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CORPORATE & FINANCIAL
WEEKLY DIGEST

May 21, 2010

SEC/CORPORATE

SEC Publishes Report from Forum on Small Business Capital Formation

The Securities and Exchange Commission recently published the Final Report from its Forum on Small Business Capital Formation, held in November 2009. The Small Business Investment Incentive Act of 1980 requires the SEC to host an annual forum that focuses on the capital formation concerns of small businesses. The purposes of the forum are to provide a platform for small business to highlight perceived unnecessary impediments in the capital raising process and to develop recommendations for government and private action to improve the environment for small business capital formation. Participants in the forum, consisting of members of various business and professional organizations, developed and ranked 26 securities law recommendations, including the following:

- ***Relax Restrictions on Private Placements*—**Forum participants recommended that the SEC consider a variety of new rules that would ease certain restrictions applicable to private placements, including recommendations that the SEC: (1) adopt new exemptions from registration that would permit general solicitation in transactions with purchasers who do not need the protections of the Securities Act of 1933 (the Securities Act); (2) relax the prohibitions against general solicitation in limited offerings (under Regulation D) to permit issuers to "test the waters" in certain circumstances; (3) allow "private placement brokers" to raise limited amounts of capital through private placements of issuers' securities offered solely to accredited investors (with full disclosure of any broker's compensation); (4) increase the $5 million ceiling under Regulation A and 500 shareholder threshold under Section 12(g) of the Securities Exchange Act of 1934 in order to allow issuers to engage in general solicitation for larger aggregate amounts of capital without registration under federal securities law; (5) shorten the integration safe harbor in limited offerings (under Regulation D) from six months to 90 days; (vi) adopt new rules that would extend the current exemption for qualified institutional buyers (QIBs) under Rule 144A beyond QIBs and permit additional trading in privately placed securities by investors who do not require the protection of Securities Act registration; and (6) adopt new accreditation standards for participation in private placements.

- ***Reduce Compliance Obligations of Smaller Reporting Companies***—Participants also made a number of recommendations that would ease reporting burdens for smaller reporting companies, including recommendations that (1) the SEC not oppose proposed legislation that would exempt smaller reporting companies from the auditor attestation requirements under Section 404(b) of the Sarbanes Oxley Act of 2002; (2) increase the public float threshold for being a smaller reporting company from $75 million to $250 million; (3) amend the definition of "smaller reporting company" to include issuers with less than $100 million annual revenue; (4) postpone the June 15, 2011, implementation of eXtensible Business Reporting Language for smaller reporting companies to the extent technological difficulties persist; and (5) reduce the "notice and access" advance mailing requirement for smaller reporting company proxy statements from 40 days to 30 days.

- ***Increase Thresholds for Exchange Act Registration*—**Participants also recommended that existing thresholds for requiring issuers to register and file periodic reports under the Securities Exchange Act of 1934 (the Exchange Act) be modified to increase the total assets test requiring public company registration

under Section 12(g) from the current $10 million level to an amount exceeding $100 million and to exclude accredited investors, large accredited investors and qualified institutional buyers from the 500 shareholder of record threshold under Section 12(g) of the Exchange Act.

Although the SEC hosted the Forum on Small Business Capital Formation, it does not endorse any of the recommendations developed by forum participants.

To view the Final Report from the Forum on Small Business Capital Formation, including a complete list of the recommendations developed by forum participants, click here.

Please see "CFTC-SEC Committee on Emerging Regulatory Issues to Meet" in **Financial Markets** below.

FINANCIAL MARKETS

CFTC-SEC Committee on Emerging Regulatory Issues to Meet

The Commodity Futures Trading Commission and Securities and Exchange Commission have announced that the first meeting of the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues will be held on Monday, May 24.

The Joint Committee will discuss the preliminary findings of the staffs of the CFTC and SEC related to the unusual market events of May 6.

The meeting will be streamed live on the Internet at www.sec.gov.
The CFTC press release regarding the meeting can be found here.

LITIGATION

Court Affirms Defamation Damages Based on Comments About Competitor's Prospects

The U.S. Court of Appeals for the Fifth Circuit affirmed a damages award levied against an education company that defamed its competitor by making comments about the competitor's business prospects to potential customers.

The College Network, Inc. (TCN), which sells study guides to nursing students, told about 40 sales agents during a 2006 regional training session that there was no need to worry about smaller competitor Moore Educational Publishers, Inc. (MEP), because that firm was "out of business" or was "going out of business." A TCN regional director encouraged agents to repeat these statements to potential customers to secure sales. In a subsequent lawsuit, MEP asserted a defamation claim against TCN predicated on the statements, and the jury—among other things—found the statements were defamatory and awarded $49,386 in reputational damages.

TCN appealed, arguing that there was insufficient evidence to award MEP reputational damages. The court rejected TCN's argument, however, as evidence introduced at trial showed that several of MEP's potential customers had declined purchases based on their perception that the company was failing, and that a correlation existed between the timing of TCN's statements and an unexplained drop in MEP's sales. This evidence sufficiently connected the defamatory statements to reputational harm to MEP and supported the jury's verdict. (*College Network Inc. v. Moore Educational Pub. Inc.*, 2010 WL 1923763 (5th Cir. May 12, 2010))

Delivery Delays Don't Support Fraud Claim

An aircraft seller's fraud claims against a manufacturer were dismissed after a federal court in Connecticut ruled that the seller did not reasonably rely on a "target" delivery date and caused its own injuries by entering restrictive resale contracts.

Aviamax Aviation Ltd. agreed to purchase an airplane from Bombadier Aerospace Corp. and had also contracted to sell the plane to a third party, who had agreed to accept delivery by any date. After substantial delays, Bombadier, in an amended agreement, committed to a "target date" of August 30, 2008, spurring Aviamax to cancel the original resale contract and execute a more lucrative deal with a prospective customer that hinged on

timely delivery. After further delays scuttled this second deal, and a third, Aviamax sued Bombadier for fraud and negligent misrepresentation, asserting that Bombadier lied about its ability to meet the delivery schedule.

The U.S. District Court for the District of Connecticut dismissed Aviamax's claims. The court held that the "target date" in the amended agreement, as well as other provisions that governed other possible delays, demonstrated that Aviamax could not reasonably rely on the delivery schedule in the amended contract. Additionally, the court held that Aviamax caused its own injuries by canceling the original "no-deadline" deal and entering the subsequent contracts, which might have been more lucrative but which involved hard deadlines that Aviamax could not reasonably expect to meet. (*Aviamax Aviation Ltd. v. Bombardier Aerospace Corp.*, 2010 WL 1882316 (D. Conn. May 10, 2010))

EXECUTIVE COMPENSATION AND ERISA

First Wave of Health Care Reform About to Hit Group Health Plans

Employers sponsoring group health plans should begin to focus on plan amendments that may be required in the "near term" under the recently adopted health care reform act, known as the Patient Protection and Affordable Care Act, as amended (PPACA).

Unlike PPACA's numerous and complicated rules, incentives, subsidies, penalties and effective dates applicable to the health care industry, insurers, employers and individual citizens, the requirements for making near-term amendments to employer-sponsored group health plans are limited in number and easily understood.

Here is a list of the most important requirements that become effective with respect to group health plans (both insured and self-insured) for plan years beginning on and after September 23 (section numbers below refer to applicable sections of PPACA):

1) the elimination of pre-existing condition limitations for participants under age 19 (section 1255);
2) the elimination of lifetime limits on the dollar value of "essential health benefits" (section 2711);
3) regulated annual limitations on the dollar value of essential health benefits (section 2711);
4) no rescission or cancellation of coverage, except for fraud or misrepresentation (section 2712);
5) designated preventive care services and immunizations must be provided, with no cost-sharing with participants (section 2713);
6) dependent coverage must be extended to adult children until age 26 (section 2714);
7) participants must be notified of material changes in a group health plan at least 60 days prior to the effective date of the change (section 2715);
8) rules restricting discrimination in eligibility and coverage in favor of "highly compensated employees", currently applicable only to self-insured plans, are to be extended to insured plans (section 2716);
9) new procedures for appealing denied claims will provide for an external review process (section 2719);
10) a patient's "bill of rights" will remove certain restrictions on access to primary care providers, emergency services, pediatric specialists and obstetrical and gynecological care (section 2719A);
11) W-2s for 2011 must show the cost of health coverage (section 1514); and
12) over-the-counter medicines cannot be reimbursed by a flexible spending account unless prescribed by a doctor (section 9003).

Some of the above changes are optional for "grandfathered" plans (i.e., plans in existence on March 23) (section 1251).

The list is finite, but so is the time period for making these changes. Plan Administrators should begin to review their plan documents, noting where changes will be required, and then begin discussions with their insurers, third party administrators and counsel to ensure a timely and coordinated implementation of these changes.

PPACA may be found here.

EU DEVELOPMENTS

AIFM Directive Progress

As a result of votes on May 17 and May 18, respectively, of the European Parliament's Economic and Monetary Affairs Committee (ECON) and European finance ministers at the meeting of the Economic and Financial Affairs Council (ECOFIN), there are now Parliament and Council draft texts of the Alternative Investment Fund Managers (AIFM) Directive. These competing texts will serve as the basis for negotiations at a series of "trilogue" meetings, which will take place starting shortly between representatives of the Parliament, Council and European Commission. Once a compromise text is agreed and approved by ECOFIN, it will be sent for approval by a plenary session of the Parliament. At present, the target date for the plenary vote is July 6. The provisions of the Directive when formally approved will then be implemented by individual EU member states and will come into force in July 2012 or later.

Among the areas on which there is substantial divergence between the ECON and ECOFIN texts are the terms under which funds and managers established outside the EU can market to EU investors. Accordingly, until the trilogue process is completed and the final text of the Directive has been published, it will not be possible to know the shape of the regulatory regime that will begin to apply from 2012.

Read more.

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