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Please note that *Corporate and Financial Weekly Digest* will not be published on November 26. The next issue will be distributed on December 3.

SEC/CORPORATE

SOX 404: A Sixth-Year Evaluation

Section 404 of the Sarbanes-Oxley Act (SOX 404) mandates that public companies assess their internal controls over financial reporting (ICFRs). SOX 404(a) requires company management to assess ICFRs, and SOX 404(b) calls for registered public accounting firms to attest to and report on the assessments, made by management.

Implementation of SOX 404 began with U.S. accelerated filers who were first required to provide management assessment and auditor attestation in annual reports for periods ending on or after November 15, 2004. Since 2004, all filers, other than non-accelerated filers (who now have been permanently exempted from the requirements of SOX 404(b) by the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act), have phased into the SOX 404 regulatory scheme and are currently required to provide SOX 404(a) and (b) certifications in their annual reports.

In the six years since the initial implementation date of SOX 404, Audit Analytics has compiled annual reports and published data on the required auditor attestations and management assessments. The SOX 404 Dashboard - Year Six Update, published in October, reports that in year six of SOX 404, only 2.4% of filings contained adverse auditor attestation disclosures. This represents a more than 50% drop since year five, in which the adverse disclosure rate came in at 5%, and an even more significant drop since year one, in which the adverse disclosure rate was 16.9%. The study shows a steady decline in adverse auditor attestations throughout the six years of SOX 404's existence and suggests that auditor involvement in the evaluation process may have led to the improvement of companies' ICFRs. However, the study also shows that adverse disclosure rate for management-only assessments continues to be high—27.8% in 2010. Nonetheless, the year six figure reflects a drop from 32.3% in year five, 32.0% in year four, and 32.8% in year three. The study suggests that the high percentage of adverse management assessments indicates that non-accelerated filers fail to maintain ICFRs that are as reliable as ICFRs maintained by accelerated filers.

BROKER DEALER

SEC Approves CBOE's Proposed Rule Changes Regarding Registration and Qualification Requirements

On November 12, the Securities and Exchange Commission approved proposed rule changes submitted by the Chicago Board Options Exchange, Incorporated (CBOE) that amend its qualification, registration and continuing education requirements for individual Trading Permit Holders (TPHs) and individual associated persons. In general, the amendments (1) expand CBOE's registration and qualification requirements to include additional types of individual TPHs and individual associated persons, (2) require all individual TPHs and associated persons engaged in a securities business on CBOE or on CBOE Stock Exchange not already registered with the Financial Industry Regulatory Authority to register as such, by January 11, 2011, and (3) will require all individual TPHs and associated persons to pass a qualification examination. CBOE is developing within the next six months an alternative to the Series 7 examination that will be tailored to individual TPHs and associated persons that are engaged in proprietary trading. All individual TPHs and individual associated persons will be required to pass this new examination no later than August 12, 2011.

To read the SEC release, click here.
To read a summary of the Notice of Proposed Rule Changes, click here.

PRIVATE INVESTMENT FUNDS

Please see "SEC to Consider Proposed Rules Applicable to Investment Advisers" in **Investment Companies and Investment Advisers** below.

CFTC

CFTC Announces Fourth Series of Dodd-Frank Rulemakings

The Commodity Futures Trading Commission has requested comments on six rule proposals to implement additional provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

- **Registration of Foreign Boards of Trade**: Section 738 of the Dodd-Frank Act provides the CFTC with authority to implement a registration system for a foreign board of trade (FBOT) that provides direct access to its trading system to market participants located in the United States. The CFTC's proposed rules would create a registration process for FBOTs to replace the existing system of staff-issued no-action relief (from which the proposed rules are substantially derived), and would make it unlawful for any FBOT to permit direct access to U.S. participants without first registering with the CFTC. An FBOT that seeks to provide direct access to participants in the United States must submit a registration application to the CFTC that includes information regarding the FBOT's membership criteria, trading system, contracts to be made available to U.S. participants, settlement and clearing systems, home regulatory regime, and rules and rule enforcement. FBOTs currently operating pursuant to no-action relief would be required to apply for registration pursuant to a "limited" registration application process. The factors to be considered by the CFTC in determining whether to grant an FBOT application are substantially similar to those currently applicable to the no-action review process, including evaluation of whether the FBOT's home regulatory authority oversees the FBOT in a manner that is comparable to CFTC oversight of designated contract markets (DCMs).

  FBOTs would also be required to satisfy certain conditions to retain their registration, including general conditions with respect to documentation and information sharing; real time, quarterly and annual reporting obligations; and specific conditions for contracts that are "linked" to U.S. contracts. The CFTC's proposed rules also set out several circumstances under which an FBOT's registration could be revoked by the CFTC, and specify the process by which an FBOT may seek approval to offer additional contracts to U.S. participants.

- **Registration and Regulation of Swap Dealers and Major Swap Participants**: The CFTC is requesting comment on proposed regulations governing registration requirements of, as well as duties to be imposed on, "swap dealers" (SDs) and "major swap participants" (MSPs), as required under Section 731 of the Dodd-Frank Act.

  Under the proposals, registration as an SD or MSP would be similar to the process currently required for other registrants. The proposals provide for a phased implementation of the registration requirement, including an optional "provisional registration" process beginning on April 15, 2011. SDs and MSPs that choose not to apply under the interim process by July 21, 2011, will be required to register by the effective date of the CFTC's forthcoming rule proposals defining the terms "swap dealer" and "major swap participant."

