Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

June 1, 2007

SEC/Corporate

HP Settlement Provides Guidance on Form 8-K Reporting of Director Resignations

On May 23, the Securities and Exchange Commission settled administrative charges against Hewlett-Packard Company (HP) for failing to disclose the circumstances that led to the resignation of director Thomas Perkins. The SEC maintained that HP should have disclosed the circumstances of Mr. Perkins' disagreement with HP in the Form 8-K it filed, rather than simply disclosing that he resigned. HP neither admitted nor denied the SEC's findings but consented to an order to cease and desist from committing or causing violations of these provisions.

Item 5.02(a) of Form 8-K requires disclosure of the circumstances of a director's resignation when it is "because of a disagreement with the registrant, known to an executive officer of the registrant...on any matter relating to the registrant's operations, policies, or practices." It also requires that the director be given the opportunity to review and respond to the registrant's disclosures concerning the disagreement. The SEC found that Mr. Perkins resigned because of his objections regarding the manner in which a leak investigation was presented to the board of directors (he believed the director who was subject to the investigation should have been told privately first) and because he disagreed with the decision to ask the director to resign, citing the director's contributions to HP.

HP, after consultation with outside counsel, took the position that this was a disagreement between Mr. Perkins and HP's Chairman, not a disagreement relating to HP's operations, policies or practices, and disclosed only the fact of Mr. Perkins' resignation pursuant to Item 5.02(b). The SEC argued that the disagreement, to the extent it involved HP's corporate governance practices and policies concerning confidential information, should have been disclosed under Item 5.02(a).

http://www.sec.gov/litigation/admin/2007/34-55801.pdf.

http://www.sec.gov/news/press/2007/2007-103.htm

SEC Adopts Final Rules Implementing Credit Agency Reform Act of 2006

On May 23, the Securities and Exchange Commission adopted final rules implementing provisions of the Credit Rating Agency Reform Act of 2006, which gave the SEC authority to implement registration, recordkeeping, financial reporting and oversight rules with respect to nationally recognized statistical rating organizations (NRSROs) intended to foster competition,

SEC/CORPORATE

For more information, contact:

Robert L. Kohl
212.940.6380
robert.kohl@kattenlaw.com

Mark A. Conley
310.788.4690
mark.conley@kattenlaw.com

David A. Pentlow
212.940- 6412
david.pentlow@kattenlaw.com

accountability and transparency in the credit rating industry currently dominated by only a few agencies. The rules, among other things:

- Require a credit rating agency to apply to the SEC for registration as an NRSRO and, if approved, to provide the SEC with information including the classes of credit ratings for which it is applying to be registered, credit ratings performance statistics, a general description of its methodologies for determining credit ratings, procedures for managing conflicts of interest, and qualifications of credit analysts;

- Require NRSROs to make and retain records relating to its business as a credit rating agency;

- Require NRSROs to furnish financial information to the SEC, on a confidential basis, including audited financial information;

- Require written policies reasonably designed to prevent inappropriate dissemination of material nonpublic information obtained in connection with the performance of credit rating services, trading by NRSRO personnel on the basis of material nonpublic information and the inappropriate dissemination of a pending credit rating prior to its issuance;

- Require disclosure and management of conflicts of interest; and

- Prohibit NRSROs from engaging in certain unfair, abusive, or coercive practices.

http://www.knowledgemosaic.com/Gateway/Rules/PRE.2007-104.052307.htm

Broker Dealer

NASD Proposes Changes to Order Audit Trail System

The National Association of Securities Dealers has proposed changes to NASD Rules 6951 and 6954 to require members who transmit an intermarket sweep order (ISO) to another member, electronic communications network, non-member or exchange to record and report to NASD that such order was an ISO. Members will be required to include this information in their Route Reports submitted to NASD pursuant to the NASD's Order Audit Trail System (OATS) rules. The effective date for the new rules is scheduled for February 4, 2008, to coincide with the effective date of other amendments to the OATS rules previously approved by the Securities and Exchange Commission. However, NASD intends to make the ISO routing method code available for use on Route Reports beginning June 11, 2007 and encourages members to begin using the code as soon as possible.

The comment period for this proposal closes June 21.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10405.pdf

NASD Proposes New Rule Regarding Designated Contact Information

The National Association of Securities Dealers has proposed a new rule regarding the reporting and review of designated contact information. New Rule 1160 would consolidate and amend certain obligations of its members to identify and report to NASD information regarding designated contact persons, which currently appear in Rules 1120, 1150, 3520 and IM-3011-2. The new

BROKER DEALER

For more information, contact:

James D. Van De Graaff
312.902.5227
james.vandegraaff@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

Patricia L. Levy
312.902.5322
patricia.levy@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Janet M. Angstadt
312.902.5494
janet.angstadt@kattenlaw.com

rule would require members to provide the required designated contact information and to update it no later than 30 days following any change.

In addition, the new rule requires members to promptly comply with any NASD request for such information (no later than 15 days after the request). However, the quarterly review of contact information that is required by the existing rules listed above would be replaced by an annual review under the new rule, with the obligation to update contact information within 17 business days after the end of each calendar year. The new rule would also eliminate the requirement that only a firm's Executive Representative be permitted to review or update the firm's emergency contact information.

The comment period for this proposal closes June 21.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10403.pdf

NSX to Require Annual Certification of Compliance Policies

The Securities and Exchange Commission has approved a new National Stock Exchange (NSX) rule requiring each NSX Equity Trading Permit (ETP) Holder to have its CEO (or equivalent officer) certify annually that the ETP Holder has in place processes to establish, maintain, review, modify and test its compliance policies and procedures. NSX also has adopted an Interpretation and Policy to accompany the new rule, which sets forth the language of the CEO certification and provides additional guidance for complying with the certification requirement. This Interpretation requires ETP holders to prepare a report for review by the CEO and chief compliance officer prior to the certification that documents the firm's processes for setting and updating its compliance policies and procedures.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10375.pdf

SEC Extends Phlx Directed Order Pilot Program

The Securities and Exchange Commission has approved a proposal by the Philadelphia Stock Exchange (Phlx) to extend its directed order pilot program for an additional year. The pilot allows specialists, Streaming Quote Traders (SQTs) and Remote Streaming Quote Traders (RSQTs) assigned in options that trade on Phlx XL to receive directed orders from a member (Order Flow Provider, or OFP) that submits, as agent, the customer order to Phlx through its Automated Options Market (AUTOM).

The pilot also establishes a participation guarantee to reward the directed specialist, SQT or RSQT for attracting such order flow to Phlx. Under the applicable rules, the OFP must transmit the directed order to a particular specialist, SQT or RSQT through AUTOM, and if the Phlx best bid or offer is at the national best bid and offer (NBBO), the directed order will automatically execute on Phlx XL and the directed specialist, SQT or RSQT will receive a participation allocation if it was quoting at the NBBO at the time the directed order was received.

Comments to the Phlx proposal must be submitted by June 21.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10376.pdf

Phlx Shortens Exposure Period for Marketable Customer Limit Orders

The Securities and Exchange Commission has approved a Philadelphia Stock Exchange (Phlx) proposal to shorten the exposure period for marketable public customer limit orders that are eventually routed through the Intermarket Option Linkage (the Linkage) when Phlx's disseminated market is not the national best bid and offer (NBBO). Currently, when Phlx's disseminated price on the opposite side of the market is not the NBBO, marketable public customer limit orders are exposed to the trading crowd and Phlx XL participants for three seconds before being routed through the Linkage to another exchange at the NBBO. Under the proposed rule, Phlx would shorten the exposure period to one second.

Comments to the Phlx proposal are due within 21 days of its publication in the *Federal Register*.

http://www.sec.gov/rules/sro/phlx/2007/34-55825.pdf

NYSE Proposes Changes to Rule 92

The New York Stock Exchange has proposed changes to its Rule 92, which sets out the general prohibition against NYSE members trading on a proprietary basis ahead of or along with customer orders executable at the same price. NYSE proposes to amend the rule to include an exception to the general prohibition which would permit members to trade ahead of a customer order for the purpose of facilitating the execution, on a riskless principal basis, of one or more other customer orders. The proposed exception is modeled after NASD's so-called "Manning Rule," and would permit the member, subject to certain requirements, to aggregate like customer orders for allocation (to the extent that aggregation is permissible for the customers' order types and instructions).

