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SEC/Corporate

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NYSE Proposes Change to Broker Discretionary Voting Rule

On February 26, the New York Stock Exchange filed with the Securities and Exchange Commission a proposed rule change to amend NYSE Rule 452, eliminating broker discretionary voting for the election of directors of NYSE-listed companies with the exception of companies registered under the Investment Company Act of 1940. Rule 452 currently allows brokers to vote on "routine" proposals if the beneficial owner of the stock has not provided voting instructions at least 10 days prior to the scheduled meeting. The proposed amendment would be applicable to proxy voting for shareholder meetings held on or after January 1, 2010.

The current NYSE Rule 452 treats as a routine proposal an "uncontested" election for a company's board of directors. However, in recent years the definition of a "contested" election has been questioned by a number of parties and interest groups due to the rise of new types of proxy campaigns. On "non-routine" matters, which generally are those involving a contest or any matter which generally affects the rights of stockholders, NYSE prohibits brokers from voting without receiving instructions from beneficial owners.

This proposed rule change eliminating broker discretionary voting for elections of directors could significantly impact the director election process, particularly in connection with establishing a quorum at shareholder meetings. The Proxy Working Group, which reviews NYSE rules regulating the proxy voting process (and supports the amendment of Rule 452) speculates in a report addressing an earlier version of a Rule 452 amendment that this proposed change will likely result in issuers having to spend more money and effort to reach shareholders who previously did not vote and could most dramatically affect those issuers who have a smaller proportion of institutional investors and thus more difficulty contacting shareholders to vote in uncontested elections.

http://www.sec.gov/rules/sro/nyse/2009/34-59464.pdf

NYSE Suspends Application of Minimum Stock Price and Market Capitalization Requirements

On February 26, the New York Stock Exchange filed an immediately effective rule amendment with the Securities and Exchange Commission that suspends the application of the NYSE's minimum stock price requirement and continues its decreased market capitalization requirement. Both NYSE rule amendments are scheduled to expire on June 30. The changes come on the heels of NASDAQ's October 18, 2008, rule amendment temporarily suspending certain of its own minimum listing and capitalization requirements in the wake of upheaval in the world's capital markets.

Previously, the NYSE-listed issuers whose stock price fell below $1.00 per

share over a consecutive 30 trading day period would not be considered in compliance with NYSE rules and would be given six months to come back into compliance. During the suspension of the minimum price standard, issuers will not be notified of new events of noncompliance, and companies that were non-compliant prior to the suspension of the minimum price rule that do not regain compliance during the suspension period will, upon reinstitution of the stock price continued listing standard, receive the remaining balance of their six months to regain compliance with the rule.

The NYSE also extended its current reduction of its average global market capitalization continued listing requirement, which was scheduled to expire on April 22. During the reduction of the market capitalization requirement, the rule will only apply to issuers whose average global market capitalization falls below $15 million for a 30 trading day period, a decrease from NYSE's standard $25 million threshold.

http://apps.nyse.com/commdata/pub19b4.nsf/docs/3415B1AA4F6D61848525756900762294/$FILE/NYSE-2009-21.pdf

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Court Denies Motion Seeking to Apply Supreme Court's *Stoneridge* Standard to Primary Actors

The plaintiffs filed a securities class action lawsuit against a computer chip manufacturer, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The plaintiffs alleged that the defendant's executives knowingly made false public statements that the high price of its products was due to market forces, when, in reality, the executives knew that illegal price fixing led to the increasing prices. The plaintiffs further alleged that the defendant's deception increased its stock price, but, when allegations of price fixing surfaced, its stock price dropped significantly.

The defendant moved for judgment on the pleadings with respect to plaintiffs' "scheme claim" under Rule 10b-5, arguing that the Supreme Court's recent decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, _ U.S. _, 128 S. Ct. 761 (2008), precluded the claim. In particular, the defendant argued that *Stoneridge* stood for the propositions that: (i) reliance by the plaintiff upon the defendant's deceptive acts is an essential element of a Section 10(b) claim, (ii) there can be no such reliance where no member of the investing public had knowledge of the deceptive acts during the relevant times, and (iii) knowledge cannot be presumed if the deceptive acts were not communicated to the public. The defendant claimed that the plaintiffs' claims did not satisfy the *Stoneridge* standard. The court disagreed and held that *Stoneridge* was inapplicable to the facts of the case.

The court rejected the defendant's argument, ruling that the *Stoneridge* holding was limited to secondary actors, such as a defendant's supplier or customer. According to the court, the *Stoneridge* decision merely restated the Supreme Court's holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (2004), that there is no private right of action against a secondary actor who allegedly aided and abetted the fraudulent scheme. Because the defendant was not a secondary actor, the court concluded that *Stoneridge* did not apply, and therefore denied the defendant's motion for judgment on the pleadings. (*In re Micron Technology, Inc.*, 2009 WL 453917 (D. Idaho Feb. 23, 2009))

Business Judgment Rule Applied in Dismissal of Derivative Action

Plaintiffs, shareholders of Citigroup, Inc., brought a shareholder derivative action against the current and former directors and officers of Citigroup,

alleging, among other things, that the defendants breached their fiduciary duties by failing to oversee and manage the risks Citigroup faced from problems in the subprime lending market and for failing to properly disclose Citigroup's exposure to subprime assets. The plaintiffs alleged that the defendants should have noticed extensive "red flags" alerting them to the problems in the real estate and credit markets, and that they ignored these warnings to pursue short-term profits.

The Delaware Chancery Court dismissed the breach of fiduciary duty claims, holding that the defendants did not adequately plead facts showing that demand on the board of directors to initiate a lawsuit on behalf of the corporation (which is ordinarily required to bring a derivative suit under Delaware law) would have been futile. Before evaluating the plaintiffs' allegations relating to demand futility, the court noted that the plaintiffs' claim that the directors did not fulfill their oversight obligations was an extremely difficult claim in light of the well-established business judgment rule, which was designed to prevent judges from second-guessing rational business decisions that were made in good faith. The court emphasized that under this rule, directors are not to be held personally liable for making poor business decisions.

Turning to the plaintiffs' "demand futility" allegations, the court rejected the plaintiffs' argument that demand should be excused because a majority of the director defendants faced a substantial likelihood of personal liability if the claims proceeded, and therefore would be unable to exercise independent and disinterested business judgment in responding to a demand. The court reasoned that the plaintiffs' allegations that the defendant directors ignored "red flags" at most evidenced bad business decisions. The court further concluded that the plaintiffs failed to allege with sufficient specificity that the directors were or should have been aware of any wrongdoing at Citigroup or were consciously disregarding a duty to prevent Citigroup from suffering losses. Accordingly, the court ruled that the plaintiff's factual allegations were not sufficient to demonstrate that the defendants faced a substantial likelihood of liability that would prevent them from impartially considering a demand to bring a derivative suit and, consequently, dismissed the plaintiffs' breach of fiduciary duty claims. (*In Re Citigroup Inc. Shareholder Derivative Litigation*, 2009 WL 481906 (Del. Ch. Feb. 24, 2009))

Broker Dealer

SEC Raises Securities Transaction Fee Rate

The Securities and Exchange Commission has announced that it intends to raise the transaction fee it is paid by each national securities exchange and national securities association. Effective April 1, or 30 days after the date of enactment of the SEC's regular appropriation for fiscal year 2009, whichever is later, the fee payable to the SEC pursuant to Section 31 of the Securities Exchange Act of 1934 will be raised to $25.70 per million dollars in securities sales from the current rate of $5.60. The transaction fee applicable to security futures transactions will remain unchanged at $0.0042 per round turn transaction.

http://www.sec.gov/news/press/2009/2009-41.htm

CBOE Amends Obvious Error Rules

The Securities and Exchange Commission has approved a proposal by the Chicago Board Options Exchange (CBOE) to amend the CBOE's "obvious error rules" to permit the President of the CBOE or the President's designee, on either person's own motion or upon request, to review any transaction occurring on the CBOE that is believed to be erroneous. A transaction

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reviewed under the amended rules may be nullified or adjusted only if the President or the President's designee determines that the transaction is erroneous. The President or the President's designee will ordinarily be expected to act as soon as possible on the day it receives notification of a transaction but may act no later than 8:30 a.m. (CT) on the next trading day for a transaction that occurs near the close of trading or due to unusual circumstances. The amended rules do not replace a party's obligation to request a review of any transaction believed to meet the criteria for an obvious error.

http://www.cboe.org/publish/RegCir/RG09-029.pdf

NYSE Members Must Continue to Submit "Reg. M Notices"

The New York Stock Exchange has issued Information Memo 09-8 to remind members and member organizations acting as lead underwriters in any offerings in NYSE or NYSE Amex listed securities, or as placement agents in any private investment in public equity (PIPE) transactions in NYSE or NYSE Amex listed securities, to provide notice of the offering activity to the NYSE Regulation, Inc. pursuant to NYSE and NYSE Amex Rule 392. On December 15, 2008, the Financial Industry Regulatory Authority implemented Rule 5190, which outlines the notification requirements for offering participants. Since that time, several NYSE members and member organizations have inquired as to whether NYSE and NYSE Amex Rule 392 continues to apply to offerings and PIPE transactions in NYSE and NYSE Amex listed securities.

http://www.nyse.com/RegulationFrameset.html?displayPage=http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom?openview&count=250&RestrictToCategory=currentyear

Financial Markets

ICE Trust Approved by Fed for Credit Default Swap Clearing

On March 4, the Federal Reserve Board approved the application of ICE US Trust LLC (ICE Trust) to become a member of the Federal Reserve System and to operate a clearinghouse for certain credit default swap transactions. ICE Trust proposes initially to clear contracts that are based on certain CDX North American indices and are submitted by the participants as principals. Each participant would also be required to contribute at least $20 million to the ICE Trust guaranty fund, with additional amounts to be required based on that participant's expected level of position exposures.

http://www.federalreserve.gov/newsevents/press/orders/20090304a.htm

OTC Derivatives

ISDA to Open Big Bang Protocol for Auction Settlement of CDS

The International Swaps and Derivatives Association (ISDA) is preparing to open what it is referring to as the "Big Bang Protocol" for hard-wiring an auction settlement procedure on credit default swaps (CDS) on March 12. The Protocol would be open for adherence through April 7. Changes to the documentation covered by the Protocol would take effect upon closure of the Protocol. The 2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement CDS Protocol is a mechanism for market participants to incorporate the ISDA Credit Derivatives Determinations Committees and Auction Settlement Supplement to the 2003 ISDA Credit Derivatives Definitions (the 2009 Supplement) into agreements and covered CDS transactions entered into prior to its implementation or subsequently, but that do not specifically incorporate the 2009 supplement. It is expected that a

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market participant who adheres to the protocol will also incorporate the 2009 Supplement into any new agreements it enters into even with non-adherents. In addition to implementing a uniform and binding mechanism through Credit Derivative Determinations Committees for determining when Credit Events and Succession Events have occurred in covered CDS transactions, for making other determinations relevant to the credit derivatives market as a whole and enabling market participants to settle covered CDS transactions based on an auction final price, the 2009 Supplement includes some changes in terms that are not directly connected to the auction settlement process. These include the introduction of a Credit Event Backstop Date with a 60-day look-back period and a Succession Event Backstop Date with a 90-day look-back period, meaning that unlike previously, it will now be possible for a credit event or succession event to have occurred prior to the trade date of a transaction, and changes to the rules regarding setting of foreign exchange rates when the deliverable obligation is in a different currency from the settlement currency. The changes to the definitions in the 2009 Supplement will now place currency hedging risk squarely on the CDS buyer. Changes have also been made to make it easier to deliver loans as the deliverable obligation, if they are the cheapest to deliver.

http://www.isda.org/ (See "CDS Auction Hardwiring.")

CFTC

IOSCO Consults on Direct Electronic Access Principles

The Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report seeking public comments on proposed principles related to direct electronic access to exchanges and other markets (Principles). IOSCO identified three key elements to be considered for guidance: (i) preconditions for direct access, with Principles setting minimum customer standards, establishing legally binding agreements between customers and intermediaries, and listing parameters for sub-delegation of direct access privileges; (ii) information flow, with Principles requiring disclosure of customer identity by intermediaries to authorities, as well as access to pre- and post-trade information by member firms; and (iii) adequate systems and controls, with Principles requiring pre-trade controls and other risk managements tools from markets with automated order routing or sponsored access, and also requiring intermediaries to have credit limit and customer position limit controls and adequate operational and technical systems. The deadline for comments is May 20.

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD284.pdf

IOSCO Publishes Proposals to Enhance Commodity Futures Markets Oversight

The Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report prepared by the IOSCO Task Force on Commodity Futures Markets, proposing to improve the supervision of commodity markets and global regulatory cooperation. The report recommends improvements that would enhance the supervisory and enforcement powers of futures market regulators and their ability to access information on related commodity markets (such as the cash and over-the-counter derivatives markets) over which they generally do not have authority. On March 5, the Commodity Futures Trading Commission and the Financial Services Authority issued a joint statement in which they welcomed the proposal.

https://www.iosco.org/library/pubdocs/pdf/IOSCOPD285.pdf
http://cftc.gov/newsroom/generalpressreleases/2009/pr5627-09.html

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CFTC Approves Electronic Filing of CPO and CTA Disclosure Documents

On March 5, in response to a petition by the National Futures Association (NFA), the Commodity Futures Trading Commission amended Regulations 4.26 and 4.36 to require commodity pool operators and commodity trading advisors to file their disclosure documents with the NFA electronically.

http://cftc.gov/stellent/groups/public/@lrfederalregister/documents/file/e9-4740a.pdf

Banking

Please see "Obama Administration Announces New Loan Modification Program Guidelines" in **Structured Finance and Securitization**, immediately below.

Structured Finance and Securitization

Obama Administration Announces New Loan Modification Program Guidelines

On March 4, the Obama Administration announced the new U.S. Treasury Department guidelines to enable servicers to begin modifications of eligible mortgages under the Administration's Homeowner Affordability and Stability Plan. The "Making Home Affordable" guidelines will implement financial incentives for mortgage lenders to modify existing first mortgages and set standards for modifications on existing mortgages owned by Fannie Mae or Freddie Mac.

Servicers that modify loans according to the guidelines will receive an up-front fee of $1,000 for each modification, plus "pay for success" fees on still-performing loans of $1,000 per year. Under the terms of the program, servicers will follow a specified sequence of steps in order to reduce the monthly payment to no more than 31% of gross monthly income (DTI). The program will share with the lender/investor the cost of reductions in monthly payments from 38% DTI to 31% DTI. The program will include incentives for extinguishing second liens on loans modified under this program. Modifications can begin immediately and may be done through December 31, 2012, and loans can be modified only once under the program.

Eligibility and verification requirements associated with this program include:

- Loans must have originated on or before January 1, 2009.
- First-lien loans on owner-occupied properties must have an unpaid principal balance less than or equal to $729,750. Higher limits are allowed for owner-occupied properties with 2-4 units.
- All borrowers must fully document income and sign an affidavit of financial hardship.
- Property owner occupancy status will be verified through borrower credit report and other documentation; no investor-owned, vacant, or condemned properties.

