can be found here.

UK DEVELOPMENTS

FSA Publishes Paper on FCA's Approach to Regulation

On June 27, the UK Financial Services Authority (FSA) published a paper on the regulatory approach of the new Financial Conduct Authority (FCA), which will be one of two regulatory agencies scheduled to replace the FSA in 2013, the other being the Prudential Regulation Authority (PRA).

The paper sets out the FSA's initial thinking on how the FCA will approach the delivery of its statutory objectives. It covers the FCA's:

- scope, and the number of firms it is expected to regulate, either solely or jointly with the PRA;
- objectives and powers, including its approach to its new competition role and how it will coordinate with the PRA and other regulators;
- regulatory approach, including details of its attitude to proactive intervention and how it will follow up existing FSA regulatory initiatives; and
- regulatory activities, and its risk framework and supervisory framework.

It also considers how the FCA will supervise markets, and its approach to wholesale business.

Read more.

EU DEVELOPMENTS

AIFMD Published in EU Official Journal

On July 1, the final text of the EU Alternative Investment Fund Managers Directive (AIFMD), passed by the European Parliament in November 2010 and formally adopted by the EU Council in May, was finally published in the EU Official Journal. The AIFMD comes "into force" on July 21, 20 days after publication. The deadline for EU Member States to implement AIFMD into national law is two years after that date, July 22, 2013. Firms requiring authorization as alternative investment fund managers will have until July 22, 2014, to obtain such authorization.

Level 2 regulations dealing with matters of detail under the AIFMD will be adopted by the European Commission, assisted by the European Securities and Markets Authority (ESMA). ESMA's draft level 2 advice to the European Commission is expected to be published before the end of November.

Read more.

European Parliament Votes on EMIR

On July 5, the European Parliament (EP), in plenary session, voted on and approved a text of the European Market Infrastructure Regulation (EMIR) based on the text passed by the Parliament's ECON committee in May (see the May 27 edition of *Corporate and Financial Weekly Digest*). This version will now represent the EP's position when it enters into trilogue negotiations with the European Council and the European Commission to reach an agreed EMIR text.

Trilogue negotiations will not start until the European Council reaches an agreement on its EMIR text. This is expected by October. There is therefore a strong probability that final agreement on the text of EMIR will be reached before the end of 2011.

Read more.

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