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Corporate and Financial Weekly Digest

June 15, 2007

SEC/Corporate

The SEC Schedules Open Meetings on June 19 and June 20

The Securities and Exchange Commission has scheduled Open Meetings on Tuesday, June 19 and Wednesday, June 20.

The subject matter of the Open Meeting on June 19 will be a roundtable discussion regarding Rule 12b-1 under the Investment Company of 1940.

The subject matter of the Open Meeting on June 20 will be the following:

- The SEC will consider whether to adopt amendments to expand its interactive data voluntary reporting program to permit mutual funds to submit as exhibits to their registration statements supplemental tagged information contained in the risk/return summary section of their prospectuses.

- The SEC will consider whether to propose amendments to Form 20-F, Rules 3-10 and 4-01 of Regulation S-X, Forms F-4 and S-4, and Rule 701 under the Securities Act of 1933, to accept financial statements prepared in accordance with International Financial Reporting Standards as published by the International Accounting Standards Board without reconciliation to generally accepted accounting principles as used in the U.S. when contained in the filings of foreign private issuers with the SEC.

- The SEC will consider whether to adopt amendments to the proxy rules under the Securities Exchange Act of 1934 to provide shareholders with the ability to choose the means by which they access proxy materials. On January 22, the SEC issued a final rule adopting amendments to the proxy rules, which allow issuers and other soliciting persons beginning July 1, 2007 to furnish proxy materials to shareholders through a "notice and access" model using the internet on a voluntary basis. The proposed amendments would provide all shareholders with the ability to choose whether to receive proxy materials in paper, by e-mail or via the internet.

  Under the proposal, an issuer that is required to furnish proxy materials to shareholders under the proxy rules would have to satisfy this requirement through a "universal internet availability" model by posting its proxy materials on a specified, publicly-accessible internet website (other than the SEC's EDGAR website) and providing record holders with a notice informing them that the materials are available and explaining how to access those materials. Shareholders would retain the ability to request paper or e-mail copies for a particular meeting or to make a permanent request for copies of proxy materials relating to all shareholder meetings. An issuer could not use the "universal internet availability" model in the context of a business combination transaction. Shareholders and other

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persons conducting their own proxy solicitations also would be required to follow the "universal internet availability" model.

http://www.sec.gov/news/openmeetings/2007/ssamtg062007-addmtg.htm

http://www.sec.gov/rules/proposed/2007/34-55147.pdf

Broker Dealer

SEC to Amend Short Sale Rules

The Securities and Exchange Commission voted this week to adopt several amendments to its short sale rules. These amendments would eliminate the grandfather provision currently contained in Rule 203 of Regulation SHO, which provides that the requirement to close-out fail to deliver positions in a threshold security that remain for 13 consecutive settlement days (the close-out requirement) does not apply to positions established prior to the security becoming a threshold security or prior to the effective date of Regulation SHO. Under the amended rule, previously excepted grandfather positions must be closed out within 35 settlement days of the effective date of the amendment. The amended rule also extends the close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act. These amendments will be effective 60 days from the date of their publication in the *Federal Register*.

The SEC has also voted to amend Rule 10a-1 to eliminate the so-called "tick test," as well as any other short sale price test of any self-regulatory organization, and to eliminate the related "short exempt" marking requirement of Rule 200(g) of Regulation SHO. These amendments will be effective immediately upon publication in the Federal Register.

Finally, the SEC also proposed amendments to Regulation SHO to require that broker-dealers marking a sale as "long" document the present location of the securities being sold and to eliminate the options market maker exception to the close-out requirement. The comment period for these proposals will end 30 days after publication of the proposed rules in the Federal Register.

http://sec.gov/news/press/2007/2007-114.htm

NASD Maintains OSJ Definition

A spokesman for the National Association of Securities Dealers has announced that the NASD will not proceed with its proposal to eliminate the definition of "Office of Supervisory Jurisdiction" currently set out in NASD Rule 3010 and to replace it with four new branch office designations. The proposal, which was published in Notice to Members 07-12 as part of the NASD's rule harmonization with the New York Stock Exchange, met with criticism that it was unnecessarily complicated and would require member firms to undertake costly updates to their advertising, written procedures and training materials. State regulators also noted that the OSJ definition has been incorporated into some state statutes, which would have to be updated to reflect the proposed changes. No alternative proposal is currently anticipated.

http://www.nasd.com/RulesRegulation/NoticestoMembers/2007NoticestoMembers/NASDW_018692

http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20070611/FREE/70608001/-1/INIssueAlert04&ht

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NYSE Amends Program Trading Rules and Reporting Requirements

The New York Stock Exchange has announced amendments to its Rule 80A to update and clarify the definition of "Program Trading" and the related reporting requirements. Under the prior definition, program trading was defined as either index arbitrage or any trading strategy involving the related purchase of a basket of 15 or more stocks with a total market value of $1 million or more. The rule provided that program trading included purchases and sales made as part of a "coordinated trading strategy," even if certain other characteristics (such as contemporaneous execution) were absent.

The amended rule, set forth in NYSE Regulation Information Memo 07-52, eliminates the $1 million threshold and focuses instead on what constitutes a "coordinated trading strategy" for purposes of the definition. In the Memo, the NYSE makes clear that not all computer-driven strategies constitute program trading and that trading strategies need not be computer-driven to be considered program trading. Instead, the determination is based on the investment objective of the trading and the linkage or dependency between trades in different securities as they relate to that objective. The Memo identifies certain factors that should be present in a coordinated trading strategy and provides examples of programs that constitute program trading.

In connection with the amended rules, the NYSE has redefined two of the existing Program Trading related audit trail account types (J and K) and has eliminated the requirement that firms submit Daily Program Trading Reports (DPTR). The new account types are available immediately and members must be in compliance by September 30. The DPTR reporting requirements also cease on September 30, but firms must continue to maintain relevant Program Trading data and must make such data available to NYSE upon request within a similar timeframe to that required for DPTRs.

http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E8852572F700530DC4/$FILE/Microsoft%20Word%20-%20Document%20in%2007-52.pdf

SEC Approves CBOE and OCC Rule Changes Regarding Credit Default Options

The Securities and Exchange Commission has approved rule changes proposed by the Chicago Board Options Exchange and The Options Clearing Corporation (OCC) relating to the listing and trading of credit default options (CDOs) on CBOE and the clearance and settlement of CDOs by OCC. CDOs are cash-settled, binary options that are automatically exercised upon the occurrence of a credit event (typically a failure to pay or other event of default) with respect to one or more specified debt securities of a public company. In the CBOE approval, the SEC determined that CDOs are "securities" as defined in the Securities Act and designated CDOs as standardized options for purposes of Exchange Act Rule 9b-1.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-11273.pdf

http://a257.g.akamaitech.net/7/257/2422/13jun20071800/edocket.access.gpo.gov/2007/pdf/E7-11370.pdf

CBOE and ISE Permanently Extend Preferenced Order Programs

The Securities and Exchange Commission has approved requests by both the Chicago Board Options Exchange and the International Securities Exchange to permanently extend their respective incentive programs regarding

preferenced orders. These programs allow order providers to designate a Preferred Market Maker on orders sent to the exchange and entitle the Preferred Market Maker to an enhanced allocation for such orders if the Preferred Market Maker was quoting at the national best bid and offer at the time the order was received. These programs previously had been operating on a pilot basis and were scheduled to expire this month.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10790.pdf

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-11268.pdf

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BANKING

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Host State Loan-to-Deposit Ratios Issued by Banking Agencies

On June 12, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency jointly issued host state loan-to-deposit ratios that will be used to determine compliance with section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal). The ratios were last updated on June 13, 2006.

Section 109 of Riegle-Neal prohibits a bank from “establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production.” It also prohibits branches of banks controlled by out-of-state bank holding companies from operating primarily for the purpose of deposit production.

Section 109 also sets forth a two-part test to measure compliance. Initially, the test “involves a loan-to-deposit screen that compares a bank’s statewide loan-to-deposit ratio to the host state loan-to-deposit ratio for banks in a particular state.” The next step is then conducted only if a bank’s statewide loan-to-deposit ratio is less than one-half of the published ratio for that state or if data involved are not available for a bank to perform the first step analysis. The second step requires that the “appropriate banking agency determine whether the bank is reasonably helping to meet the credit needs of the communities served by the bank’s interstate branches.” Failure of both the first and second step results in a violation of section 109 and is subject to sanctions issued by the appropriate banking agency.

http://www.federalreserve.gov/boarddocs/press/bcreg/2007/200706122/default.htm

United Kingdom Developments

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Review of Issuer Liability and Fraudulent Misstatement

On June 4, HM Treasury published the final report by Professor Paul Davies QC, a leading company law academic, on issuer liability to investors in respect of misstatements to the market.

The background to the review is that Section 90A of the UK Financial Services and Markets Act 2000 (FSMA), introduced by section 1270 of the UK Companies Act 2006, establishes a statutory liability regime under which issuers will be liable for fraudulent misstatements in periodic disclosures to the market – a law change required in order to implement the EU Transparency Directive. The review was commissioned to consider industry concerns about the consistency of the new statutory liability regime and whether common law

rights of shareholders were at risk.

The final report recommends that HM Treasury should introduce regulations to extend the statutory liability regime to include liability for corporate misstatements to the market. The report also recommends that (i) fraud be maintained as the standard of liability; (ii) the statutory regime should apply to all ad hoc disclosures and Regulatory Information Service (RIS) announcements; (iii) the regime should extend to disclosure by issuers with securities listed on exchanges (including AIM and the Plus (Ofex) Market) and all multilateral trading facilities; (iv) there should be liability for dishonest delay in making statements to the RIS; and (v) rights should be conferred equally on buyers and sellers.

http://www.hm-treasury.gov.uk/media/4/7/davies_review_finalreport_040607.pdf

FSA Publishes Feedback on Private Equity Risks

On June 11, the UK Financial Services Authority (FSA) published its feedback to Discussion Paper DP06/6 "Private Equity: A discussion of risk and regulatory engagement", which examined the impact of growth and development in the private equity market on the FSA's regulation of the UK's wholesale markets.

In DP06/6 the FSA identified the risks it perceived were posed to its statutory objectives by the growth in private equity and outlined the measures taken to mitigate these risks. The feedback received confirmed that FSA had correctly identified and prioritized those risks and that the proposed regulatory approach to dealing with them was appropriate and effective.

According to the FSA, conflicts of interest still pose a significant risk in the private equity markets. The FSA intends to tighten the regulatory reporting requirements for firms and will conduct a semi-annual survey every six months on banks' exposures to leveraged buy-outs in which private equity funds had a stake.

The International Organization of Securities Commissions (IOSCO) has also commissioned a taskforce, to be chaired by the FSA, to assess the impact of recent developments in the private equity market and identify issues which can be addressed within its remit.

http://www.fsa.gov.uk/pubs/discussion/fs07_03.pdf

Litigation

Court Denies Motion to Dismiss Securities Fraud Claims

A securities fraud action was brought on behalf of all persons who purchased or acquired the common stock of Jarden Corp., a consumer products company, between June 29, 2005 and January 11, 2006. The complaint alleged that the company and its officers made materially false and misleading statements concerning its acquisition of another company, including misrepresenting the synergies that would result from the acquisition. Defendants moved to dismiss and the court denied the motion.

The court found that the PSLRA's safe harbor for forward-looking statements did not apply in this case because, in order for statements to fall within the safe harbor, the statements could not include representations of present fact, even if they also contained forward-looking aspects. The court found that statements, such as that the target company's cash flows and sales were

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“trending exactly as we would like,” could be false or misleading given the data available concerning those cash flows and sales at the time the statements were made.

The court also found that plaintiffs adequately pleaded scienter, noting that allegations of motivation to artificially inflate the stock price to convert preferred stock and to gain incentive performance bonuses were sufficient to plead scienter adequately. The court held that even if the defendants were innocent, the timing of the sales of substantial portions of their personal holdings was “curiously coincidental.” (*Darquea v. Jarden Corp.*, 2007 WL 1610146 (S.D.N.Y. May 31, 2007))

Securities Fraud Plaintiff Failed to Plead Scienter Adequately

A Minnesota district court dismissed a securities fraud claim brought by a class of investors against a corporation that was forced to restate its financial results multiple times over a two-year period due to “dozens, if not hundreds, of accounting errors.” The complaint alleged that the sheer volume of accounting errors, when combined with the sale of personal holdings of stock by some officers of the corporation, indicated a scheme to defraud the investors during the class period.

The court pointed out that even though the management of the corporation may have been incompetent, the securities laws were designed to prevent securities fraud, not accounting malpractice. Therefore, the court found that instead of demonstrating that the scheme was a “high-level plot to overstate the company’s performance,” the allegations merely “portray[ed] a company that was riddled with incompetence among its financial managers and accountants.”

Plaintiffs also asserted scienter should be inferred when the timing of defendants’ sales of personal stock is considered alongside the accounting errors. The court rejected this theory, pointing out that the defendants did not sell their stock when the price was at its highest. In fact, after the defendants sold their stock, the price of the stock reached a much higher level that it maintained for some period of time and defendants never sold additional stock at this higher price. (*In re Ceridian Corporation Securities Litigation*, 2007 WL 1620788 (D. Minn. June 5, 2007))

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