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CORPORATE & FINANCIAL
WEEKLY DIGEST

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SEC/CORPORATE

SEC Issues Additional Guidance on Emerging Growth Companies

On May 2, the Division of Corporation Finance of the Securities and Exchange Commission published an additional set of frequently asked questions (FAQs) regarding Title I of the Jumpstart Our Business Startups Act (JOBS Act), which was enacted on April 5. Title I of the JOBS Act includes reforms intended to facilitate capital raising by "emerging growth companies" (EGCs), such as allowing EGCs to submit draft registration statements on a confidential basis to the SEC. Title I of the JOBS Act became operative upon enactment.

Which companies can qualify as EGCs?

Total annual gross revenues for the most recently completed fiscal year is used to determine whether a company qualifies as an EGC. The calculation of total annual gross revenues of a financial institution includes gross revenues of traditional banking activities but not gains and losses on dispositions of investment portfolio securities (consistent with the approach set forth in Securities Exchange Act Rule 12b-2 for determining smaller reporting companies).

In general, all non-convertible debt securities issued over the prior three-year period, whether outstanding or not, count towards the $1 billion debt limit for purposes of determining whether a company has lost its ECG status. An issuer is not required to count debt securities issued in an A/B debt exchange offer; only the initial placement under Rule 144A is counted.

The effective date of the definition of ECG focuses on whether the first sale of common equity securities pursuant to an effective registration statement occurred on or before December 8, 2011. Accordingly, a sale of debt securities pursuant to an effective registration statement would not affect an issuer's qualification as an ECG. Also, an ECG may use the confidential submission process to submit a draft registration statement for an A/B debt exchange offer on Form S-4 or on Form F-4, so long as the company's initial public offering of common equity securities has not yet occurred.

If no other disqualifying condition occurs earlier, an issuer will lose its ECG status on the last day of the year which included the fifth anniversary of the first sale of common equity securities pursuant to an effective registration statement. An issuer may not regain ECG status after losing it pursuant to the disqualification provisions of the Securities Act of 1933.

If a predecessor is not eligible to be an ECG because its first sale of common equity securities occurred on or before December 8, 2011, then its successor is also not eligible. Neither an asset-backed securities issuer nor an investment company registered under the Investment Company Act may qualify as an ECG. However, because business development companies (investment companies that are not required to register under the Investment Company Act but are regulated pursuant to Sections 55 through 65 of the Investment Company Act) are generally subject to the disclosure and other requirements exempted by Title I, they can qualify as an ECG.

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How should an EGC make its filings with the SEC?

The SEC will publicly release its comment letters and issuer responses no earlier than 20 business days following the effective date of the registration statement. Although confidential treatment will be afforded to response letters, an ECG should identify information for which it intends to seek confidential treatment under the procedures of Rule 83 upon public filing of its response letters on EDGAR.

An ECG that is not also a smaller reporting company is not permitted to comply with the smaller reporting company version of management's discussion and analysis, despite the fact that an ECG is expressly permitted to comply with the smaller reporting company version of compensation disclosures under Regulation S-K.

What are the financial statement disclosure requirements applicable to EGCs?

EGCs must comply with XBRL requirements.

For an ECG that is not a smaller reporting company, three years of audited financial statements are required to be included in the company's Form 10-K or Form 20-F. An ECG will only be required to include two years of audited financial statements in its registration statement for its initial public offering of common equity securities and its first Form 10-K or Form 20-F following such initial public offering will only be required to include the earliest audited period presented in connection with its initial public offering. An ECG may present its earnings to fixed charges for the same number of years for which it provides selected financial data disclosures in a registration statement.

An ECG can take advantage of an extended transition period for complying with any "new or revised" financial accounting standard, where "new or revised" accounting standard refers to any update issued by the Financial Accounting Standards Board to its Accounting Standards Codification after the effective date of the JOBS Act.

If a foreign private issuer that reconciles its home country GAAP financial statements to U.S. GAAP otherwise qualifies as an ECG, the foreign private issuer may take advantage of the extended transition period for complying with new or revised financial accounting standards in its U.S. GAAP reconciliation.

ECG companies that choose to take advantage of the extended transition period for complying with any new or revised financial accounting standard must still comply with those accounting standards that exclude from their scope nonpublic entities.

If an ECG initially decides to take advantage of the extended transition period for complying with new or revised financial accounting standards, it may later decide to opt in and comply with the financial accounting standard effective dates applicable to non-EGCs. Any decision to opt in should be prominently disclosed in the first periodic report or registration statement following the company's decision; the disclosure should state that such decision is irrevocable.

An ECG is required to include any restatement disclosures in its financial statements until its financial statements are updated for the next annual period.

Notwithstanding Section 7(a)(2)(A) of the Securities Act of 1933 which allows an ECG to only include two years of audited financial statements in its registration statement for its initial public offering, an ECG that is a first-time adopter of IFRS must still comply with Paragraphs 6 and 21 of IFRS 1, *First-time Adoption of International Financial Reporting Standards*, and present the required three statements of financial position.

Click here to read the FAQs.

CFTC

CFTC Issues Proposed Interpretative Statement

On May 1, the Commodity Futures Trading Commission, by a vote of 5-0, issued a proposed interpretative statement that would exempt foreign regulators from certain indemnification and confidentiality provisions of the Commodity Exchange Act (CEA).

Section 21(d) of the CEA provides that, before a swap data repository (SDR) may share data or information with a domestic or foreign regulator, the regulator must enter into a written agreement with the SDR to abide by the confidentiality requirements in the CEA and to indemnify the SDR and CFTC from any litigation expenses that may be incurred for any purported failure of the regulator to comply with the confidentiality agreement.

The CFTC is proposing to interpret section 21(d) to provide that its provisions would not apply to a foreign regulator that has a sufficient independent regulatory interest in obtaining the data even if that data has also been reported to the SDR pursuant to the CEA or CFTC regulations.

The CFTC accordingly proposes to interpret section 21(d) such that a registered SDR would not be subject to the confidentiality and indemnification requirements if: (i) the SDR is also registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and (ii) the data sought by a foreign regulatory authority has been reported to the SDR pursuant to the foreign jurisdiction's regulatory regime.

The proposal will be in the Federal Register for a 30 day comment period.

Click here for more information.

CFTC to Hold Public Meeting to Consider a Final Rule

The Commodity Futures Trading Commission will hold a public meeting on May 10 at 9:30 a.m. (EST) to consider the following rule on Core Principles and Other Requirements for Designated Contract Markets and a Proposed Order Amending the Effective Date for Swap Regulation.

Information regarding the open meeting may be found here. The original proposed rule and order may be found using the following links:

(1) Core Principles and Other Requirements for Designated Contract Markets; and
(2) Proposed Order Amending the Effective Date for Swap Regulation

CME Issues Advisory Notice Regarding the Termination of Temporary Waiver of Annual Application for Position Limits Exemption

On April 30, CME Group issued a Market Regulation Advisory Notice related to the termination of its previously issued temporary waiver of the otherwise required annual application for exemptions from position limits. Pursuant to CME Group Rule 559, a person who has been authorized to exceed position limits must file an updated application on an annual basis. On December 20, 2011, CME Group issued a temporary waiver of this requirement in anticipation of the CFTC's new position limit rules, which would separately require market participants to submit applications for exemptions. The temporary waiver is set to expire on May 31, 2012. CME Group is not offering an extension to the waiver, because the majority of the CFTC's position limit and exemption regulations have not become effective and the effective date is not yet known.

Market participants that are currently operating under an exemption from speculative position limits that would have expired on or before May 31 must submit updated position limit exemption applications by May 31 in order to continue holding positions that exceed the speculative position limit after that date. Any market participant that relied on the temporary waiver and has not filed an updated annual application due between December 20, 2011 and May 31, 2012, must file such an application no later than May 31, 2012.

Notwithstanding the termination of the temporary waiver, all market participants currently operating under the terms of an Exchange-granted exemption from speculative position limits remain bound by, and must comply with, all relevant terms and conditions of such exemptions and Exchange rules.

Click here for more information.

LITIGATION

Tenth Circuit Court of Appeals Denies Attempt to Withdraw Fifth Amendment Invocation

The U.S. Court of Appeals for the Tenth Circuit recently addressed the question of when a defendant can withdraw an invocation of the Fifth Amendment right to refrain from making self-incriminating statements.

Defendant Brian Smart was a fund manager accused by the Securities and Exchange Commission of operating a Ponzi scheme. During the SEC's initial investigation and again later in the litigation discovery process, Smart invoked the Fifth Amendment and refused to answer the SEC's questions. The SEC moved for summary judgment, asking the District Court to draw an adverse inference against Smart as a result of his Fifth Amendment invocations. Smart moved to withdraw his Fifth Amendment assertion, arguing that he did not realize what the ramifications of that assertion would be. The District Court denied Smart's motion to withdraw, drew an adverse inference, and awarded summary judgment to the SEC.

The Tenth Circuit held that the District Court did not abuse its discretion in refusing to allow Smart to withdraw his Fifth Amendment assertion. Relying on cases from the Fifth and Second Circuits, the Court emphasized that the decision to allow withdrawal is fact-dependent. In general, courts should be inclined to permit withdrawal where the opposing party would not suffer undue prejudice. On the other hand, courts should not permit withdrawal if "the litigant is trying to abuse, manipulate, or gain an unfair strategic advantage over opposing parties [by invoking the Fifth amendment]."

In this case, the defendant had invoked the Fifth Amendment during a pre-suit deposition, failed to attend his litigation deposition, and ignored attempts by the SEC to reschedule further depositions. The Court also found that because Smart made his Fifth Amendment assertion early in the investigatory process and only attempted to withdraw it after the SEC moved for summary judgment, he had ample time to determine the consequences of his assertion. Given the Defendant's apparent use of the Fifth Amendment for improper strategic reasons, the Tenth Circuit upheld the District Court's decision to deny Defendant's motion to withdraw his Fifth Amendment assertion.

S.E.C. v. Smart., No. 11-4134, 2012 WL 1450424 (10th Cir. Apr. 27, 2012).

Idaho District Court Holds That Arbitration Requirement is Subject to Limited Judicial Review

The United States District Court for the District of Idaho held that, under Ninth Circuit law, an arbitration award is judicially reviewable under the Federal Arbitration Act even where the arbitration agreement at issue contained language describing the arbitrator's award as "final and binding" and not subject to appeal.

The arbitration award in this case arose out of a real estate dispute between investors and a real estate investment company known as DBSI, Inc. Subsequent to some initial court filings, the District Court ordered the parties to commence binding arbitration in accordance with an agreement between the parties requiring that all disputes be arbitrated pursuant to the rules and procedures of the American Arbitration Association. The arbitrator conducted an evidentiary hearing and issued a damages award in favor of the investors. The investors moved to confirm the award, while DBSI filed a motion to vacate.

The investors argued that DBSI waived its right to judicial review of the arbitration award. In particular, the investors pointed to language in the parties' contract providing that "[a[ny award rendered…shall be final and binding on each and all of the parties" and that the parties were "waiving their judicial rights to discovery and appeals."

The District Court first observed that while the Second and Eleventh Circuit had held that parties could not contractually agree to foreclose all judicial review of an arbitration award, the law in the Ninth Circuit was less

clear. In particular, the Court noted that at least one Ninth Circuit case in dicta indicated that parties' could contractually agree to eliminate all judicial review if such an intent was clear from the terms of the arbitration agreement.

In the present case, the District Court held that the "final and binding" language and appellate waiver were not sufficiently clear to permit the arbitration award to escape all judicial review (e.g. for an arbitrator's abuse of authority, bias or manifest disregard of the law).

To eliminate all judicial review, the Court suggested the parties use language making clear that the arbitrator's decision shall be "non-reviewable" or "final and unreviewable for error of law or legal reasoning of any kind."

Swenson, et. al. v. Bushman Investment Properties, et. al., No. 10-cv-00175-ELJ, 2012 WL 1488346 (D. Idaho Apr. 27, 2012).

UK DEVELOPMENTS

FSA Fines and Imposes Prohibition On Compliance Officer for Client Money Breaches and Fines Firm

On May 1, the UK Financial Services Authority (FSA) published the final notices it had issued to David Thornberry and Christchurch Investment Management Ltd (Christchurch) for failings in relation to client money segregation.

The FSA found that both Christchurch and David Thornberry had insufficient knowledge and oversight of compliance with the FSA's client money rules. This led to serious breaches of the FSA client asset rules (CASS) which lasted from November 2007 until May 2010. Specific failures included failing to put in place adequate trust documentation for any of Christchurch's 227 client bank accounts, which put client money at risk in the event of the firm's insolvency.

The FSA fined Mr. Thornberry £11,550 (approximately $18,700) and prohibited him from acting as a compliance officer or having responsibility for client money or assets. This is the first time the FSA made such a prohibition order on an individual. The FSA fined Christchurch £26,000 (approx. $42,100). Christchurch and Thornberry agreed to settle at an early stage and therefore the financial penalties were reduced by 30%.

Richard Sutcliffe, head of the FSA's Client Assets Unit stated:

> "Christchurch's failure to engage properly with the client assets rules is unacceptable. A firm must have adequate systems and controls in place to demonstrate that it complies with the CASS rules at all times. Otherwise clients are exposed to significant risks in the case of insolvency, fraud or poor handling of client money."

For more information, click here.

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