Loan modification terms and procedures of the program include:

- Participating servicers are required to service all eligible loans under the rules of the program unless explicitly prohibited by contract; servicers are required to use reasonable efforts to obtain waivers of limits on participation.
- Participating loan servicers will be required to use a net present value (NPV) test on each loan that is at risk of imminent default or at least 60 days delinquent. The NPV test will compare the net present value of cash flows with modification and without modification. If the test is

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positive (NPV of expected cash flow is greater with the modification), the servicer must modify absent fraud or a contract prohibition. Parameters of the NPV test are spelled out in the guidelines.
- The modification sequence requires first reducing the interest rate (subject to a rate floor of 2%), then if necessary extending the term or amortization of the loan up to a maximum of 40 years, and then if necessary forbearing principal.
- Servicers must enter into the program agreements with Treasury's financial agent on or before December 31, 2009.

The program includes measures to prevent and detect fraud, such as documentation and audit requirements. Servicers will be required to collect, maintain and transmit records for verification and compliance review, including borrower eligibility, underwriting and incentive payments.

http://www.treasury.gov/press/releases/tg48.htm
http://financialstability.gov/

Federal Reserve Launches TALF, Removes Executive Compensation Restrictions and Revises Terms

On March 3, the Federal Reserve launched the Term Asset-Backed Securities Loan Facility (TALF) by announcing that the first loan subscription date will be March 17, removing executive compensation requirements and providing revised terms and conditions for the TALF. The TALF was originally announced on November 25, 2008, has been revised through an interactive process, and is intended to help consumers and small businesses obtain credit by promoting the issuance of asset-backed securities (ABS). Currently, these ABS must be backed by student loans (federally guaranteed, including consolidation, or private), auto loans and leases (cars, light trucks, motorcycles or RVs, but not yet including rental fleet leases), credit card receivables and certain small business loans. On February 10, the U.S. Treasury Department announced that TALF will later be expanded, as part of a Consumer Business Lending Initiative, from its current $200 billion size to an up to $1 trillion program, and additional types of ABS will be eligible. In the white paper released on March 3, the Treasury and the Federal Reserve state that they are currently analyzing the appropriate terms and conditions for ABS backed by various types of commercial mortgage loans; that the April TALF funding will include ABS backed by small ticket equipment, heavy equipment, and agricultural equipment loans and leases, and rental, commercial, and government vehicle fleet leases; and that eventually TALF may include ABS backed by non-agency residential mortgage loans, collateralized loan and debt obligations, and other floorplan and dealer inventory loans.

The Federal Reserve Bank of New York will make its initial TALF loans on March 25 and will stop making new loans on December 31, unless the Federal Reserve agrees to extend the facility. Going forward, monthly subscriptions will be scheduled on the first Tuesday of each month. Highlights of the new TALF terms include:
- Borrowers will be able to request an unlimited number of loans per month.
- The executive compensation restrictions have been removed.
- Collateral that has a market value above par can qualify as eligible collateral.
- The haircuts and interest rates have been decreased for student loans and small business loans backed by government guarantees.
- An average life calculation has been provided for purposes of determining the maturity dates of the collateral.
- Definitions of “Prime” and “Subprime” are provided.
- Primary dealers, issuers, sponsors and their respective affiliates are prohibited from entering into hedging transactions specific to securities

purchased with TALF financing. However, the prohibition does not extend to portfolio-wide hedging transactions, which may include securities purchased with TALF loans.

http://www.federalreserve.gov/newsevents/press/monetary/20090303a.htm

A detailed Katten *Client Advisory* on the TALF program is available here.

ERISA

Retirement Plan Loans to be Exempt from Requirements of the Truth in Lending Act and Regulation Z

Effective July 1, 2010, participant loans taken from employer-sponsored retirement plans will no longer be subject to the requirements of the Truth in Lending Act of 1968 (TILA) and the regulation implementing TILA known as Regulation Z. The Board of Governors of the Federal Reserve recently approved an amendment to Regulation Z that exempts most retirement plan loans to participants.

