Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

May 4, 2007

SEC/Corporate

Foreign Private Issuers Plan to Abandon U.S. Listings

On April 30, the International Herald Tribune reported that a number of foreign private issuers are planning to delist their securities on U.S. based stock exchanges by taking advantage of recent rule changes by the Securities and Exchange Commission which make it easier for foreign private issuers to delist from stock exchanges and deregister with the SEC. Groupe Danone of France, the world's largest maker of yogurt; Adecco of Switzerland, the world's largest employment company; Scor, the largest French insurer; PCCW, Hong Kong's largest phone company; British Airways and Telekom Austria have all announced that they will delist their securities from the New York Stock Exchange.

The delistings are pursuant amendments to Rule 12g3-2 of the Securities Exchange Act of 1934, Rule 12g-4 of the Exchange Act, Rule 12h-3 of the Exchange Act and the adoption of a new Rule 12h-6 of the Exchange Act issued by the SEC on March 27 with an effective date of June 4. Rule 12h-6 of the Exchange Act allows a foreign private issuer to terminate its registration of a class of securities under Section 12(g) of the Exchange Act or terminate its reporting obligations arising under Section 13(a) of Exchange Act or Section 15(d) of the Exchange Act after certifying to the SEC on Form 15F that:

1) the foreign private issuer has had reporting obligations under Section 13(a) of the Exchange Act or Section 15(d) of the Exchange Act for at least the 12 months preceding the filing of the Form 15F, has filed or furnished all reports required for this period and has filed at least one annual report pursuant to section 13(a) of the Exchange Act;

2) the foreign private issuer's securities have not been sold in the U.S. in a registered offering under the Securities Act of 1933 during the 12 months preceding the filing of the Form 15F, other than securities issued:

   i. to the issuer's employees;

   ii. by selling security holders in non-underwritten offerings;

   iii. upon the exercise of outstanding rights granted by the issuer if the rights are granted pro rata to all existing security holders of the class of the issuer's securities to which the rights attach;

   iv. pursuant to a dividend or interest reinvestment plan; or

   v. upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued

SEC/CORPORATE

For more information, contact:

Robert L. Kohl
212.940.6380
robert.kohl@kattenlaw.com

Mark A. Conley
310.788.4690
mark.conley@kattenlaw.com

Palash Pandya
212.940.6451
palash.pandya@kattenlaw.com

by the issuer;

3) the foreign private issuer has maintained a listing of the subject class of securities for at least the 12 months preceding the filing of the Form 15F on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer' s securities in another foreign jurisdiction, constitutes the primary trading market for those securities; and

4) (i) the average daily trading volume of the subject class of securities in the U.S. for a recent 12-month period has been no greater than five percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

   (ii) on a date within 120 days before the filing date of the Form 15F, a foreign private issuer's subject class of equity securities is either held of record by:

   a) less than 300 persons on a worldwide basis; or

   b) less than 300 persons resident in the U.S.

A foreign private issuer must wait at least 12 months before it may file a Form 15F to terminate its reporting obligations under Section 13(a) of the Exchange Act or Section 15(d) of the Exchange Act pursuant to 12h-6 (a)(4)(i) of the Exchange Act if:

1) the issuer has delisted a class of equity securities from a national securities exchange or inter-dealer quotation system in the U.S., and at the time of delisting, the average daily trading volume of that class of securities in the U.S. exceeded 5 percent of the average daily trading volume of that class of securities on a worldwide basis for the preceding 12 months; or

2) The issuer has terminated a sponsored American Depositary Receipts facility, and at the time of termination the average daily trading volume in the U.S. of the American Depositary Receipts exceeded 5 percent of the average daily trading volume of the underlying class of securities on a worldwide basis for the preceding 12 months.

Twenty-nine percent of the 1,200 foreign private issuers registered with the SEC are eligible to withdraw from SEC registration according to an estimate in March 2007 by John White, director of the SEC's Division of Corporation Finance. The amendments and new rule adoption take effect just six weeks before a deadline for foreign private issuers to comply with auditing standards in the Sarbanes Oxley Act of 2002. The departures take place as U.S. regulators debate ways to make U.S. financial markets more competitive. Executives and business groups blame the costs associated with Sarbanes Oxley Act compliance as driving away non-U.S. based companies from U.S. financial markets. (*International Herald Tribune*, 4/30/07)

http://www.sec.gov/rules/final/2007/34-55540.pdf

Broker Dealer

SEC Exempts Wrap Fee Managed Accounts from Confirmation Rule

In an exemption order to Wachovia Securities LLC and Securities Financial Network, the Securities and Exchange Commission granted an exemption to broker-dealers that are registered as investment advisers and operate a wrap fee program where they manage clients' funds on a discretionary basis. The

BROKER DEALER

For more information, contact:

James D. Van De Graaff
312.902.5227
james.vandegraaff@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

exemption allows broker-dealers to send these clients' quarterly account statements with all the information that would be in a confirmation for each trade during the quarter instead of sending trade by trade confirmations subject to the following conditions:

- At or prior to account opening, and at least annually thereafter they must offer to provide, a brochure describing the products, services, and fees of the programs offered, in accordance with Rule 204-3 under the Investment Advisers Act of 1940.

- They must develop a form of written or electronic consent that will be prominent, clear and easily understandable for clients who request not to receive trade-by-trade confirmations.

- Clients electing to receive periodic statements in lieu of trade-by-trade confirmations will be able to later change their minds and request, for no additional cost, trade-by-trade confirmations for any transaction since the date of the last periodic statement, as well as for all subsequent transactions. Clients must be given notice that they may request, for no additional fee, trade-by-trade confirmations for previous transactions effected for up to a one-year period preceding the last periodic statement.

- Clients will have access to the broker's website and will be able to view, in no event later than the next business day after trade date (T+l), all information required by Rule l0b-10. Clients will also be able to obtain all information required by Rule 10b-10 either by telephoning their respective account representatives or by requesting the trade-by-trade confirmation for the particular transaction.

- Brokers must continue to generate and send trade-by-trade confirmations to those clients who do not elect to receive periodic statements in lieu of trade-by-trade confirmations.

- Brokers cannot require or request that their clients elect not to receive trade-by-trade confirmations. Brokers cannot suggest that (i) one choice is better than the other; (ii) such an election is required; or (iii) the clients will incur additional costs if they do not elect to receive periodic statements in lieu of trade-by-trade confirmations.

- Except in rare circumstances that have been previously disclosed to clients, the broker cannot charge clients a mark-up, mark-down, or commission for effecting transactions, and no client will be charged a sales load in connection with transactions in mutual fund shares.

http://www.sec.gov/divisions/marketreg/mr-noaction/2007/wachovia043007-10b-10.pdf

NASDAQ Proposes Rules for Trading Rule 144A Securities

PORTAL was created by the NASD when the Securities and Exchange Commission adopted Rule 144A to allow trading of unregistered securities among qualified institutional buyers (QIBs). To date, PORTAL's main function is to list securities so they can be made eligible for book entry transfer through Depository Trust Company. The NASDAQ Stock Market LLC (NASDAQ) is proposing rules to actively trade 144A securities among QIBs. 144A securities eligible for PORTAL trading would have to be issued by issuers (i) subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act), (ii) exempt therefrom as a foreign private issuer under Exchange Act Rule 12g3-2(b), (iii) foreign government eligible to register securities under Schedule B of the Securities Act of 1933, or (iv) disclose in its private

Patricia L. Levy
312.902.5322
patricia.levy@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Janet M. Angstadt
312.902.5494
janet.angstadt@kattenlaw.com

placement memorandum an agreement to provide holders and prospective holders reasonably current information about the issuer's business and financial statements.

Broker-dealers that are NASDAQ members and execute a subscriber agreement may submit agency orders as a PORTAL Broker and may act as principal in a two way quotations for their own account if they are a QIB and acting as a PORTAL Dealer. QIBs may gain access to the PORTAL system by executing an agreement and becoming a PORTAL Qualified Investor. PORTAL participants may view quotations. The quotations are not firm, and the parties would negotiate trades through PORTAL or directly. Executed PORTAL trades would be submitted to TRACE (for debt securities) and the OTC Reporting Facility (for equity securities) and to the Depository Trust and Clearing Corporation for clearance and settlement. All trade information for trades that are negotiated through PORTAL will be disseminated to PORTAL Brokers, PORTAL Dealers and PORTAL Qualified Investors. There will be no public disclosure of any PORTAL market information, including quotes, transactions and other information displayed in PORTAL.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-8252.pdf

NASDAQ Proposes Rules for Trading on the NASDAQ Option Market

The NASDAQ Stock Market LLC (NASDAQ) has filed with the Securities and Exchange Commission rule proposals for trading on the NASDAQ Options Market, LLC (NOM). All NASDAQ members will be eligible to participate as either an Options Order Entry Firm (OEF) or Options Market Maker if authorized by NASDAQ and if they are a member of another options exchange. Options Market Makers register as such on a series by series basis. At least one Options Market Maker must be registered for a series to trade on NOM. An Options Market Maker has to (i) maintain a two-way market for at least 10 contracts in at least 75% of the options series for which it is registered, (ii) participate in the opening and (iii) meet minimum net capital requirements. OEFs will act as agent for customer orders and non-market maker, participants trading for their proprietary account.

An Options Participant can't execute as a principal an option order they represent as agent unless the order is exposed for at least three (3) seconds. The NOM wil join the Options Clearing Corporation (OCC) and will be linked to OCC to report trades. NOM will be open to receive and display orders at 8:00 A.M. Eastern Time. Trading will begin at 9:30 A.M.

For options trading at less than $3.00, the trading increment is five (5) cents; $3.00 or more the trading increment is ten (10) cents; options in the Penny Pilot Program and on the Nasdaq 100 Trust, the trading increment is one (1) cent. There will be five types of orders: (i) Limit Orders; (ii) Discretionary Orders – displayed price and size and a non-displayed discretionary price range at which the entering party is willing to buy or sell; (iii) Minimum Quantity Order – execute immediately or cancel for a minimum quantity; (iv) Market Orders; and (v) Price Improving Orders – buy or sell at a specified price at increments smaller than the minimum price variation. Orders will fall into one of four terms: (i) Expired Time – if not fully executed at entry remains available until the earlier specified time or cancellation by the entering Participant; (ii) Immediate or Cancel; (iii) DAY – if not fully executed at entry, remains available until the earlier of close of trading or cancellation by the entering Participant; and (iv) Good til Cancelled.

The NOM system allows order entry as attributed (display Participant's MPID), non-attributed- displayed without an MPID, or non-displayed – while not displayed the order is available for execution against incoming orders. Participants may enter multiple orders at single or multiple price levels. The

system will display all displayed orders. NOM will participate in the Options Intermarket Linkage to receive orders from other options exchanges and will use NASDAQ to send options orders to other option exchanges. When an order is sent out one of the Option Market Makers in that series will be designated as the Principal acting as agent to send the order, clear and settle it and when executed at the other exchange, execute a matching order on NOM.

NOM listing standards will be the same as those of the other options exchanges. NOM initially plans to list and trade options listed on other exchanges. NOM's conduct rules will replicate those of the Boston Options Exchange for certain matters and of the Chicago Board Options Exchange for others. NOM Participants must be members of at least one other options exchange, and these other options exchanges will be the examining option exchange to inspect and enforce NOM rules.

http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-8244.pdf

Banking

OTS Requests Comment on Proposals Related to Supervision of SLHCs

On April 9, the Office of Thrift Supervision (OTS) issued for comment a proposal that would make changes to the component descriptions and rating scale used to evaluate savings and loan holding companies (SLHCs).

Currently, the supervisory rating system is known as CORE and includes: (i) capital, (ii) organizational structure, (iii) relationship, and (iv) earnings. After evaluating each component, the OTS then assigns the holding company a composite SLHC rating that is either above average (equivalent to a 1 or 2 rating), satisfactory (generally equivalent to a 2 but may include components rated a 1 or 3), or unsatisfactory (generally equivalent to a 4 or 5 rating).

Under the OTS's proposal, the "R" component of CORE would be changed to "risk management." Within this component, examiners would evaluate "corporate governance, board of directors and senior management oversight; policies, procedures and limits; risk monitoring and management information systems; and internal controls."

In addition, under the proposal, the OTS set forth the use of a 5 point numeric scale similar to the Uniform Financial Institution Ratings System and the OTS CAMELS system for both composite and component ratings assigned to SLHCs. In the OTS's opinion, "the use of a five-point scale will better reflect issues of supervisory concern and will provide more distinction in the supervisory assessment of condition" and will "correlate with and is more comparable to the thrift and bank holding company rating systems." (72 *Federal Register* 17618, 4/9/07)

Comments must be received by June 8.

United Kingdom Developments

National Audit Office Reports on FSA Performance

On April 30, the UK National Audit Office (NAO) announced the results of its assessment of the performance of the UK Financial Services Authority (FSA), the first undertaken since the FSA's creation in 2001. The report assesses:

- performance management;
- working with other regulators;

BANKING

For more information, contact:

Jeff Werthan
202.625.3569
jeff.werthan@kattenlaw.com

Christina J. Grigorian
202.625.3541
christina.grigorian@kattenlaw.com

Adam Bolter
202.625.3665
adam.bolter@kattenlaw.com

UK DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776. 7622
martin.cornish@kattenlaw.co.uk

Edward Black
44.20.7776.7624
edward.black@kattenlaw.co.uk

- international influence and representation;
- financial crime; and
- financial capability.

The report was broadly positive in the five areas examined, for example stating "The FSA is highly regarded within the financial services industry in the UK and internationally and its risk–based approach is increasingly seen as a model to follow by other regulators." Concerns were raised by stakeholders on the number of rules in the FSA Handbook, the implementation of "more principles-based regulation" and the need for the FSA's approach to reflect the actual experience of consumers.

The head of the NAO, Sir John Bourn, commented that "The FSA has done well …but the challenge for the FSA is now to move to the next level. It must do more to demonstrate its impact; to get a clearer understanding of how much its different activities cost; and, crucially, to streamline its processes and advice, to benefit industry and consumers."

See the links below for the full NAO report and FSA's response.

http://www.nao.org.uk/pn/06-07/0607500.htm

http://www.fsa.gov.uk/pages/Library/Communication/Statements/2007/nao_review.shtml

Litigation

Court Holds That LLC Membership Interests Are Not Securities

Granting defendants' motion to dismiss for lack of subject matter jurisdiction, a district court held that memberships interests in a limited liability company (LLC) were not securities under the Securities Exchange Act of 1934 (the Exchange Act). Plaintiff's securities law claims were based on his allegation that defendants defrauded him into transferring two-thirds of his interest in an LLC to them. Claiming federal jurisdiction based on violations of the Exchange Act, plaintiff argued that the LLC membership interests he sold to defendants were securities because the interests were an investment contract.

The Court rejected this argument, holding, among other things, that the question of whether the interests were securities turned on whether or not defendants, who acquired the interests, were passive investors in the LLC. The Court found that because defendants were the managing members of the LLC they could not be considered to be passive investors. As a result, the Court held that the membership interests were not securities under the Exchange Act and that, as a consequence, federal jurisdiction was lacking. (*Endico v. Fonte*, No. 07 Civ. 2398 (LAK), 2007 WL 1215140 (S.D.N.Y. Apr. 24, 2007))

Court Rejects Motion to Lift Stay of Discovery

Finding that plaintiff failed to demonstrate "undue prejudice" or that evidence would be destroyed, a district court rejected plaintiff's motion to lift the stay on discovery imposed pursuant to the Private Securities Litigation Reform Act (PSLRA) pending adjudication of defendant's motion to dismiss. Plaintiff argued that if the Court did not lift the stay of discovery, evidence would likely be destroyed and he would be prevented from making "informed decisions about litigation strategy." In rejecting the plaintiff's request, the Court explained that the PSLRA mandates that when a defendant in a securities fraud case indicates an intention to bring a motion to dismiss, no discovery may take place.

Sean Donovan-Smith
44.20. 7776 7625
sean.donovan-smith@kattenlaw.co.uk

LITIGATION

For more information, contact:

Steve Shiffman
212.940.6785
steven.shiffman@kattenlaw.com

Daniel Edelson
212.940.6576
daniel.edelson@kattenlaw.com

The Court held, among other things, that plaintiff's inability to gather evidence to assist in formulating its litigation strategy did not constitute "undue prejudice" but was, in fact, the precise result contemplated by Congress when it passed the PSLRA. In addition, the Court held that general allegations that evidence would be destroyed were insufficient to support a lifting of the stay. Instead, a party seeking to lift the automatic stay must "make a specific showing that the loss of evidence is imminent," such as would be the case if an important witness was terminally ill. (*Kelleher v. Advo, Inc.*, No. 3:06CV01422 (AVC), 2007 WL 1232177 (D. Conn. Apr. 24, 2007))

CFTC

No-Action Relief from Introducing Broker Registration

On April 26, the Commodity Futures Trading Commission's Division of Clearing and Intermediary Oversight (DCIO) adopted a no-action position authorizing the foreign affiliates (Affiliates) of a futures commission merchant (FCM) to introduce U.S. institutional customers on a fully disclosed basis to any registered FCM for purposes of trading U.S. exchange-traded futures and options, without registering as introducing brokers under the Commodity Exchange Act (CEA). The relief was based on the FCM's representations that (i) the Affiliates are, and would continue to be, exempt from registration with the CFTC pursuant to CFTC Rule 30.10; (ii) the Affiliates would not solicit U.S. customers for trading on U.S. markets; (iii) the Affiliates would not handle any U.S. customer funds for trading on any U.S. markets; and (iv) all trades would be carried on a fully disclosed basis in accordance with CFTC Rule 1.57.

The relief was further subject to the condition that the FCM submit to DCIO a written acknowledgment that it will be jointly and severally liable for any violations of the CEA or CFTC regulations committed by the Affiliates in connection with their handling of orders for U.S. customers for trading of futures and options on U.S. exchanges, including those orders executed by the FCM and given up to another FCM.

http://www.cftc.gov/files/tm/letters/07letters/tm07-05.pdf

CFTC

For more information, contact:

Kenneth Rosenzweig
312.902.5381
kenneth.rosenzweig@kattenlaw.com

William Natbony
212.940.8930
william.natbony@kattenlaw.com

Fred M. Santo
212.940.8720
fred.santo@kattenlaw.com

Kevin Foley
312.902.5372
kevin.foley@kattenlaw.com

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to Regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

Charlotte
401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

Chicago
525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

Irving
5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

London
1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

Los Angeles
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

New York
575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

Palo Alto
260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

Washington, DC
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax