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Corporate and Financial Weekly Digest

Business/Financial News in Brief
November 17, 2006

A Note from the Editor

Please note that *Corporate and Financial Weekly Digest* will not be published next Friday, November 24, due to the Thanksgiving Holiday. The next issue will be distributed on December 1.

SEC/Corporate

SEC Announces Enhanced Online Search Capabilities on EDGAR Database

On November 14, the Securities and Exchange Commission announced that investors will now be able to search the contents of disclosure documents filed electronically with the SEC using a new full-text search tool available without charge on the SEC's website. The newly searchable information includes registration statements, annual and quarterly reports, and other filings by companies and mutual funds filed during the past four years on the Commission's EDGAR database.

Each year 15 to 18 million pages of filings are submitted to the SEC by more than 15,000 public companies and other filers via the EDGAR system. The EDGAR full-text search will allow users to enter a keyword or conceptual search query and retrieve a list of related filings. Searchers will also be able to make use of Boolean operators and wildcard capabilities. Other features of the EDGAR Full-Text Search tool include:

- Search by specific filing type;
- Search by company name;
- Search by Central Index Key (CIK) code;
- Search by industry or Standard Industrial Classification (SIC) code; and
- Search results limited by date range

The new EDGAR full-text search tool is available on the SEC website at
http://searchwww.sec.gov/EDGARFSClient/jsp/EDGAR_MainAccess.jsp

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Banking

OTS Issues Immediate Changes to "Loans to One Borrower" Limitations

On November 2, the Office of Thrift Supervision (OTS) issued a Chief Executive Officers Memorandum with respect to limitations on loans to one borrower. Specifically, in that memorandum, the OTS declared that, pursuant to Section 404 of the Financial Services Regulatory Relief Act of 2006 (the Act), a savings association may now make loans to develop domestic residential housing units to one borrower regardless of the final purchase price of each single-family dwelling unit in the development. Prior to the passage of the Act, there was a limitation on the final purchase price of $500,000.

In the pronouncement, the OTS stated that it had "supported the change because the per-unit cap had restricted a savings association's ability to use the special exception for domestic residential housing developments in many high cost areas . . . [and had been] burdensome to many small- and mid-sized community lenders."
http://www.ots.treas.gov/docs/2/25246.pdf

FDIC Reminds Banks to Review Their One-Time Assessment Credit

The Federal Deposit Insurance Corporation is reminding FDIC-insured depository institutions that their Preliminary Statements of One-Time Assessment Credit are available for viewing through FDIC*connect*. Insured depository institutions have only until December 18 to submit a Request for Review to correct any errors in their Statements.

Highlights:

- The FDIC Board of Directors recently approved the final rule to implement the One-Time Assessment Credit, as required by the Federal Deposit Insurance Reform Act of 2005. The rule takes effect November 17.

- An institution's Preliminary Statement of One-Time Credit is available only through FDIC*connect*, the FDIC's e-business portal.

- An institution may request a review of its One-Time Assessment Credit eligibility or amount no later than December 18.

- Because the amounts shown in the Statement will not reflect credits as a result of transfers under the "de facto rule," an institution claiming credits under this rule must file a request for review.

- An institution that does not request a review of its One-Time Assessment Credit eligibility or amount by December 18, will be barred from subsequently requesting a review.

- If an institution agrees with the information presented on the Preliminary Statement of One-Time Assessment Credit, it does not need to take any further action.

- Refer to Financial Institution Letter (FIL)-93-2006, issued October 18, for a copy of the final rule and guidelines for filing a request for review.

http://www.fdic.gov/news/news/financial/2006/index.html

FinCEN Issues Advisory Regarding Shell Companies

On November 9, the Financial Crimes Enforcement Network (FinCEN) issued an advisory to all U.S. financial institutions on identifying, assessing and managing the potential risks associated with accounts maintained for shell companies. According to FinCEN's release, "shell companies can be exploited by money launderers and other perpetrators of financial crime because of the lack of transparency in the formation process and the inability to identify beneficial owners."