The proposed amendments also would eliminate the requirement to obtain order-by-order consent for a member firm to trade along with a customer's order, instead allowing customers to affirmatively grant blanket consent for subsequent trade alongs, if appropriate disclosure is provided to the customer. Finally, the proposal would create an exemption from Rule 92 to allow members who are facilitating a customer order to route intermarket sweep orders (ISOs) as required by Regulation NMS without violating Rule 92, upon certain conditions.

For purposes of the exemption, when routing ISOs the member must yield its principal executions to any open customer orders required to be protected by Rule 92 and capable of accepting the fill. In addition, the exemption would require that if the member executes an ISO to facilitate a customer order at a price inferior to a protected quotation, then either the customer must consent to not receiving the better price obtained by the ISO or the member must yield its principal execution to the customer.

The comment period for this proposal closes June 21.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10404.pdf

Investment Companies and Investment Advisers

No-Action Letter Issued on Status of Mezzanine Loans Under Investment Company Act

On May 24, the Office of the Chief Counsel of the Division of Investment Management of the Securities and Exchange Commission issued a no-action letter on the status of mezzanine loans under the Investment Company Act of 1940. The letter has significant implications for real estate investments trusts engaged in commercial lending.

Section 3(c)(5)(C) of the Investment Company Act contains a provision that excludes from the coverage of the Act certain issuers engaged in real estate activities. That section generally excludes from the definition of an Investment Company an issuer that is "primarily engaged in...purchasing or otherwise acquiring mortgages and other liens on and interests in real estate". In prior no-action letters the Staff had taken the position that, in order for an issuer to rely on this exemption, at least 55% of its assets must be invested in "mortgages and other liens on and interests in real estate" (qualifying interests), at least 25% of its assets must be invested in real estate type interests (subject to reduction to the extent that more than 55% of its assets are invested in qualifying interests) and up to 20% of its assets may be invested in miscellaneous investments.

Until this recent no-action letter, there was substantial uncertainty as to whether mezzanine loans would be classified as qualifying interests. In issuing the no-action letter, the Staff noted that, in the commercial real estate financing industry, second mortgages, which have always been classified as qualifying interests, have effectively been replaced in part by Tier I mezzanine loans. In the context of the Staff's letter, a Tier I Mezzanine Loan, is a loan to a special purpose property owning entity that is secured by all of the ownership interests in that entity. Subject to certain additional limitations described in the no-action letter, the Staff concludes that Tier I Mezzanine Loans would be considered qualifying interests for the purpose of complying with the exclusion from the definition of an investment company provided by Section 3(c)(5)(C) of the Investment Company Act. (*Capital Trust, Inc.,* 5/24/07)

http://www.sec.gov/divisions/investment/noaction/2007/capitaltrust052407-3c5c.pdf

Banking

Federal Reserve Announces Amendments to Regulation O

On May 29, the Board of Governors of the Federal Reserve System adopted final amendments to its Regulation O to eliminate certain reporting requirements. This final rule is identical to the interim rule the Federal Reserve released in December 2006 regarding the same issues. The final rule implements Section 601 of the Financial Services Regulatory Relief Act of 2006 which became effective on October 13, 2006.

The final rule eliminates the following provisions: (i) requirements that an executive officer of a member bank file a report with such bank's board whenever the executive officer receives credit from another bank; (ii) requirements that a member bank include a separate report with its quarterly Call Report regarding any extensions of credit the bank has made to its executive officers since its last report; and (iii) requirements related to the

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

Marybeth Sorady
202.625.3727
marybeth.sorady@kattenlaw.com

Mark I. Fisher
212.940.8877
mark.fisher@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

Peter J. Shea
704.444.2017
peter.shea@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

BANKING

For more information, contact:

Jeff Werthan
202.625.3569
jeff.werthan@kattenlaw.com

Christina J. Grigorian
202.625.3541
christina.grigorian@kattenlaw.com

Adam Bolter
202.625.3665
adam.bolter@kattenlaw.com

reporting and public disclosure of extensions of credit to an executive officer or principal shareholder of a member bank by a correspondent bank of such member bank.

The final rule will be effective 30 days after publication in the *Federal Register*.

http://www.federalreserve.gov/boarddocs/press/bcreg/2007/200705292/attachment.pdf

Federal Reserve Sets Date for Hearing on Subprime Loans

On May 29, The Federal Reserve Board announced a June 14 public hearing under the Home Ownership and Equity Protection Act. The purpose of the hearing is to gather information about how the Board might use its rulemaking authority to curb abusive lending practices in the home mortgage market, including the subprime sector, in a way that preserves incentives for responsible lenders to provide credit to borrowers.

