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Corporate and Financial Weekly Digest

March 23, 2007

SEC/Corporate

SEC Adopts Final Rules for Foreign Private Issuer Deregistration

On March 21, the Securities and Exchange Committee adopted new rules that will establish a more clearly defined process with a new benchmark by which a foreign private issuer can terminate its Exchange Act registration and reporting obligations. Under new Exchange Act Rule 12h-6, a foreign private issuer will be eligible to terminate its registration of securities under Exchange Act section 12(g), or its reporting obligations regarding a class of equity securities under Exchange Act section 15(d), if it meets a quantitative benchmark, which is not based on a head count of its shareholders, as is the current exit rule. An issuer of equity securities will be able to terminate its Exchange Act registration and reporting obligations, assuming it meets the other conditions of Rule 12h-6, if the average daily trading volume of the subject class of securities in the United States has been 5 percent or less of the worldwide average daily trading volume of that class of securities for a recent 12-month period.

The new rules require an issuer to include both on-exchange and off-exchange transactions when determining its U.S. trading volume. However, the rules also permit the inclusion of off-exchange transactions when calculating worldwide trading volume if the information about the off-exchange transactions comes from sources that are reasonably reliable and is not duplicative of other trading volume data.
Among other things, the new rules for termination provide as follows:

- if an issuer has delisted a class of equity securities from a U.S. exchange, or terminated a sponsored American Depositary Receipts facility and, at the time of delisting or termination, it exceeded the trading volume threshold, the issuer must wait at least a year before it may terminate its Exchange Act reporting obligations in reliance on the trading volume standard;

- an equity securities issuer must have maintained a listing of the subject class of securities on one or more exchanges in its primary trading market for at least the 12 months before filing for deregistration under new Rule 12h-6;

- Rule 12h-6 will require an equity securities registrant not to have sold its securities, with certain exceptions, in the United States in a registered offering under the Securities Act during the preceding 12 months; and

- an equity securities registrant will have to have been an Exchange Act reporting company for at least a year, to be current for that period, and to have filed at least one Exchange Act annual report before it may file for deregistration under the new rule.

SEC/CORPORATE

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The rules will become effective 60 days from their publication in the Federal Register.

http://www.sec.gov/news/speech/2007/spch032107es.htm

Broker Dealer

Nasdaq Proposes to Create a New Order Type

On March 6, the NASDAQ Stock Market LLC filed with the Securities and Exchange Commission proposed rule changes to update and codify the requirements applicable to Nasdaq members that provide sponsored access to other firms and customers to the Nasdaq execution system. Nasdaq proposes to create a new order type, the Directed Order, for use by its members in compliance with their obligations under Regulation NMS.

Directed Orders would allow Nasdaq participants to grant access to customers and other brokers to place orders without checking the Nasdaq book that would go directly to another market place for execution. If a Directed Order was not executed it would be returned to the Nasdaq participant. Directed Orders may be designated as "intermarket sweep orders." A broker-dealer that designates an order as an intermarket sweep order has the responsibility of complying with Rules 610 and 611 of Regulation NMS, i.e. it is a limit order that may sweep all protected bids or asks on all markets at the one price designated in the order.

http://www.sec.gov/rules/sro/nasdaq/2007/34-55405.pdf

Remote Quoting by Market Makers

The Chicago Board Options Exchange, Incorporated filed with the Securities and Exchange Commission a notice of filing and immediate effectiveness of a proposed rule change to request permanent approval of an existing pilot program that allows a CBOE Market Maker to submit electronic quotations while physically away from CBOE's trading floor in the Market Maker's appointed Hybrid Classes and Hybrid 2.0 Classes. In the past, Market Makers were only permitted to stream electronic quotations in their appointed Hybrid and Hybrid 2.0 classes when they were physically present in the trading crowd.

The CBOE requested, and the SEC approved, on a pilot basis, the ability to evaluate the effectiveness of allowing Market Makers to quote remotely. The current pilot program is scheduled to expire on March 24. The CBOE believes it would be beneficial to permanently approve the pilot program and permit Market Makers to continue to have the ability to quote electronically away from the CBOE's trading floor.

http://www.sec.gov/rules/sro/cboe/2007/34-55381.pdf

Market Makers' Physical Presence in the Trading Crowd

The Chicago Board Options Exchange, Incorporated filed with the Securities and Exchange Commission a notice of filing and immediate effectiveness of proposed rule change to extend two pilot programs allowing Remote Market Makers (RMMs) and Electronic DPMs (e-DPMs) the ability to have one separate affiliated Market Maker physically present in the trading crowds where they operate as an RMM or e-DPM, respectively.

In July 2003, the SEC approved the e-DPM program, including the pilot program. The pilot allows e-DPM firms to maintain a physical presence in the trading crowd through an affiliated Market Maker which also would be able to

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stream a quote. The pilot limits the number of separate affiliates per trading crowd to one. In March 2005, the SEC approved the RMM program, including the pilot program. The pilot allows RMM firms to maintain a physical presence in the trading crowd through an affiliated Market Maker which also would be able to stream a quote. The pilot limits the number of separate affiliates per trading crowd to one. Under the proposed rule change, the pilots would be extended from March 14, 2007 until March 14, 2008.

http://www.sec.gov/rules/sro/cboe/2007/34-55438.pdf

NYSE Proposed Amendments to Order Routing Rule

The New York Stock Exchange LLC filed with the Securities and Exchange Commission for immediate effectiveness proposed amendments to Rule 15A.50, which reflect certain changes made to NYSE trading systems in order to comply with the Order Protection Rule of Regulation NMS (Rule 611). NYSE Rule 15A.50 currently describes NYSE's order routing practices under the Intermarket Trading System (ITS) Plan, which is expected to terminate on the Trading Phase Date of Regulation NMS. As revised, Rule 15A.50 describes the circumstances under which NYSE will automatically route orders to prevent trade-throughs under Rule 611 and consistent with the anticipated elimination of the ITS Plan. NYSE has requested limited no-action relief to postpone its obligation under the revised rule to route orders to protected quotations of NASD Alternative Display Facility participants and to the International Stock Exchange until April 5.

http://www.sec.gov/rules/sro/nyse/2007/34-55387.pdf

Banking

Federal Regulators Seek Public Comment on Model Privacy Notice

On March 21, eight federal regulators, including the five federal bank and credit union regulators, released a notice of proposed rulemaking (NPR) requesting comment on a model privacy form that financial institutions can use for their privacy notices to consumers required by the Gramm-Leach-Bliley Act (GLB Act). The privacy notices must describe an institution's information sharing practices. For certain types of sharing, consumers have the right to opt out. The notices must be provided when a consumer first becomes a customer of a financial institution and then annually for as long as the customer relationship lasts.

The NPR was issued pursuant to the Financial Services Regulatory Relief Act of 2006, which amended the GLB Act to require the agencies to propose a model form that is succinct and comprehensible to consumers, allows consumers easily to compare privacy practices of financial institutions, and uses easily readable type font.

The proposed model privacy form is the "prototype privacy notice" developed after a year-long consumer testing process. A detailed report describing the testing and resulting prototype privacy notice was released in March 2006. The NPR proposes that a financial institution that chooses to use the model form would satisfy the disclosure requirements for the notices and therefore could take advantage of a legal "safe harbor." The NPR also proposes to remove, after a transition period, the sample clauses now included in some of the agencies' privacy rules.

The NPR was developed jointly by the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National

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Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Securities and Exchange Commission.

The agencies seek comment on all aspects of the model form, including its content, format, and whether it provides sufficient flexibility for financial institutions to disclose their sharing practices accurately.

Written comments on the proposed rule amendments may be submitted within 60 days after their publication in the Federal Register, which is expected in late March.

http://www.fdic.gov/news/board/notice320073.pdf

Rule Revising Community Reinvestment Act Regulations Published

On March 19, Office of Thrift Supervision (OTS) director John Reich announced that the Community Reinvestment Act (CRA) obligations applicable to federal thrifts were revised by the OTS in an effort to "reestablish uniformity between its rules and those of the other federal banking agencies." According to the OTS, the revisions align the agency's rules with those of the other federal banking agencies by:

- eliminating the option of alternative weights for lending, investment, and service under the large, retail savings association test;
- defining institutions with assets between $250 million and $1 billion as "intermediate small savings associations" subject to a new community development test;
- indexing the asset threshold for "small" and "intermediate small" savings associations annually based on changes to the Consumer Price Index; and;
- clarifying the adverse impact on a savings association's CRA rating where the OTS finds evidence of discrimination or other illegal credit practices.

The final rule is effective July 1, with rule changes applicable to examinations beginning in the third quarter of 2007. Director Reich noted, however, that "for institutions that have adjusted their CRA programs in reliance on the availability of the alternative weight option under the large retail savings association test – or on the availability of the streamlined small institution test for institutions with up to $1 billion in assets, OTS examiners will take into consideration – as part of the performance context – that the rules have not been consistent during the evaluation period...The preamble provides specific discussion of how we will use performance context for institutions that adjusted their CRA program in recognition of the previous rule adopted by OTS."

http://www.ots.treas.gov/docs/7/777016.html

United Kingdom Developments

Court Orders Disclosure of Information Prepared for FSA Investigation

In dismissing an appeal by Aberdeen Asset Managers and UBS against a decision ordering the disclosure of certain documents, the UK Court of Appeal held in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd and others,* 2007 EWCA Civ 197 that the confidentiality provisions of the Financial Services and Markets Act 2000 (FSMA) which preclude the Financial Services Authority (FSA) from making disclosure to a third party of information obtained by it in the course of investigations did not provide any protection

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from disclosure by a party under FSA investigation.

The Court of Appeal held that for the purposes of section 348 FSMA, a person could not be said to "obtain" information from the FSA which it had collected in the course of inquiries if the authority gave him a document containing information he already possessed even if, as far as the authority was concerned, he was not the source.

The Court held that section 348 FSMA did not impose any bar on disclosure by a secondary recipient of information in (i) a situation where confidential information had been supplied to the FSA by an employee from their own files without having had specific authority to do so, and (ii) the situation where the FSA supplied information to a recipient which the recipient already had. The Court concluded that a person did not "obtain" information from the FSA for the purpose of section 348 FSMA if he had that information before it was given to him by the FSA. That would be so even if that person were not the "source" of that information in the sense of having authorized some individual on its behalf to give the information in question to the FSA.

http://www.lawreports.co.uk/WLRD/2007/CACIV/mar0.5.htm

Litigation

Business Judgment Rule Did Not Insulate Corporation from Indemnification Liability

The U.S. Court of Appeals for the Third Circuit held that the business judgment rule did not insulate a corporation from its obligation to indemnify individuals covered by an indemnification clause. After losing in the District Court, the corporation appealed, claiming that the District Court incorrectly rejected its argument that the Board's decision to withhold indemnification was a valid exercise of its business judgment that should not have been overturned.

The Court of Appeals first noted its view that it was "at a loss to see" how the Board's exercise of business judgment in withholding indemnification could protect the corporation if, under the terms of the indemnity clause, indemnification was required. However, because both parties viewed the business judgment rule question as critical, it then proceeded to analyze whether the Board's exercise of its business judgment was valid. Despite the corporation's argument that information before the Board, including advice of counsel, provided a sufficient basis for its decision, the Court disagreed.

After questioning the merit of the corporation's "advice of counsel" argument (because the corporation refused to disclose the content of that information), the Court found that other infirmities established that the Board failed to act with "reasonable diligence" in deciding to withhold indemnification, including (i) failing to conduct "any investigation into the veracity of the allegations" against the claimants, and (ii) refusing to interview the claimants despite their repeated requests to speak with the Board. Accordingly, the Court declined to apply the business judgment rule so as to reverse the District Court's ruling. (*American Society for Testing & Materials v. Corrpro Companies, Inc.*, No. 05-4164, 2007 WL 656326 (3d Cir. Mar. 6, 2007))

No Private Right of Action Under §§ 34(b), 36(a) and 48(a) of ICA

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of a putative class action brought by mutual fund investors for alleged violations of Sections 34(b), 36(a) and 48(a) of the Investment Company Act (ICA). The Complaint asserted that defendants siphoned funds from the mutual funds to pay kickbacks to brokers who agreed to promote the sale of fund shares.

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Plaintiffs alleged that the resulting expansion of fund assets increased advisory fees disproportionate to the value of services provided to a level that exceeded what would have been negotiated in arm's length transactions. The complaint alleged that in furtherance of the alleged scheme (i) defendants made misrepresentations and omissions of material fact in registration statements in violation of § 34(b); (ii) defendants breached their fiduciary duties under § 36(a); and (iii) certain defendants caused other defendants to violate the ICA, resulting in control person liability under § 48(a).

Affirming the District Court's dismissal, the Second Circuit held that no private right of action existed under any of the aforementioned sections of the ICA. After noting that Congressional intent is the "keystone" as to whether a private right of action under a federal statute exists, the Court found ample support for its decision that no such right supported the plaintiffs' claims, including (i) the express provision in § 42 of the ICA providing the Securities and Exchange Commission with authority to enforce *all ICA provisions*, which suggests that Congress's failure to similarly provide an express private right of action was intentional; (ii) the express provision of a private right of action to investors in § 35(b), which suggests that Congress's omission of such a right in the sections plaintiffs sued under was intentional; and (iii) Congress's focus in sections 34(b), 36(a) and 48(a) on the persons and entities regulated, rather than on the persons protected, which suggested that Congress intended these sections to "regulate" rather than create new "rights." (*Bellikoff v. Eaton Vance Corp.*, No. 05-6957-cv, 2007 WL 766209 (2d Cir. Mar. 15, 2007))

CFTC

Amendments to Acceptable Practices for Core Principle 15 Proposed

The Commodity Futures Trading Commission has proposed amendments to the definition of "public director" in the Acceptable Practices for Core Principle 15. These acceptable practices set out a safe harbor under which designated contract markets (DCMs) can satisfy their obligations under Core Principle 15 to minimize conflicts of interest in their decision making processes. To qualify for the safe harbor, DCMs are required to have a certain percentage of "public directors" on their boards and certain oversight committees. The proposed amendments would clarify those circumstances under which a person would be considered affiliated with a DCM, and therefore disqualified from serving as a public director for purposes of the safe harbor, by setting out a more objective standard of review.

The proposed rule changes will be open for public comment for 30 days following their publication in the Federal Register.

http://www.cftc.gov/opa/press07/opa5304-07.htm

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