In addition to discussing the components of the release, FinCEN stated that it intends to continue to engage states in a discussion regarding the lack of transparency in the formation of shell companies. FinCEN's current assessment of this issue is that, "while legal entities like limited liability companies are legitimate corporate mechanisms, states whose laws do not require LLCs to disclose or report identities of members or managers are attractive to people seeking to form a shell company for illicit purposes." FinCEN calculates that there are 47 jurisdictions in the U.S. where ownership of an LLC may legally remain unreported depending on the structure of the corporation.
http://www.fincen.gov/ShellCompaniesRelease.pdf

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Broker Dealer

Amendments to Rule 10308 of the NASD Code of Arbitration Procedure

The NASD issued Notice to Members 06-64 announcing that the Securities and Exchange Commission approved amendments to the arbitrator classification criteria set forth in Rule 10308 of the NASD Code of Arbitration Procedure. Any investor involved in a dispute with a broker-dealer or its associated persons that is governed by the NASD arbitration rules is entitled to a hearing by an arbitration panel. Depending on the amount of claim in dispute, the panel usually consists of either a single public arbitrator (under $50,000) or, in a panel of three arbitrators, two public arbitrators (in excess of $50,000). The amendments clarify that individuals with significant ties to the securities industry may not serve as public arbitrators in NASD arbitrations.
Rule 10308(a)(4) of the Code contains the definition of a non-public arbitrator and Rule 10308(a)(5) of the Code contains the definition of a public arbitrator. To prevent certain individuals with significant ties to the securities industry from serving as public arbitrators, Rule 10308(a)(5) has been amended to exclude individuals (or their spouses or immediate family members) who are employed by, or are officers or directors of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business. The amendments further amend the definition of a non-public arbitrator in Rule 10308(a)(4)(A)(i) to clarify that persons who are registered through a broker-dealer may not be classified as public arbitrators.

NASD plans to distribute a survey to all arbitrators on the active roster requesting an update to their disclosures given the effect of the above-referenced amendments to the arbitrator classification rules. The amended rules will become effective on January 15, 2007.
http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_017901.pdf
http://www.sec.gov/rules/sro/nasd/2006/34-54607.pdf

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United Kingdom Developments

Companies Act 2006 Publication Delayed

In last week's CFWD we reported that the Companies Act 2006 had completed its passage through Parliament on November 8, but that the final text of the Act was not yet available. The Office of Public Sector Information (OPSI) announced on November 16, that it does not expect to receive the approved text of the Act from the House of Lords before the end of November. When OPSI receives the text of the Act it will be made available immediately on OPSI's website
http://www.opsi.gov.uk/legislation/

European Commission Releases Proposals for Modernizing EU Investment Fund Regulation

On November 16, the European Commission issued a white paper containing proposals for the modernization of the EU framework for investment funds. They are designed to simplify the current EU UCITS Directive on investment funds, to ensure that investors receive useful cost and performance disclosures when selecting funds, and to make it easier for the industry to achieve cost savings and specialization benefits across the European single market.

Following consultation, the Commission plans to propose these changes in autumn 2007, in the form of amendments to the current Directive. The Commission will also consider whether to make similar changes for other fund products, particularly real estate funds, not covered by the current EU UCITS Directive.

The proposals are designed to:

- examine options for establishing a European private placement regime for the marketing of funds;
- enable fund managers to manage funds domiciled in other Member States;
- simplify the notification procedure for cross-border marketing;
- create a framework for the cross-border merger of funds;
- create a framework for asset pooling;
- improve the quality and relevance of the key disclosure documents to the end investor; and
- strengthen supervisory cooperation to monitor and reduce risk of cross-border investor abuse.

http://ec.europa.eu/internal_market/securities/ucits/index_en.htm

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If Personal Jurisdiction Exists Over One Defendant in Civil RICO Suit, Personal Jurisdiction Over Other Defendants Extends Nationwide If "Ends of Justice" So Require

