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SEC/CORPORATE

SEC Proposes Amendments to NASDAQ Listing Rules

On May 19, the Securities and Exchange Commission published a notice soliciting comments on amendments to NASDAQ's Listing Rules. NASDAQ filed the rule change with the SEC on May 14 and has designated the proposed rule change as constituting a non-controversial rule change, which renders the proposal effective upon filing with the SEC.

Proposed Amendments

The NASDAQ Listing Rules require that a listed company notify NASDAQ when an executive officer of such company becomes aware of any material noncompliance with NASDAQ's corporate governance requirements contained in the Rule 5600 series. According to the SEC release, NASDAQ has consistently interpreted this notification requirement such that any noncompliance with the corporate governance requirements contained in the Rule 5600 series would be considered material. The proposed amendment to Rule 5625 would clarify this interpretation by NASDAQ by requiring notification of any noncompliance. The proposed amendments would also make conforming changes to Rule 5615(a)(3) and IM-5615-3, which, among other things, require a foreign private issuer to provide notice of noncompliance, and to Rule 5250, which cross references the requirement to provide notice of noncompliance.

Comments should be submitted within 21 days after publication in the *Federal Register*.

Click here for the full text of the proposed amendments.

SEC's Chief Accountant Testifies on Developments in Accounting and Auditing Standards

On May 21, the Securities and Exchange Commission's Chief Accountant, James Kroeker, testified on behalf of the SEC before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the U.S. House Committee on Financial Services. Mr. Kroeker discussed the status of the following accounting and auditing standards matters the SEC is working on with the Financial Accounting Standards Board (FASB) and the Public Company Accounting Oversight Board (PCAOB).

- *Repo 105 Transactions and Off-Balance Sheet Accounting*. The Lehman Brothers Examiner's Report highlighted Lehman's accounting for so-called "Repo 105" transactions (which are contracts to sell a security today and to repurchase that same security at a date in the future for a set price) as sales rather than secured borrowings. This treatment resulted in artificially reducing Lehman's reported liabilities. Based on the responses to the SEC's letters to 19 large public companies requesting information about their use and accounting of Repo 105 transactions, the SEC determined that inappropriate practices are not widespread. However, the SEC has requested several companies to enhance disclosure regarding their accounting of Repo 105 transactions and expand disclosure of off-balance sheet arrangements beginning in their Form 10-Qs. Additionally, the FASB is engaged in a broader standard-setting initiative with respect to the recording of assets and liabilities in securitization structures and other special purpose type entities.

- *Global Accounting Standards*. In connection with its continued consideration of global accounting standards and convergence of U.S. generally accepted accounting principles and International Financial Reporting Standards (IFRS), the SEC has initiated a work plan to study the scope of, timing of and approach to changes necessary to effectively incorporate IFRS into the financial reporting system for U.S. issuers. There are also ongoing convergence projects between the FASB and IFRS involving financial instrument fair values, revenue recognition, leases, debt vs. equity, and financial statement presentation with the goal of developing high-quality, common accounting standards.

- *Interactive Data (XBRL)*. The three-year phase-in of the SEC's interactive data rules, which require the submission of financial statements and notes to the financial statements in a format known as eXtensible Business Reporting Language (XBRL), is proceeding on schedule. While approximately 500 companies have submitted XBRL-encoded financial statements to date, additional companies must begin complying with the XBRL rules with their Form 10-Qs for June 2010, with the remainder beginning with their Form 10-Qs for June 2011. The XBRL list of tags has already been integrated into the FASB's Accounting Standards Codification, making it possible to navigate from financial statements filed with the SEC to the underlying accounting standards, and to navigate from an accounting standard to where it has been applied in practice, enabling the FASB and the SEC to better monitor how standards are being applied in practice.

- *PCAOB Developments*. The PCAOB's inspection program includes inspections of non-U.S. registered public accounting firms. However, due to the PCAOB's lack of explicit legal authority to share information with foreign accounting regulators, the PCAOB has been hindered in its efforts to gain access to non-U.S. accounting firms and their audit work papers. As a result, the PCAOB has not been able to perform many of the required inspections of registered accounting firms in these foreign jurisdictions. The SEC supports the U.S. House's version of the regulatory reform bill that would allow the PCAOB to share certain information with audit regulators in foreign jurisdictions. Additionally, the SEC believes that clarification of the PCAOB's oversight of auditors who perform audits of broker-dealers will improve the quality of such audits and strengthen investor protection and broker-dealer compliance.

- *Internal Control Over Financial Reporting*. The final phase-in of the requirement under Sarbanes-Oxley Section 404 to have auditor attestation of internal control over financial reporting is proceeding on schedule. This requirement will be effective for non-accelerated filers (registrants under $75 million of public float) beginning for fiscal years ending on or after June 15, 2010.

Click here for the full text of the testimony of the SEC's Chief Accountant.

BROKER DEALER

DTCC to Provide FINRA Access to Participant Position Reports

The Financial Industry Regulatory Authority and the Depository Trust & Clearing Corporation (DTCC) are establishing a program that will provide FINRA staff with direct and routine access to position reports and similar information that DTCC (and its affiliates and subsidiaries) provides to its participants. Under the arrangement, FINRA staff may make specific information requests regarding a firm that is both a FINRA member firm and a DTCC participant. FINRA and DTCC are planning to develop an automated process for the exchange of such information. Although FINRA currently has access to this information from its member firms, it believes that direct access from DTCC will provide more timely information with greater efficiency.

Click here to read the FINRA Information Notice.

FINRA Proposes Registration and Qualification Requirements for Certain Operations Personnel

The Financial Industry Regulatory Authority is seeking comment on a proposal to expand its registration requirements to include as qualified and registered persons certain "back-office" operations personnel of a member firm. Accordingly, FINRA is proposing a new registration category for "Operations Professionals," which generally would include those persons who have decision-making and/or oversight authority over certain "covered functions" as specified in the proposed rule, such as activities relating to sales and trading support and the handling of customer assets. In addition to the licensing and exam requirements, FINRA also is proposing a continuing education requirement for such persons. FINRA believes these measures will enhance the regulatory structure surrounding a member firm's back-office operations and will help ensure investor protection mechanisms are in place in all areas of a member firm's business that could harm a customer, a firm, the integrity of the marketplace or the public. Comments are due to FINRA by July 12.

Click here to read FINRA Regulatory Notice 10-25.

LITIGATION

Motion to Dismiss Lehman-Related Securities Class Action Denied

Judge John Koeltl in the U.S. District Court for the Southern District of New York recently denied a motion to dismiss a securities class action arising, in part, from the Lehman Brothers bankruptcy filing.

On July 9, 2008, JA Solar Holdings Co., Ltd., a China-based manufacturer of high-performance solar cells, purchased a $100 million note issued by Lehman Brothers Treasury Co. B.V. (Lehman Treasury), a subsidiary of Lehman Brothers Holdings, Inc. (Lehman Brothers). According to the complaint, the note was supposed to have 100% principal protection and was guaranteed by Lehman Brothers.

Lehman Brothers filed for bankruptcy on September 15, 2008, prior to the note's maturity date, and Lehman Treasury subsequently failed to pay the note when it came due on October 9, 2008. On November 12, 2008, JA Solar announced that it had recorded a $100 million impairment charge on the value of the note. That day, JA Solar's stock price declined by 28%.

The second amended complaint alleged that JA Solar and three senior officers violated Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 by making materially misleading statements concerning JA Solar's relationship with Lehman Brothers and the impact of Lehman Brothers' bankruptcy filing on the value of the note.

First, plaintiffs alleged that in August 2008, JA Solar disclosed that it had retained Lehman Brothers and other banks to help manage its cash without disclosing the fact that JA Solar had purchased the note from Lehman Treasury. Second, plaintiffs alleged that in a September 2008 press release and conference call, JA Solar materially understated the risk that the Lehman Brothers bankruptcy filing would have on the value of the note by (a) emphasizing that JA Solar had purchased the note from Lehman Treasury, which was not "the subject of insolvency proceedings", and (b) suggesting that the note was "principal protected" notwithstanding the bankruptcy filing.

The court found that plaintiffs adequately pleaded the elements of a Section 10(b) claim under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). With regard to the August 2008 disclosure, the court found that once JA Solar decided to disclose its relationship with Lehman, it had a duty to be accurate and complete. With regard to the September 2008 statements, the court determined that, notwithstanding the fact that it purchased the note from Lehman Treasury, JA Solar knew that Lehman Brothers was the only guarantor of the note and that Lehman Brothers was in fact in bankruptcy. (*Ellenburg v. JA Solar Holdings Co., Ltd.*, 2010 WL 1983375 (S.D.N.Y. May 17, 2010))

Court Imposes Rule 11 Sanctions Pursuant to the PSLRA

Three attorneys were recently sanctioned under the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA requires, among other things, that at the conclusion of a securities litigation, courts must determine whether the parties complied with Rule 11 of the Federal Rules of Civil Procedure, and, if Rule 11 has been violated, impose mandatory sanctions. Further, the PSLRA creates a presumption that an award of attorneys' fees and costs is the most appropriate sanction.

In general, Rule 11 requires attorneys to certify that information contained in a pleading or other paper is accurate, is supported by evidence and the law, and is not being presented for an improper purpose.

The complaint at issue alleged fraud based on a series of false and misleading statements concerning Australia and New Zealand Banking Group Limited's financial results and future performance. The allegations in the original complaint were made upon information and belief, and were based upon plaintiffs' attorneys' analysis of publicly available news articles and analyst reports. Following submission of the original complaint, a lead plaintiff for the class was appointed, who subsequently filed an amended complaint. The amended complaint abandoned certain allegations contained in the original complaint and identified new misleading statements.

The court found that the original complaint violated Rule 11 because one paragraph containing material allegations central to the viability of the entire pleading was "utterly lacking in [evidentiary] support."

The key paragraph alleged that "in a series of internal emails" dated in March 2007 (the beginning of the class period), executives for the issuer recognized that a borrower was in financial difficulty and the company's loans to the borrower were in jeopardy. The basis for this allegation was a news article referencing internal emails from one year later, in March 2008. Plaintiffs' counsel asserted that he mistakenly read the article to refer to March 2007 emails (which would have implied knowledge by senior executives early in the class period) rather than March 2008 emails.

The attorneys further argued that Rule 11 was not violated, because: (1) the remainder of the original complaint, as a whole, was grounded in fact; (2) alternative news sources similarly suggested scienter; (3) the objectionable paragraph was included in the original complaint in good faith; and (4) the amended complaint, which abandoned the erroneous allegations, effectively cured the error by superseding the original pleading.

The court rejected these arguments, finding that good faith alone is not a defense to sanctions under most circumstances, even where a factual error is isolated, and that the filing of an amended complaint did not cure the defects in the original complaint because the PSLRA demands that courts perform a Rule 11 analysis on *any* complaint.

Both attorneys who signed and filed the original complaint, as well as their respective law firms, were found jointly and severally liable for the fees and costs. The imposition of full fees and costs, however, is a rebuttable presumption, and the court gave the parties further opportunity to prove why an award of full attorney's fees would be an unreasonable burden. (*In re Australia and New Zealand Banking Group Limited Securities Litigation*, 2010 WL 1875728 (S.D.N.Y. May 11, 2010))

ANTITRUST

Supreme Court Issues Important Ruling for Joint Venturers and IP Licensing Groups

On Monday, the Supreme Court unanimously ruled that the National Football League's collective licensing of team logos should be subject to scrutiny under the antitrust laws. This decision has potentially important implications for parties to joint ventures, IP licensing consortia, and other entities that involve collaboration among competitors or industry participants.

The NFL's 32 teams market their intellectual property through a joint venture called NFL Properties. The joint venture acts as a single licensing agent for all 32 NFL teams. For years, NFL Properties granted nonexclusive licenses to a number of competing apparel manufacturers, who incorporated team logos into fan apparel. In 2000, NFL Properties changed its policy and granted Reebok a 10-year exclusive license to sell trademarked headwear for all 32 teams. American Needle, a licensee whose agreement with NFL Properties was not renewed when Reebok received the exclusive license, sued, alleging that the agreement between the NFL, its teams, NFL Properties, and Reebok constituted a restraint of trade that violated Section 1 the Sherman Act.

The NFL defendants argued that Section 1 of the Sherman Act did not apply to them because NFL Properties was a single entity and Section 1 only applies to conduct involving multiple parties. They argued that under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), they were incapable of conspiring with one another in violation of Section 1 because they were a single economic enterprise, at least with respect to the challenged conduct. In *Copperweld*, the Court held that the coordinated activity of a parent corporation and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of Section 1. The Court this week declined to extend *Copperweld* protection to the NFL because "[w]hen each NFL team licenses its intellectual property, it is not pursuing the common interests of the whole league but is instead pursuing interests of each corporation itself." The Court's ruling only addresses whether the joint licensing is covered by Section 1 of the Sherman Act. It does not address whether the license is legal. The case will now return to the district court, where American Needle must prove that the licensing practice unreasonably harms competition.

The ruling makes it clear that joint ventures comprising separate economic actors will not enjoy blanket immunity and instead will be analyzed according to how their collective actions affect competition. (*Am. Needle, Inc. v. NFL*, No. 08-661, Slip Op. (May 24, 2010))

EXECUTIVE COMPENSATION AND ERISA

Department of Labor Drafts Unemployment Compensation Integrity Act of 2010

On May 17, the U.S. Department of Labor delivered a draft of the Unemployment Compensation Act of 2010 to Congress. The Act is designed to help states fight employer fraud that results in payments of excess unemployment benefits. The Act would permit states to deposit up to 5% of recovered unemployment compensation overpayments in a fund from which money may be withdrawn to “deter, detect and collect” erroneous payments to individuals, the misclassification of employees as independent contactors, or other violations of state law relating to employer fraud or evasion of contributions. States would also be required to assess a penalty of at least 15% of the amount of the erroneous payment that resulted from claimant fraud. When announcing the draft, Secretary of Labor Hilda Solis stated, “The Unemployment Compensation Integrity Act would give states the additional resources and tools they need to guarantee that only those who are eligible for benefits receive them and employers who defraud the system pay their fair share of taxes.”

To read the text of the draft, click here.

UK DEVELOPMENTS

FSA Imposes Ban and Highest-Ever Fine on Individual

On May 20, the UK Financial Services Authority (FSA) announced that it had fined Simon Eagle £2.8 million (approximately $4 million) and prohibited him from working in financial services as a result of the deliberate market abuse scheme he had carried out in 2003-2004. The fine, made up of a penalty of £1.5 million (approximately $2.2 million) and disgorgement of profits of £1.8 million (approximately $2.6 million), is the largest fine ever imposed by the FSA on an individual.

Mr. Eagle acquired SP Bell Ltd (SPB), an agency stockbroker, in May 2003 and became its chief executive. Between July 2003 and May 2004 he carried out a complex and prolonged scheme that ramped up the share price of Fundamental-E Investments (FEI) for his own benefit at the expense of other FEI investors and misusing accounts of SPB clients.

This case is linked to the fines totalling £4.25 million (approximately $6.2 million) imposed on Winterflood Securities Limited and two of its traders (as reported in the April 3, 2009, edition of *Corporate and Financial Weekly Digest* and confirmed on April 22, 2010, after an appeal to the Court of Appeal) for their role in misuse of rollovers and delayed rollovers that created a false market for FEI shares and misleading the market.

FSA Director of Enforcement and Financial Crime Margaret Cole said: “This scheme was rotten throughout and at the core was Simon Eagle. He showed a breathtaking disregard for his clients, for his duty as an approved person and chief executive and for the effect of his scheme on markets. He has played procedural games in an attempt to avoid being held accountable for his actions and this tough action shows that we are determined to keep dishonest cheats, like Simon Eagle, out of financial services.”

To read more about Simon Eagle, click here.
To read more about Winterflood, click here.

FSA Bans Former Broker Employee for Fraud

On May 25, the UK Financial Services Authority (FSA) announced that it had prohibited John White, a former employee of Seymour Pierce Limited, from working in financial services for committing fraud.

As reported in the October 16, 2009, edition of *Corporate and Financial Weekly Digest*, the FSA fined Seymour Pierce £154,000 (approximately $222,000) for failing to establish effective controls to prevent an employee committing fraud; Mr. White was that employee.

FSA Director of Enforcement and Financial Crime Margaret Cole said: "We expect people who work in the financial services industry to behave with honesty and integrity, yet White's conduct was anything but. As this case demonstrates, we are committed to deterring behaviour of this kind by punishing anyone found to have committed such misconduct."

Read more.

Offshore Funds Practice Manual Issued

The UK tax authority, Her Majesty's Revenue and Customs (HMRC) has issued its new Offshore Funds Practice Manual. This sets out official guidance as to which funds will be treated as "offshore funds" for UK tax purposes and details of HMRC's approach as to how offshore funds will be treated. The redemption or sale of an interest in an offshore fund by a UK investor is treated as income, rather than as a capital disposal. This means that, for example, UK personal investors would be charged income tax (at rates of up to 50%) rather than capital gains tax (at a flat rate of 18%) on a redemption or sale of their interest in the fund.

The most significant changes are that:

1) A fund will be able to avoid being treated as an offshore fund for tax purposes if it becomes a "reporting fund". A "reporting fund" will be obliged to report all of its income to HMRC, and any UK investors will be taxed on their share of that income, regardless of whether or not they have actually received this income. Previously, a fund needed to actually distribute at least 85% of its income to investors in order to avoid offshore fund treatment.
2) There are significant changes to the definition of an offshore fund. A fund need no longer be a "collective investment scheme" within the UK Financial Services and Markets Act. Instead, subject to certain exceptions, it will be treated as an offshore fund if it has certain characteristics. These are that (i) the fund is not a UK tax resident; (ii) the fund enables investors to take part in any benefit arising from the acquisition, holding, management or disposal of assets; (iii) the investors do not have day-to-day control of the management of the assets; and (iv) a reasonable investor would expect to be able to realize his investment based entirely or almost entirely by reference to the net asset value of the assets under management or to any index.

The new Offshore Funds Practice Manual sets out in some detail how HMRC intends to apply these new rules.

Read more.

For more information, contact:

SEC/CORPORATE		
Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
David A. Pentlow	212.940.6412	david.pentlow@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
James B. Anderson	312.902.5620	james.anderson1@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Daren R. Domina	212.940.6517	daren.domina@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Robert M. McLaughlin	212.940.8510	robert.mclaughlin@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com
LITIGATION		
William M. Regan	212.940.6541	william.regan@kattenlaw.com
Jessica M. Garrett	212.940.6523	jessica.garrett@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Steven G. Eckhaus	212.940.8860	steven.eckhaus@kattenlaw.com
J. Bradley Clair	212.940.6322	bradley.clair@kattenlaw.com
UK DEVELOPMENTS		
Martin Cornish	44.20.7776.7622	martin.cornish@kattenlaw.co.uk
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk
Andrew Turner	44.20.7776.7627	andrew.turner@kattenlaw.co.uk

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Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK WASHINGTON, DC

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