Lenders generally must disclose certain key terms and costs associated with lending arrangements to consumers, as such disclosures are required by TILA and Regulation Z. Moreover, retirement plans that permit participant loans (such as 401(k), 403(b), and 457(b) plans) were previously subject to the disclosure requirements imposed by TILA and Regulation Z. Compliance with these rules was considered a burden by plan administrators because finance charges and the applicable APR needed to be determined and disclosed in participant statements.

The recent amendment to Regulation Z exempting plan loans from TILA applies to an extension of credit in (i) an employer-sponsored retirement plan that is qualified under Section 401(a) of the Internal Revenue Code (Code); (ii) a tax-sheltered annuity under Section 403(b) of the Code; and (iii) an eligible government deferred compensation plan under Section 457(b) of the Code. To qualify for the exemption, the loan must be comprised of fully vested funds from the participant's account and be made in compliance with all applicable provisions of the Code. The exemption applies to retirement plans regardless of whether such plan is subject to the Employee Retirement Income Security Act of 1974.

http://edocket.access.gpo.gov/2009/pdf/E8-31185.pdf

ERISA

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UK Developments

FSA Issues Rules Mandating Disclosure of Contracts for Difference (CFDs)

On March 3, the UK Financial Services Authority (FSA) published a feedback statement and final rules on the disclosure of long positions held as Contracts for Difference (CFDs). This follows from its consultation paper CP08/17 on the disclosure of CFDs published in October 2008, as reported in the October 24, 2008, edition of *Corporate and Financial Weekly Digest*. As foreshadowed by CP08/17, the FSA will implement a general disclosure regime for long CFD positions. The initial disclosure threshold will be at 3%, in line with the existing UK disclosure rules for long positions in equities. Further disclosures are required as each 1% threshold is passed thereafter. Again the same as the long equities disclosure regime.

Under the new CFD rules, position size is to be calculated on a delta-adjusted basis rather than a nominal basis. There is an exemption to the disclosure requirements for CFD writers which act as regulated intermediaries. The FSA

UK DEVELOPMENTS

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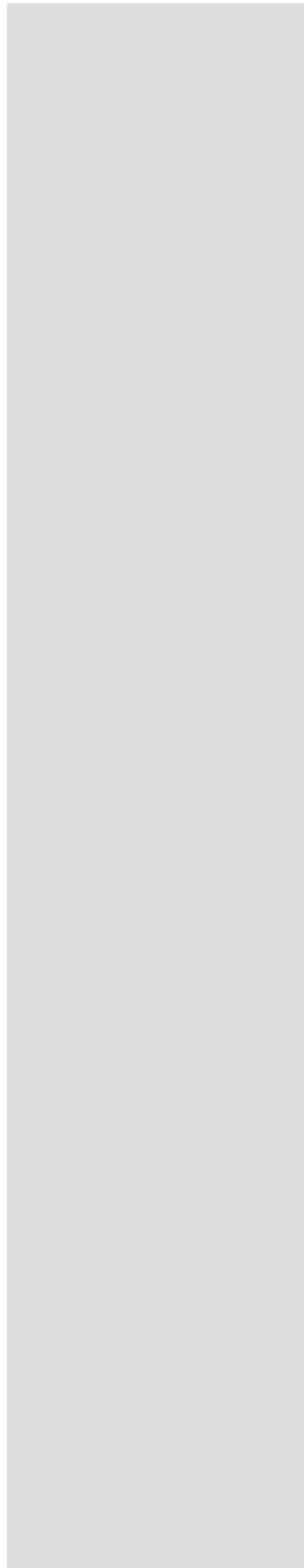
has introduced this in order to reduce unnecessary disclosures. Exemptions paralleling those for market makers and trading book in the equity disclosure regime are also implemented. The new rules take effect on June 1, 2009.

http://www.fsa.gov.uk/pubs/policy/ps09_03.pdf



* Click here to access the *Corporate and Financial Weekly Digest* archive.

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