After several steel buildings owned by plaintiff collapsed, the plaintiff sued the companies from which he purchased the buildings and replacement parts as well as certain officers of those companies, asserting civil RICO and state law claims. The District Court (in Kansas), applying RICO §1965(b), dismissed various Pennsylvania-based defendants for lack of personal jurisdiction. Plaintiff appealed, arguing that the District Court should have ruled that under RICO §1965(d) personal jurisdiction may be asserted over "any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." While noting that there is a split in the Circuits, the Tenth Circuit joined the Second, Seventh and Ninth Circuits in holding that §1965(b) applies and that nationwide service of a summons may only be made in civil RICO claims if (i) personal jurisdiction can be established over at least one defendant without such service, and (ii) the "ends of justice" require permitting such service. The Tenth Circuit also reviewed the District Court's ruling that the "ends of justice" requirement could not be satisfied because all defendants were amenable to suit in Pennsylvania. After acknowledging that a Ninth Circuit decision was consistent with the District Court's ruling, the Tenth Circuit reached the opposite conclusion after discussing the legislative history (reflecting Congress' intent that RICO be liberally construed to eradicate organized crime) and decisions construing analogous federal antitrust laws. Nonetheless, because the plaintiff's only assertion in support of nationwide service – that he sustained damages and litigation costs in Kansas – did not satisfy the "ends of justice" standard, particularly where the plaintiff did not claim a financial impediment to suing in Pennsylvania, the Court affirmed the dismissal for lack of personal jurisdiction. (*Cory v. Aztec Steel Building, Inc.*, No. 06-3051, 2006 WL 3222302 (10th Cir., Nov. 8, 2006))

Securities Fraud Class Action Dismissed for Failure to Satisfy Pleading Requirements

The Court dismissed with prejudice a complaint brought by purchasers of PDI, Inc. common stock for failure to satisfy the pleading requirements of F. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act (PSLRA). The claims concerned disclosures about revenues and profits PDI anticipated in connection with three "performance-based contracts" pursuant to which PDI held the right to market and sell specified prescription drugs. Plaintiffs asserted that defendants' statements relating to these agreements were false and misleading in violation of §10(b) of the 1934 Act and Rule 10b-5. In essence, plaintiffs alleged that defendants overstated anticipated profits and revenues and supported their claim by pointing to the actual results, which fell short of the projections. After noting that the heightened "who, what, when, where, and how" pleading requirements of Rule 9(b) apply to securities fraud cases and that the PSLRA requires a securities plaintiff to specify facts (i) indicating the falsity of each challenged statement, and (ii) establishing a strong inference of scienter, the Court ruled that the plaintiff failed to meet its pleading burden. The Court found, among other things, that the plaintiffs had not alleged any facts to support the claim that defendants knew their projections were false and misleading when they were made. The Court rejected the argument that the projections were knowingly false because they exceeded actual results, reaffirming that "fraud by hindsight" cannot state a claim and ruling that plaintiffs' "opinion" that defendants could not have believed their projections also did not suffice. Plaintiffs' scienter allegations were also ruled deficient. While allegations of "motive and opportunity" can support the requisite strong inference of scienter, the Court ruled that motives that conform with industry practice in the relevant industry are insufficient. Accordingly, plaintiffs' claim that defendants were motivated to make the alleged misrepresentations in order to preserve the jobs of 500-600 employees did not suffice. Apart from the Court's finding that it was industry custom to keep qualified employees during slow periods, the Court also found this alleged motive "to defy logic" – since it was premised on defendants (who included the owners of 40% of PDI) making fraudulent statements in order to keep

employees defendants allegedly knew were not needed, even though keeping them in such circumstances would have been contrary to defendants' investment interest. (*In re PDI Securities Litigation*, No. 02-211 (GEB), 2006 WL 3150822 (D.N.J. Nov. 2, 2006))

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CFTC

NFA Proposes Amendments to Assert Jurisdiction Over Retail Forex Transactions

On November 13, National Futures Association filed with the Commodity Futures Trading Commission for approval amendments to its regulations and interpretive notices governing Forex Dealer Members (FDMs). The amendments are intended to address concerns raised by the Seventh Circuit's decision in *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004), and affirm NFA's authority over the activities of FDMs that engage in off-exchange forex transactions with retail customers, even if such transactions are not considered futures or options. Most notably, NFA has proposed a new definition of "forex" in Bylaw 1507 to replace references to "foreign currency futures and options" in NFA regulations. This definition generally includes all speculative, leveraged retail forex transactions, but not hedging activities or transactions entered into for delivery.

NFA's proposal also clarifies several of its existing FDM rules. Among other things, the amendments state that FDMs are responsible for all of their forex affiliates and must assure that such affiliates do not engage in forex transactions unless they are authorized to do so under the Commodity Exchange Act.
http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1677

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