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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC Proposes New Shareholder Proxy Access Rules

On May 20, the Securities and Exchange Commission, by a 3 to 2 vote, proposed changes to the federal proxy rules to permit certain shareholders broader access to company proxy materials for the purpose of nominating independent directors.

Proposed changes include the addition of a new Rule 14a-11 to the SEC's proxy rules, which would establish a tiered structure by which shareholders holding a minimum percentage of a company's outstanding voting securities would be entitled to submit nominations for either one director or up to 25 percent of the company's directors, whichever is greater, for inclusion in proxy materials. The proposed minimum holding requirements would be as follows: for large accelerated filers, one percent of outstanding voting securities; for other accelerated filers, three percent of outstanding voting securities; and for non-accelerated filers, five percent of outstanding voting securities. Shareholders would be permitted to aggregate holdings to meet these thresholds, and the proposals will include a new exemption for solicitations by shareholders seeking to form a nominating shareholder group. If a company receives more shareholder nominees than it is required to include in its proxy materials it would include "those put forward by the nominating shareholder or group that first provides timely notice to the company".

To be eligible for proxy access, shareholders must have held such minimum number of securities for at least one year. Additionally, nominees must be "independent" directors according to standards of the applicable national securities exchange or securities association. Nominating shareholders would be required to submit to the company and file with the SEC a new Schedule 14N, which would include disclosures regarding the shareholder's security holdings and certifications that (i) the shareholder would hold such securities through the date of the annual meeting and (ii) the shareholder is not seeking to gain more than a minority representation on the registrant's board of directors. The company's proxy materials would be required to include disclosure concerning the nominating shareholder as well as the director nominee. The nominating shareholder would also be liable for any false or misleading statements provided by such shareholder and included in the company's proxy materials.

In addition, the SEC proposed to amend Rule 14a-8(i)(8) to remove as grounds for a registrant's exclusion of shareholder proposals amendments to a company's by-laws regarding the company's director nomination procedures or other director nomination disclosure provisions, provided that these proposals do not violate or conflict with the SEC rules (including proposed Rule 14a-11). Rule 14-8(i)(8) currently permits registrants to exclude such proposals from its proxy statement. In contrast to the tiered holding requirements applicable under Rule 14a-11, a shareholder proposing such by-law changes would be required to comply only with the current Rule 14a-8 eligibility provisions—that the proponent have continuously held at least $2,000 in market value (or one percent, whichever is less) of the company's securities for at least one year prior to submitting the proposal.

The proposed rules would apply to all Exchange Act reporting companies, including investment companies, other than debt-only companies. However, the Division of Corporation Finance emphasized that proposed Rule 14a-11 would not apply to shareholders who are otherwise prohibited from nominating a director under either state law or the company's organizational documents.

Public comments on the proposed rule amendments must be received by the SEC within 60 days after their publication in the Federal Register. Following such publication, Katten will issue a *Client Advisory* summarizing in greater detail the proposed proxy access rules.

Click here to read the SEC press release.
Click here to read remarks from Lillian Brown, Senior Special Counsel, SEC Division of Corporation Finance.

Supreme Court to Rule on Constitutionality of PCAOB

In an Order issued on May 18, the Supreme Court of the United States granted a petition for a writ of certiorari in a case challenging the constitutionality of the Public Company Accounting Oversight Board (PCAOB), established pursuant to the Sarbanes-Oxley Act of 2002.

Plaintiff in the action asserts that the provisions of the Sarbanes-Oxley Act creating the PCAOB violate separation of powers principles and the Appointment Clause of the U.S. Constitution in that the PCAOB's members are appointed by the Commissioners of the Securities and Exchange Commission who also have authority to remove PCAOB members. Plaintiffs allege that PCAOB members are "principal officers" who, under the Constitution, are required to be appointed by the President and confirmed by the Senate, and that the President must have the power to remove PCAOB members. Certiorari was granted after the U.S. Court of Appeals for the D.C. Circuit rejected plaintiff's arguments, finding, among other things, that the PCAOB's members are "inferior officers" and therefore need not be appointed by the President pursuant to the Appointment Clause, and that the President's indirect power through the SEC to remove such officers was sufficient.

The case will be heard during the Supreme Court's October term.

(*Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 537 F, 3d 667 (D.C. Cir. 2008))
(*Free Enterprise Fund v. Public Co. Accounting Oversight Bd*., _ S.Ct. _, 2009 WL 46537, 77 USLW 3431 (U.S. May 18, 2009))

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LITIGATION

Discovery Stay in Securities Action Lifted to Avoid Undue Prejudice

Plaintiffs, holders of American depository receipts (ADRs) representing shares in defendant Sadia S.A., a Brazilian food processing company, brought a securities fraud action pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Defendant moved to dismiss the complaint, thereby triggering an automatic stay of discovery pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA) pending the resolution of the motion.

Plaintiffs moved to lift the stay to the extent of requiring defendant to produce a report issued at the conclusion of an internal investigation of Sadia (Report) which had already been produced to Brazilian shareholders in a parallel action pending in Brazil.

The court first found that the discovery stay under the PSLRA "may be lifted *only* when the request is sufficiently particularized *and* when maintenance of the stay would either generate an impermissible risk of the destruction of evidence or create undue prejudice." (Emphasis in original.) The court ruled that the request, which was limited to a single identifiable report, was sufficiently particularized. Further, in granting plaintiffs access to the Report, the court ruled that given the existence of the parallel litigation, without access to the Report, the plaintiffs in the New York action would be disadvantaged "vis-à-vis [the] Brazilian litigants." In reaching its decision, the court noted that there would be little or no burden on Sadia to produce the Report because Sadia had already produced it in the lawsuit in Brazil. (*Westchester Putnam Heavy & Highway Laborers Local 60 Benefit Funds v. Sadia S.A.*, No. 08 Civ. 9528(SAS), 2009 WL 1285845 (S.D.N.Y. May 8, 2009))

Proposed Motion to Intervene in Derivative Securities Action Denied

The District Court for the Southern District of New York consolidated three separate derivative actions brought by shareholders of Ambac Financial Group, Inc (Ambac) against Ambac officers and directors in which claims for breach of fiduciary duty, corporate waste, unjust enrichment and violations of the Securities Exchange Act of 1934 were alleged (Consolidated Action). The plaintiffs in two derivative actions filed against Ambac's officers and directors in the Delaware Court of Chancery (Proposed Intervenors) moved to intervene in the Consolidated Actions pending in the Southern District (both as of right and with the Court's permission) and to be designated as co-lead plaintiffs with respect to the breach of fiduciary duty claim, which was the sole claim asserted in the Delaware actions. The three original plaintiffs opposed the motion.

The Court began by noting that, among other things, a party seeking to intervene as of right must show that its interest is not adequately represented by the other parties to the action in which intervention is sought. The Court then clarified that because the Proposed Intervenors sought to intervene as plaintiffs in a shareholder derivative action, the "true party in interest" was the corporation itself, and not the Proposed Intervenors. Accordingly, the Court ruled that granting intervention would not be appropriate if the original three plaintiffs in the Consolidated Action could adequately represent Ambac's interests.

The Proposed Intervenors, while conceding that the original plaintiffs adequately represented Ambac's interest on two of the three existing claims, asserted that their proposed Complaint in Intervention contained more detailed allegations regarding the third claim—for breach of fiduciary duty—and that they would more "vigorously prosecute" that claim. However, after noting that the Proposed Intervenors must rebut "the presumption of adequate representation by the party already in the action," the Court held that the presumption had not been rebutted. The Court ruled that simply because the original plaintiffs had asserted not only a fiduciary duty claim but also additional causes of action in the Consolidated Action did not render the original plaintiffs' representation "inadequate" with respect to the fiduciary duty claim. Having held that the Proposed Intervenors could not intervene as a matter of right, the Court then declined to exercise discretion to grant them permissive intervention. (*Ambac Financial Group, Inc., Derivative Litigation*, No. 08 Civ. 854 (SHS), 2009 WL 1309148 (S.D.N.Y. May 12, 2009))

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BROKER DEALER

FINRA Proposes Rules Governing Suitability and Know-Your-Customer Obligations

On May 15, the Financial Industry Regulatory Authority issued Regulatory Notice 09-25 requesting comment on proposed rules governing suitability and know-your-customer obligations. Proposed FINRA Rule 2111 (modeled on National Association of Securities Dealers Rule 2310, which would be eliminated) would codify various interpretations regarding the scope of the suitability rule (such as explicitly applying suitability obligations to a recommended transaction or investment strategy involving a security or securities), clarify the information to be gathered and used as part of a suitability analysis and create a clear exemption for transactions or investment strategies involving a security or securities recommended to institutional customers, subject to specified conditions. FINRA proposes to adopt as FINRA Rule 2090 a modified version of New York Stock Exchange Rule 405(1) regarding know-your-customer obligations, under which firms would be required to use due diligence, in regard to the opening and maintenance of every account, to know the essential facts concerning every customer (including the customer's financial profile and investment objectives or policy). Comments must be received by FINRA by June 29.

To read FINRA Regulatory Notice 09-25, click here.

SEC Approves Changes to Forms U4 and U5

The Securities and Exchange Commission has approved amendments to Forms U4 and U5, which, respectively, are forms used to apply for or to terminate securities industry registration. The amendments, among other things, add new regulatory action disclosure questions intended to enable the Financial Industry Regulatory Authority and other regulators to identify individuals and firms subject to disqualification as a result of a finding of a willful violation, require firms to report allegations of sales practice violations made against a registered person in an arbitration or litigation in which that person is not a named party, increase the monetary threshold for reporting settlements of customer complaints, arbitrations or civil litigation from $10,000 to $15,000 and, as to Form U5, revise the "Date of Termination" definition and enable firms to amend the "Date of Termination" and "Reason for Termination" sections, subject to certain conditions and notifications. The amendments regarding sales practice violations, the monetary threshold and the date of and reason for termination became effective on May 18 (along with other clarifying and technical amendments, as further discussed in FINRA Regulatory Notice 09-23). The amendments adding new regulatory action disclosure questions with respect to willful violations will become effective on November 14.

Click here to read FINRA Regulatory Notice 09-23.

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PRIVATE INVESTMENT FUNDS

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CFTC

CFTC Extends Comment Period on Swap Dealer Hedge Exemption Concept Release

The Commodity Futures Trading Commission has extended the public comment period on its March concept release relating to hedge exemptions for swap dealers. Among the primary issues raised in the concept release are whether swap dealers’ “bona fide hedge” exemptions from speculative position limits should be eliminated and replaced by more limited “risk management” exemptions, and, if so, the appropriate criteria for such new exemptions.

The comment period for the concept release now closes on June 16, as reported in the CFTC press release. The concept release is available here.

Gensler Confirmed as CFTC Chairman, Chilton Nominated for Second Term as Commissioner

On May 19, the U.S. Senate voted to confirm Gary Gensler as Chairman of the Commodity Futures Trading Commission. Gensler was nominated to the post by President Obama in mid-December 2008.

Also on May 19, the White House announced that CFTC Commissioner Bart Chilton has been nominated for a second term. Chilton has served as a Commissioner since August 2007.

A record of the Senate vote confirming Gensler’s nomination is available here.
The announcement of Chilton’s nomination is available here.

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INVESTMENT COMPANIES AND INVESTMENT ADVISORS

SEC Requests Independent Confirmation of Advisor Assets

The Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) has published information regarding its new practice of requesting independent confirmation of account balances directly with various persons, including clients and shareholders, as part of its examinations of the books and records of securities firms and investment advisors. The request will be in the form of a "Routine Account Information Confirmation" sent to clients and shareholders, the response will be voluntary and the SEC emphasizes that in no way should receipt of the form be construed as an indication of any problem or irregularity by the firm being inspected. The form lists the amount of the client's balance with, last deposit to, and last withdrawal from, the securities firm or investment advisor being examined, with this information taken from the books and records of the firm or advisor, and asks the client to confirm whether this balance, deposit and withdrawal information is consistent with its own records. A cover letter sent with the form will include the contact information of an SEC examiner in the event the client has any questions or wants to confirm that the request actually came from the SEC.

To view a sample "Routine Account Information Confirmation" form click here.

See also the March 13, 2009, edition of *Corporate and Financial Weekly Digest*, discussing separate letters written by OCIE staff to the Managed Funds Association and the Investment Adviser Association regarding the SEC's announcement of the new examination practice.

SEC Proposes Amendments to the Custody Rule

The Securities and Exchange Commission has proposed amendments to Rule 206(4)-2, the custody rule under the Investment Advisers Act of 1940, intended to provide additional safeguards to clients and investors and give the SEC better information about the custodial practices of registered investment advisors.

A key element of the amendments is to require all advisors that have custody of client assets to undergo an annual surprise examination by an independent public accountant. The proposal also requires the annual surprise examination in the case of advisors to pooled investment vehicles (e.g., hedge funds and private equity funds) where the advisor is deemed to have custody of the assets. Currently, so long as a pooled investment vehicle undergoes an audit at least annually, and its investors receive audited financial statements within 120 days of the end of its fiscal year, no additional surprise examination is required. The proposed amendment also clarifies that if a registered investment advisor is relying on the annual audit of a fund over which it has custody to avoid having to provide (or having a qualified custodian provide) investors in that fund with quarterly account statements, then the fund must also undergo a liquidation audit and distribute audited financial statements promptly after the fund liquidates and makes final distribution payments other than at a year end.

For registered advisors who maintain custody of client assets with a qualified custodian affiliated with the advisor, the proposed amendments would treat the advisor as having direct custody of the client assets, applying all the requirements of the rule to that advisor and custody arrangement, and add the additional requirement of an annual "internal control report" by a Public Company Accounting Oversight Board registered independent public accountant. The proposed rule changes also include various requirements to report information to the SEC.

Click here for the proposed amendment.

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BANKING

Federal Reserve Announces Amendments to Reserve Requirements

On May 20, the Board of Governors of the Federal Reserve System (Federal Reserve) announced the approval of final amendments to Regulation D, *Reserve Requirements of Depository Institutions*.

The amendments are intended to make it easier for community banks that use correspondent banks to receive interest on excess balances held at Federal Reserve banks. In addition, with the adoption of the Regulation D amendments, the Federal Reserve "liberalized" restrictions on the types and number of transfers and withdrawals that may be made from savings deposits. According to the final amendments, six monthly transfers or withdrawals from savings deposits by check, debit card or similar order payable to third parties are now permitted (previously, the limit was three withdrawals monthly by such mechanisms). Finally, the Federal Reserve also authorized the establishment of "excess balance accounts" at Federal Reserve banks. "Excess balance accounts" are limited-purpose accounts for maintaining excess balances of one or more institutions that are eligible to earn interest on their Federal Reserve balances. According to the accompanying press release, such accounts have been authorized to alleviate pressures on correspondent-respondent business relationships in the current "unusual financial market environment" which has caused some respondents to hold their excess balance accounts in an account at the Federal Reserve rather than sell them through a correspondent in the federal funds market.

The final amendments will become effective 30 days after their publication in the Federal Register.

Read more.

OTS Issues CEO Bulletin for Other-Than-Temporary Impairment for Debt Securities

On May 14, the Office of Thrift Supervision, which regulates savings banks and their holding companies, issued a CEO Bulletin (Bulletin) that alerts institutions to the recent change to generally accepted accounting principles (GAAP) with respect to available-for-sale and held-to-maturity debt securities. The Bulletin highlights new other-than-temporary impairment (OTTI) accounting guidance issued on April 9 by the Financial Accounting Standards Board (FASB) for debt securities .

Under FASB Staff Position (FSP) FAS 115-2, an impairment for debt securities, in certain circumstances, is separated into the credit loss amount recognized in earnings and the amount related to all other factors (non-credit loss) recognized in other comprehensive income, net of applicable taxes. Under FSP FAS 115-2:

1. If (i) an institution intends to sell the debt security, *or* (ii) it is "more likely than not" that it will be required to sell the security before recovery of its amortized cost basis (less any current-period credit loss), OTTI equal to the entire difference between the security's amortized cost basis and its fair value shall be recognized in earnings.
2. If, however, (i) an institution does not intend to sell the debt security, and (ii) it is not "more likely than not" that the institution will be required to sell the security before recovery of its amortized cost basis (less any current-period credit loss), and (iii) it does not expect to recover the entire amortized cost basis, the OTTI shall be separated and recognized as follows:

    a. The credit loss amount shall be recognized in earnings.
    b. The non-credit loss shall be recognized in other comprehensive income (OCI), net of applicable taxes.

The Bulletin reminds management and examination staff that the regulatory capital treatment of losses on debt securities has not changed, noting that the new accounting guidance may result in a different amount of non-credit losses on available-for-sale and held-to-maturity debt securities being recognized in OCI instead of earnings. The non-credit losses in accumulated OCI will be added back as part of unrealized losses in determining Tier 1 capital on Thrift Financial Report Schedule Consolidated Capital Requirement. The Bulletin also states that each quarter, management is responsible for ensuring that each security's fair value is measured consistent with GAAP and also documenting whether impairment is temporary or other-than-temporary.

Read more.

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STRUCTURED FINANCE AND SECURITIZATION

Federal Reserve Adds Legacy CMBS to TALF

On May 19, the Federal Reserve Bank of New York (FRBNY) announced that, starting in late July, certain AAA-rated commercial mortgage-backed securities issued before January 1, 2009 (Legacy CMBS), will be eligible collateral under the FRBNY's Term Asset-Backed Securities Loan Facility (TALF). This announcement marks the first addition of a legacy asset class to the list of eligible TALF collateral. Since March 17, the FRBNY, in conjunction with the U.S. Treasury Department, has been providing non-recourse, low-interest TALF loans to eligible borrowers in order to finance purchases by those borrowers of newly issued asset-backed securities (ABS) on a highly leveraged basis. Prior to this development, those ABS had to be issued on or after January 1, 2009, and could only be backed by recently originated commercial mortgage loans, student loans, credit card receivables, auto and equipment loans and leases, small business loans, and certain other eligible receivables. As noted by the FRBNY, the extension of the TALF program to include Legacy CMBS is intended to promote price discovery and liquidity for existing CMBS.

For more information see Katten's *Client Advisory* on the topic.

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ANTITRUST

Court Dismisses Technological Tying Claim From iPod/iTunes Antitrust Class Action

A lawsuit against Apple regarding the relationship between its iPod digital music player and its iTunes Music Store (iTMS) was pared back on May 15, when the U.S. District Court for the Northern District of California dismissed one form of antitrust tying claim from the case. The plaintiffs are purchasers of iPods from Apple and of audio or video files from Apple's iTMS. In a consolidated complaint filed in 2007, they alleged that Apple engaged in unlawful tying in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as other federal antitrust and state law claims. Specifically, they complained that Apple employed Digital Rights Management (DRM) restrictions that rendered content purchased from the iTMS technologically incompatible with digital players other than Apple's own iPod. This practice allegedly locked iTMS customers into purchasing only Apple iPods going forward and at prices higher than if competing iTMS-compatible digital music players had been available.

Tying refers to the practice of selling one product (the "tying" product) only on the condition that the customer also purchases a second product (the "tied" product). In some circumstances tying is treated as a *per se* antitrust violation, while in other cases it requires a full blown analysis of the effects of tie under the "rule of reason." Here, the court ruled that the incompatibility created by Apple's DRM technology would not be sufficient for a *per se* claim. The court will address the rule of reason theory after further briefing from the parties. (*Apple iPod iTunes Antitrust Litig.*, No. 05-00037, slip op. (N.D. Cal. May 15, 2009))

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UK DEVELOPMENTS

FSA Bans Trader for Overnight Concealment of Trading Position

The UK Financial Services Authority (FSA) has banned David Redmond, a former proprietary trader in freight and oil with Morgan Stanley's London commodities division, from performing any function in relation to any regulated activity on the grounds that he is not a fit and proper person.

The FSA stated that it made no criticisms of Morgan Stanley or any other individuals at the firm. The firm promptly identified and investigated the issue and took swift action against Redmond, suspending him the day the acts in question came to light and subsequently dismissing him.

On February 6, 2008, Redmond built up a substantial short position in WTI Futures on the ICE Futures (Europe) web-based trading platform. In breach of Morgan Stanley's policies and procedures, he then concealed the position overnight, exposing the firm to the risk of incurring a significant loss. On February 7, 2008, rather than informing the firm of his actions, Redmond traded out of the position. He admitted concealing the position only when directly challenged by the firm.

Margaret Cole, the FSA's Director of Enforcement, in a published comment emphasized that this concealment of positions showed a lack of honesty and integrity that fell short of the standards the FSA expects of approved persons.

The FSA indicated that, based on a number of mitigating factors, it would be likely to agree to an application from Redmond to lift the ban after two years, provided there is no further evidence of misconduct.

Read more.

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