Hearing participants will discuss whether the Board should use its rulemaking authority to address concerns about certain terms and practices related to home mortgage loans, including:

- Prepayment penalties
- Escrow accounts for taxes and insurance on subprime loans
- "Stated income" or "low doc" loans
- Consideration of a borrower's ability to repay a loan

Participants will also discuss the effectiveness of state laws that have prohibited or restricted these and other terms or practices, and whether the Board should consider adopting similar regulations to curb abusive lending practices. The Board is also soliciting written comments from the public. Comments are due August 15.

The hearing is scheduled for Thursday, June 14, at the Federal Reserve Board in Washington, D.C. Additional information about the hearing can be found at www.federalreserve.gov. Those planning to attend the hearing should, for security purposes, register no later than June 12. An online registration form can be found at:

https://www.federalreserve.gov/secure/forms/hoeparegistration.cfm

United Kingdom Developments

New Rules Continue Move to Principles-Based Regulation

On May 31, the UK Financial Services Authority (FSA) published a Policy Statement 07/6 that marks a further significant step towards more principles-based regulation. The Policy Statement confirms the approach proposed by the FSA in October 2006 to revise its Conduct of Business rules on the basis of principles and high-level rules, except where detailed provisions are either required by EU directives, or are the only practicable way of achieving consumer protection or other regulatory outcomes.

As a result, the revised Conduct of Business rule book will be half the length of the corresponding current rule book. It will implement the relevant provisions of the EU Markets in Financial Instruments Directive (MiFID) as well as non-MiFID Conduct of Business rules.

UK DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776. 7622
martin.cornish@kattenlaw.co.uk

Edward Black
44.20.7776.7624
edward.black@kattenlaw.co.uk

Sean Donovan-Smith
44.20. 7776 7625
sean.donovan-smith@kattenlaw.co.uk

The Policy Statement also provides feedback on the responses to remaining proposals made in CP 06/19, "Reforming Conduct of Business Regulation", and CP 06/20, "Financial Promotion and other Communications". It also confirms, with some amendments, the rules and guidance published in PS 07/2, "Implementing the Markets in Financial Instruments Directive".

http://www.fsa.gov.uk/pubs/policy/ps07_06.pdf

EU Developments

CESR Publishes Final Guidance on Implementation of MiFID

On May 29, The Committee of European Securities Regulators (CESR) announced the completion of their work in relation to MiFID aimed at fostering supervisory convergence and securing consistent implementation among EU Member State regulators in the day-to-day application of the MiFID provisions. CESR has now published guidance and recommendations on inducements, best execution, passporting and transaction reporting which focuses on operational aspects and practical solutions that arise as a consequence of MiFID.

http://www.cesr-eu.org/index.php?page=document_details&id=4612&from_id=53

Litigation

Securities Fraud Claim for Failure to Plead Loss Causation Dismissed

Granting defendants' motion to dismiss plaintiff's securities fraud class action claim, a federal district court held that plaintiffs failed to adequately plead loss causation because their shares in defendants' company lost value before, not after, the truth regarding defendants' purported misrepresentations were publicly disclosed. The Court explained that to adequately plead a securities fraud claim, a plaintiff must, among other things, allege that that the defendant's misrepresentations "proximately caused" plaintiff's losses. Here, the plaintiffs' own allegations fatally undermined their theory of loss causation. Because the Complaint alleged that defendants continued to conceal the truth of their wrongdoing from the public at the time plaintiff's share prices fell, the Court determined that the losses arising from the decrease could not have been caused by the market's reaction to learning the truth about defendants' improper activity. As a result, the Court held that plaintiffs had failed to state a valid cause of action. (*Powell v. Idacorp*, 2007 WL 1498881 (D. Ida. May 21, 2007))

Circuit Court Affirms Refusal to Enforce International Arbitration Award

Finding that appellant failed to present the necessary "extraordinary circumstances" required in order for a United States court to set aside a foreign judgment on public policy grounds, the Court of Appeals for the District of Columbia Circuit refused to enforce a $60,000,000 arbitration award that had been entered by an ICC arbitration panel in Columbia and, thereafter, nullified by Colombia's highest administrative court. Appellant argued that the Colombian court had ignored both Colombian and international law in nullifying the award.

The Circuit Court rejected this argument, finding, among other things, that there was nothing in the record to indicate that the proceedings before the

EU DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776. 7622
martin.cornish@kattenlaw.co.uk

Edward Black
44.20.7776.7624
edward.black@kattenlaw.co.uk

Sean Donovan-Smith
44.20. 7776 7625
sean.donovan-smith@kattenlaw.co.uk

LITIGATION

For more information, contact:

Alan Friedman
212.940.8516
alan.friedman@kattenlaw.com

Daniel Edelson
212.940-6576
daniel.edelson@kattenlaw.com

Columbian court were "tainted" or that the judgment was not authentic. While the Circuit Court recognized that foreign judgments need not be enforced if they offend "public policy," the occasions where courts apply this rule are limited to instances where the foreign judgment is so "repugnant" as to enable the Court to conclude that the decision is contrary "to fundamental notions of what is decent and just in the United States." Because the appellants failed to meet this demanding standard, the Circuit Court affirmed the district court's dismissal of the lawsuit. *(Termorio S.A. E.S.P. v. Electranta S.P.*, 2007 WL 1515069 (D.C. Cir. May 25, 2007))

CFTC

No-Action Relief for SGX-DT U.S. Dollar Denominated Futures Contract

The Commodity Futures Trading Commission Office of General Counsel has granted no-action relief to the Singapore Exchange Derivatives Trading Limited (SGX-DT) concerning the offer and sale in the U.S. of SGX-DT's U.S. dollar denominated futures contract based on the Nikkei 225 Index. In 1986, the CFTC granted no-action relief to permit the offer and sale in the U.S. of SGX-DT's Nikkei 225 Index Japanese yen denominated futures contract. The terms and conditions of the U.S. dollar and Japanese yen contracts are substantially similar, with the only difference being that the new contract's multiplier is in U.S. dollars.

http://www.cftc.gov/files/tm/letters/07letters/tm07-07.pdf

Changes to NFA Registration Rules 203 and 214 Proposed

The National Futures Association (NFA) submitted to the Commodity Futures Trading Commission for approval a proposal to amend NFA Registration Rules 203 and 214. Currently, the late termination notice rule imposes a $100 fee on a registrant that files a notice terminating an individual as an associated person or as a principal more than 20 days after the effective date of the termination. NFA proposes to increase the 20-day window to 30 days. The proposed amendments will bring NFA's filing period and late fee rule into alignment with the corresponding provisions of National Association of Securities Dealers Bylaws. Since Commission Regulation 3.31(c)(1) also contains a 20-day filing requirement, NFA is concurrently submitting a Petition for Rulemaking to amend that regulation.

http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1858
http://www.nfa.futures.org/news/newsProposedRule.asp?ArticleID=1856

NFA Proposes Changes to Fees Related to Forex Dealers

The National Futures Association (NFA) submitted to the Commodity Futures Trading Commission for approval a proposal to amend NFA Bylaws 1301, 1302 and 1303 and the Interpretive Notice regarding Forex Transactions. NFA Bylaw 1301(e) imposes annual dues on Forex Dealer Members (FDMs) based on their gross annual revenue from their forex business. NFA indicated in its filing that the number of active FDMs has increased and the liabilities to customers has continued to rise since the dues were last increased in 2005. The proposed amendments would (i) raise the minimum and maximum annual dues, (ii) add a transaction fee based on the notional value of each transaction, and (iii) add a charge for unregulated entities that solicit or introduce retail business or manage retail accounts for the FDMs.

http://www.nfa.futures.org/news/newsProposedRule.asp?ArticleID=1862

CFTC

For more information, contact:

Kenneth Rosenzweig
312.902.5381
kenneth.rosenzweig@kattenlaw.com

William Natbony
212.940.8930
william.natbony@kattenlaw.com

Fred M. Santo
212.940.8720
fred.santo@kattenlaw.com

Kevin Foley
312.902.5372
kevin.foley@kattenlaw.com

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to Regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

Charlotte
401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

Chicago
525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

Irving
5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

London
1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

Los Angeles
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

New York
575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

Palo Alto
260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

Washington, DC
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax