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CORPORATE & FINANCIAL WEEKLY DIGEST

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SEC/CORPORATE

SEC Extends Comment Period for Compensation Committee and Compensation Advisor Requirements

On March 30, the Securities and Exchange Commission approved proposed rules that would direct the national securities exchanges to establish listing standards that, among other things, require each member of an issuer's compensation committee to be a member of its board of directors, and to be "independent." In addition, the proposals would adopt new disclosure rules concerning the use of compensation consultants and conflicts of interest. See the April 1 edition of *Corporate and Financial Weekly Digest*.

The SEC originally requested that comments be received by April 29. The U.S. Chamber of Commerce, in an April 15 letter, requested that the SEC extend the comment period and, after considering the request, the SEC extended the comment period to May 19.

Read more.

BROKER DEALER

SEC Seeking Public Comment on Short Sale Disclosure Studies

The Securities and Exchange Commission is seeking public comment on the feasibility, benefits and costs of two short selling disclosure regimes as a part of a study mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 417 of the Dodd-Frank Act requires the SEC to conduct studies of the feasibility, benefits and costs of (1) requiring reporting in real time, publicly or, in the alternative, only to the SEC and the Financial Industry Regulatory Authority, short sales positions in publicly listed securities, and (2) conducting a voluntary pilot program in which public companies could agree to have sales of their shares marked "long," "short," or "market maker short," and purchases of their shares marked "buy" or "buy-to-cover," and reported as such in real time through the Consolidated Tape. The SEC must submit a report on the results of these studies to Congress no later than July 21. Comments are due on or before 45 days after publication in the *Federal Register*.

Click here to read SEC Release No. 34-64383.

FINRA Proposes Rule Changes to FINRA Rule 5131

The Financial Industry Regulatory Authority has proposed rule changes to FINRA Rule 5131 (New Issue Allocations and Distributions) to simplify the rule's spinning provision and to delay until September 26 the implementation date of the rule's provisions prohibiting spinning and purchasing of new issues in the secondary market prior to the start of trading of such shares in the secondary market. Paragraph (b) of FINRA Rule 5131 will prohibit an underwriter from allocating new issues to directors or executives of investment banking clients in exchange for receipt of investment banking business. The FINRA proposal would delete paragraph (b)(1) of the rule, which requires members to establish, maintain and enforce policies and procedures reasonably designed to ensure that "investment banking personnel" have no involvement or influence, directly or indirectly, in the members' new issue allocation decisions because of member concerns regarding the interpretation of this provision, particularly the term "investment banking personnel."

Paragraph (d)(4) of FINRA Rule 5131 (Market Orders) will prohibit members from accepting any market order for the purchase of shares of a new issue in the secondary market prior to the start of trading of such shares in the secondary market. Because members have requested additional time to develop a process for reliably identifying new issues and to modify their order handling systems, FINRA is proposing to delay the implementation date of this provision of the rule until September 26. The effective date of the proposed rule changes will be the date of Securities and Exchange Commission approval.

Click here to read FINRA's proposed rule change.

OTC DERIVATIVES

Exemption of FX Forwards and Swaps from Swap Rules Under Dodd-Frank

On April 29, the U.S. Department of the Treasury published a formal notice of its intention to exclude Foreign Exchange Swaps and Foreign Exchange Forwards from the definition of swaps under provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The exclusion is being accomplished by exercise of the authority given to the Secretary of the Treasury in the Dodd-Frank Act to make a determination that those products "should not be regulated as swaps." As a result of the determination, FX Forwards and FX Swaps (1) cannot be subjected to mandatory clearing and exchange trading, and (2) will not count for purposes of determining a party's status as a Swap Dealer or Major Swap Participant. However, the exclusion is narrowly drawn so that those products will nevertheless be subject to certain other Dodd-Frank Act swap requirements, and other types of foreign exchange transactions that do not qualify as FX Swaps and FX Forwards will remain subject to the Dodd-Frank Act.

The primary limitation on the exclusion proposed by the Treasury is that it applies only to Foreign Exchange Forwards and Foreign Exchange Swaps as those terms are defined in the Dodd-Frank Act and not to foreign exchange transactions generally. A "Foreign Exchange Forward" is "a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange." A "Foreign Exchange Swap" is "a transaction that solely involves (A) and exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and (B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange." Nothing else is included in the determination, so foreign exchange options, currency swaps and non-deliverable forwards (because they are viewed as not involving an "exchange" of currencies) remain covered as "swaps" under the Dodd-Frank Act. (FX spot transactions, of course, are not covered by the Dodd-Frank Act at all because they are accepted as not having a forward element even if they settle as a matter of market practice one or two days after the relevant trade date.)

The other important limitation on the exclusion is that it does not free the two products from all Dodd-Frank Act swap rules. Specifically, (1) all Foreign Exchange Swaps and Forwards will have to be reported in the same manner as trades that fall within the swap definition, and (2) a Swap Dealer or Major Swap Participant engaging in those types of transactions will be held to the same business conduct standards that are generally applicable to swap transactions. It will also be illegal to use FX Swaps and Forwards to evade other derivatives reforms.

The Treasury is allowing a 30-day comment period on the proposed determination. Under the relevant provisions of the Dodd-Frank Act, the final determination by the Secretary of the Treasury will not be effective "until it is submitted to the appropriate committees of Congress." Although the Dodd-Frank Act does not identify the full list of such committees, it does say that the appropriate committees "include" the committees in both the House and Senate dealing with agricultural affairs.

The Treasury press release concerning the proposed determination can be found here.
The text of the Notice of Proposed Determination can be found here.

CFTC

CFTC Extends Comment Period for Multiple Dodd-Frank Rulemakings

The Commodity Futures Trading Commission has determined to extend the public comment period for over 30 of its proposed rulemakings under the Dodd-Frank Wall Street Reform and Consumer Protection Act until June 3. The rule proposals covered by the extension were proposed between October 2010 and March 2011 and relate to various aspects of the regulatory framework for swaps under the Dodd-Frank Act. For many of these proposed rulemakings, the public comment period has already closed, and is therefore being reopened until June 3. Comments previously received by the CFTC on such rule proposals after the close of the original comment period will be treated as if received during the reopened comment period and need not be resubmitted.

In its release announcing the extension of the public comment period, the CFTC also requests comment on the order in which it should consider the final rule proposals.

The CFTC release, including a full list of the affected rule proposals, is available here.

LITIGATION

Employment Contract Claims Survive Motion to Dismiss

The U.S. District Court for the Southern District of New York denied defendants' motion to dismiss a complaint alleging that defendants improperly used confidential business information and solicited plaintiffs' employees and customers in contravention of defendants' employment agreements.

Plaintiff, Speedmark Transportation, is a "leading global provider of secure transportation services." Defendants are former employees who, while still employed at Speedmark, allegedly set up Everglory Logistics as an international freight forwarder that would compete directly with Speedmark. Thereafter, the individual defendants resigned, and solicited and induced a number of Speedmark employees to resign with them. After those resignations, two of the defendants solicited business from two long-time Speedmark customers.

Defendants' employment agreements barred them from directly or indirectly soliciting employees, service providers, independent contractors or customers for a period of 12 months from the termination of their employment with Speedmark.

Defendants moved to dismiss on the ground that the complaint failed to meet the "plausibility" pleading standard required by *Iqbal/Twombly* and Federal Rules of Civil Procedure (FRCP) 8(a)(2). The court disagreed, holding that the complaint was not required under Rule 8 to allege how Speedmark's clients were contacted or whether Everglory successfully stole business from Speedmark.

The court also declined to consider at the FRCP 12(b)(6) stage defendants' argument that their employment agreements were governed by and void under Massachusetts law. The court held that a choice-of-law determination was premature because the parties had not yet taken the discovery necessary for a context-specific "center of gravity" or "grouping of contacts" choice-of-law analysis.

Finally, the court declined to dismiss plaintiff's tort claims that closely tracked the breach of contract cause of action because the tort claims "would not expand the scope of discovery." (*Speedmark Trans., Inc., v. Mui et al.*, No. 11 Civ. 722, 2011 WL 1533042 (S.D.N.Y. Apr. 21, 2011))

Delaware Chancery Rejects Purported Agreement Extending Court-Ordered Deadline

The Court of Chancery of Delaware ruled that counsel failed to establish "excusable neglect" when it requested additional time to submit an expert witness report after the deadline for that report—as provided for in the court's previously issued scheduling order—had expired.

The litigation at issue concerned the wind-down and asset sale of Integrated Fuel Cell Technologies. In July 2010, the court entered a scheduling order at the parties' request which, among other things, set deadlines for expert reports and the completion of expert depositions. Thereafter, the parties ran into scheduling difficulties. According to plaintiff's counsel, an oral agreement was reached with defendants extending the deadline for expert reports. Plaintiff later moved to extend the time for expert reports on the basis of that agreement.

The Delaware Chancery Court emphasized that because the motion was made after the deadline set forth in the scheduling order, it required a showing of "excusable neglect" and not merely "good cause." According to the court, plaintiff failed to establish excusable neglect for several reasons.

First, defendants disputed that any agreement had been made, and plaintiff failed to reduce the purported agreement to writing (which had been the parties' consistent practice for discovery agreements throughout the litigation). Second, even if an agreement had been made, plaintiff never moved to amend the scheduling order and "[i]nformal agreements among counsel do not operate, *ex proprio vigore*, to modify a Court's order." Third, plaintiff did not serve its expert report until one full week after the deadline set in the disputed oral agreement ("in a rather brazen display of chutzpah", according to the court). Finally, the court concluded that allowing the late expert report would prejudice the defendants' trial preparation effort. (*Encite LLC v. Soni, et al.*, Civil Action No. 2476-CC, 2011 WL 1565181 (Del. Ch. Ct. Apr. 15, 2011))

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