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Corporate and Financial Weekly Digest

May 11, 2007

SEC/Corporate

SEC Fee Rate Advisory for Fiscal Year 2008

On May 7, the Securities and Exchange Commission announced that, effective the later of October 1 or five days after the SEC receives its fiscal year 2008 regular appropriation, the Section 6(b) fee rate applicable to the registration of securities, the Section 13(e) fee rate applicable to the repurchase of securities and the Section 14(g) fee rates applicable to proxy solicitations and statements in corporate control transactions will increase to $39.30 per million from the current rate of $30.70 per million. The Section 6(b) rate is also the rate used to calculate the fees payable with the Annual Notice of Securities Sold Pursuant to Rule 24f-2 under the Investment Company Act of 1940.

In addition, effective the later of October 1 or 30 days after the date on which the SEC receives its fiscal year 2008 regular appropriation, the Section 31 fee rate applicable to securities transactions on the exchanges and certain over-the-counter markets will decrease to $11.00 per million from the current rate of $15.30 per million. The assessment on security futures transactions under Section 31(d) will remain unchanged at $0.0042 for each round turn transaction.

The SEC will issue further notices as appropriate to keep the public informed of developments relating to the effective dates of the fee rates described above.

The proceeds from filing fees go directly to the U.S. Treasury and are unrelated to the SEC budget. The fee increases represent a 28% increase, the first increase in some time and they follow a decrease of 70% last year.

http://www.sec.gov/news/press/2007/2007-89.htm

Broker Dealer

AMEX Adds Trade-Through Exceptions to AEMI Rules

The American Stock Exchange has amended its Rule 126A-AEMI, which implements the order protection requirements of Regulation NMS on AMEX's NMS-compliant platform, AEMI, to include additional exceptions and exemptions from those requirements. The amended rule adds the "stopped order" exception set out in Regulation NMS Rule 611(b)(9), as well as the exemptions for "qualified contingent trades" and "sub-penny trade-throughs," to the list of circumstances under which AEMI may execute a trade that would otherwise constitute a trade-through without simultaneously generating an Intermarket Sweep Order to the away protected quotation.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-8225.pdf

SEC/CORPORATE

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ISE to Accept and Execute Certain Block Orders in Penny Increments

The Securities and Exchange Commission has approved a rule change proposed by the International Securities Exchange (ISE) to decrease the minimum increment for entry and execution of single-sided, block-size orders through ISE's Block Mechanism. Prior to the rule change, the Block Mechanism accepted and executed orders in standard increments of 5 and 10 cents and at split prices of 2.5 cents and 5 cents. Under the amended rule, orders may be entered and executed in penny increments using the Block Mechanism, but such orders will no longer be executed at split prices.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-8597.pdf

Banking

OTS Adopts Interim Final Rule Implementing Prohibitions Under Section 19(e)(1) of the FDIA

Effective May 8, the Office of Thrift Supervision (OTS) adopted an interim final rule implementing certain prohibitions applicable to a person convicted of any criminal offense involving dishonesty, a breach of trust or money laundering or that enters into certain agreements to enter into a pretrial diversion in connection with such prosecution (Covered Convictions). Section 19(e)(1) of the Federal Deposit Insurance Act (FDIA) provides that such person is prohibited from owning, controlling or participating in, either directly or indirectly, any savings and loan holding company (SLHC) (Prohibited Actions). A person who knowingly violates the statute shall be fined not more than $1 million for each day the prohibition is violated or imprisoned for not more than five years or both.

The interim final rule provides guidance with respect to Prohibited Actions by essentially adopting many of the definitions already applicable to insured depository institutions under Section 19(a) of the FDIA. Regarding Covered Convictions, OTS has provided guidance on the scope of what constitutes a "conviction" and an "agreement to enter into a pretrial diversion or similar program." OTS also provides guidance as to the meaning of "dishonesty" and the basis for determining whether a criminal offense involves dishonesty or a breach of trust. The interim rule excludes certain types of adjudications and criminal offenses and provides a set of criteria by which an offense will be deemed *de minimis* and therefore excluded.

Pursuant to its powers under Section 19(e)(2), OTS also provides two regulatory exemptions from the prohibitions described above. First, OTS is exempting SLHC employees whose responsibilities and activities are limited solely to agriculture, forestry, manufacturing, retail merchandising, or public utilities operations. OTS believes it is unlikely that employees with such responsibilities (at the holding company level) would constitute a threat to a institution's safety and soundness. Second, OTS is providing a transitional, temporary exemption for any prohibited person with respect to a SLHC on October 13, 2006 (date of enactment of Section 19(e)). Such exemption expires 120 days from the effective date of this interim rule, unless an application has been filed seeking a case-by-case exemption. The OTS interim rule provides guidance in applying for a case-by-case exemption. Comments must be received by July 9.

http://www.americanbanker.com/media/regulatory/federalregister/pdfs/050807.pdf

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BANKING

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Litigation

Securities Fraud Class Action Dismissed Under PSLRA

PainCare Holdings, Inc.'s common stock purchasers brought a securities fraud class action, alleging that the company's reported financial results violated GAAP by materially understating reported expenses and materially overstating reported net income. Plaintiffs contended that these erroneously favorable figures enabled the company to engage in acquisitions and other transactions by using artificially inflated common stock. The company's stock price declined substantially immediately after it disclosed the violations and its need to restate earnings for a two year period. Defendants prevailed on their move to dismiss the lawsuit on the grounds that the complaint failed to satisfy the enhanced pleading requirements of the Private Securities Litigation Reform Act (PSLRA) and Rule 9(b) of the Federal Rules of Civil Procedure.

The court found that the "essence" of plaintiff's allegations of defendants' fraudulent misrepresentations was simply that the Company's financial statements, Securities and Exchange Commission filings and press releases about its financial performance during the two year period preceding the restatement announcement were incorrect. The court ruled that these allegations did not satisfy either the "who, what, when, where, and how" requirement of Rule 9(b) or the pleading threshold to establish scienter.

While recognizing that scienter may be satisfied by showing that defendants "acted with a severely reckless state of mind," the court noted the absence of any allegations indicating such a state of mind. To the contrary, the court noted that the company at all relevant times consistently used the same disclosed method of accounting in its financial statements and that all such statements had been certified by independent auditors. The court also ruled that the massive restatement of earnings was not an indicium of fraud, noting the complete absence of any allegations that the defendants were aware of the GAAP violations at the time the alleged misrepresentations were made. (*In re PainCare Holdings Securities Litigation,* No. 6:06-cv-362-Orl-28DAB, 2007 WL 1229701 (M.D. Fla. April 25, 2007))

Corporation Adequately Pleaded Securities Fraud Against Chairman

A corporation engaged in oil and gas producing activities brought a securities fraud action against individual defendants, including its former chairman and several unlicensed brokers, to recover damages allegedly incurred as a result of a fraudulent scheme pursuant to which the defendants sold the company's securities in order to artificially inflate the stock price and generate illegal commissions.

The company alleged, among other things, that the chairman (i) in order to build a "ponzi" scheme and attract future investors, arranged for each investor to be paid a "profit" that exactly matched pre-investment projections, regardless of the company's actual performance; (ii) knew that many of the individuals purchasing stock were "unaccredited investors;" (iii) entered into commission agreements with the defendant brokers whose existence was deliberately concealed from the Board through which more than $7 million in commissions were paid, which payments were often falsely described as being for "consulting," "legal," or "acquisition" fees; and (iv) caused false reports to be filed with the Securities and Exchange Commission. The company claimed that, as a result of these actions, its financial well-being and the market for its securities had been damaged by, among other things, demands by victimized investors for rescission, a publicly disclosed SEC investigation and the company's incurring related legal and professional expenses.

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The court denied the chairman's motion to dismiss the securities fraud claims. The court rejected the chairman's argument that any damages allegedly sustained were speculative or consequential, ruling that that the damages alleged – for rescission, for paying millions of dollars in improper commissions, and incurring legal and professional expenses relating to the SEC investigation – were neither remote from the consequences of the chairman's alleged wrongdoing nor speculative.

The court also ruled that the company adequately pleaded reliance by alleging that the chairman repeatedly withheld material information from the Board in order to prevent the Board from uncovering the illegal scheme. Finally, the court ruled that the complaint satisfied the pleading requirements of Rule 9(b) and the PSLRA because the company alleged with specificity omissions that the chairman made to the Board, misstatements included in specifically identified SEC filings signed by the chairman, and details of the chairman's role in creating the scheme. (*Energytec, Inc. v. Proctor,* No. 3:06-CV-871-L, 3:06-CV-933-L, 2007 WL 1266051 (N.D. Tex. April 30, 2007))

CFTC

Joint Investor Alert to Highlight Risks in FOREX Market Issued

The Commodity Futures Trading Commission and the North American Securities Administrators Association issued a joint investor alert to warn retail investors about dangers related to foreign exchange currency trading frauds.

http://www.cftc.gov/opa/enf07/opa5332-07.htm

CFTC

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