  The CFTC is also requesting comment on its proposal regarding the threshold at which a person's swap dealing activity outside of the United States should be considered to "have a direct and significant connection with activities in, or effect on, commerce of the United States" such that registration as an SD would be required. The proposal states that the CFTC generally would not require registration for persons whose only connection to the United States is the use of, or reporting of transactions to, U.S.-registered trading or clearing organizations, but expects that persons outside of the United States who engage in swap dealing and regularly enter into swaps with U.S. persons would likely be required to register as SDs.

Finally, the CFTC is requesting comment on proposed business conduct rules for registered SDs and MSPs.

- **Designation of CCO and Preparation of Annual Compliance Report**: The CFTC has also proposed rules that would require each FCM, SD and MSP to designate a chief compliance officer (CCO). Under the proposed rules, the CCO would be a principal of the FCM, SD or MSP; would be required to have the appropriate background and skills to perform compliance duties for the registered entity; and could not be a person disqualified from registration under the Commodity Exchange Act. The duties of the CCO would include establishing compliance policies, resolving conflicts of interest, reviewing ensuring compliance with applicable law and establishing remediation procedures for noncompliance issues. The CCO would also be required to prepare and certify an annual report to the CFTC assessing the FCM's, SD's or MSP's compliance policies and their effectiveness.

- **Research and Conflicts of Interest**: The CFTC has released two sets of proposed rules relating to the implementation of conflict of interest policies and procedures by (1) FCMs and introducing brokers (IBs), and (2) SDs and MSPs, respectively. The proposed rules were adapted in part from comparable rules applicable to securities broker-dealers, and would require that FCMs, IBs, SDs and MSPs implement policies and procedures, including appropriate informational barriers, to appropriately segregate the activities of research analysts from the influence of personnel involved in pricing, trading or clearing activities. The proposed rules would restrict non-research personnel from influencing the content of research reports, and would prohibit the supervision of research personnel by certain trading and clearing personnel, the consideration of a research analyst's contributions to the firm's trading or clearing business when setting the analyst's compensation, and any retaliation against research analysts in connection with research reports that may adversely affect the firm's trading or clearing activities.

  The CFTC's rules also require that appropriate partitions be established between SDs and MSPs and any affiliated clearing member (or, in the case of SDs and MSPs that are also registered as FCMs, between clearing unit personnel and business trading personnel of such firm), and prohibit SDs and MSPs from interfering with or attempting to influence decisions relating to the provision of clearing services or acceptance of clearing customers by an affiliated FCM (for example, due to a perceived competitive threat posed to the SD or MSP by such clearing customer).

- **Whistleblower Incentives and Protections**: The CFTC has proposed rules in response to Section 748 of the Dodd-Frank Act, which directs the CFTC to promulgate rules regarding whistleblower incentives and protections. Specifically, the CFTC is required to promulgate rules implementing the payment of awards to whistleblowers who provide original information to the CFTC that leads to successful enforcement of a CFTC action resulting in monetary sanctions exceeding $1 million. The amount of such awards, as determined by the CFTC, will be between 10% and 30% of the sanctions collected in either a CFTC action or a related action based upon the original information provided by the whistleblower.

  The proposed rule includes the procedures for submitting relevant information to the CFTC and criteria for determinations by the CFTC of eligibility for and the amount of awards. Certain government employees and other statutorily ineligible individuals would not be eligible to receive awards. The CFTC proposal further provides that information submitted and the identity of the whistleblower would be treated as confidential by the CFTC, subject to certain exceptions.

The comment periods for the proposals described above will expire 60 days from the dates of their respective publications in the *Federal Register*.

Information regarding all of the CFTC proposals, including the text of the CFTC releases, fact sheets and Q&As can be found here.

NFA Launches Online AML Procedures System

National Futures Association (NFA) has launched a new online system to assist futures commission merchants (FCMs) and introducing brokers (IBs) in developing anti-money laundering (AML) programs. The system is designed to help users identify the minimum required components of an AML program and to provide additional guidance and information on the various components of the program, including example provisions. FCMs and IBs are not required to use the system in designing their AML program, and use of the system does not provide users with a “safe harbor” from applicable AML requirements under NFA rules or federal law. NFA further cautions that the system is only intended to provide an outline for an AML program, which may need to be further tailored to the specific risks of a firm’s business.

The NFA notice to members announcing the launch of the new system, as well as instructions for accessing the system, is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC to Consider Proposed Rules Applicable to Investment Advisers

In an open meeting scheduled for November 19, the Securities and Exchange Commission will consider proposing rules that would increase the statutory threshold for registration by investment advisers with the SEC, require advisers to hedge funds and other private funds to register with the SEC, and address reporting by certain investment advisers that are exempt from registration. Other proposed rules to be considered would implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 for advisers to venture capital funds and advisers with less than $150 million in private fund assets under management in the United States, and clarify the meaning of certain terms included in a new exemption for foreign private advisers.

To read the SEC News Digest click here.

LITIGATION

Unnamed Class Member Could Not Bring Separate Suit for Disgorgement of Attorneys’ Fees

Nine months after the U.S. District Court for the Southern District of Texas approved a fee application in the *In re Enron* class action litigation, plaintiff Michael Brown, an unnamed member of the class, brought a new action in the same court, asserting claims of fraud and breach of fiduciary duty against Thomas Bilek and his law firm, seeking disgorgement of the $16 million in attorneys’ fees awarded Mr. Bilek for his work in the litigation. In the Enron litigation, pursuant to the Private Securities Litigation and Reform Act (PSLRA), the court had appointed the Regents of the University of California as lead plaintiff. The Regents selected Milberg Weiss Bershad Hynes & Lerach LLP as lead counsel for the class, and the district court approved that selection. Milberg Weiss, whose California office was handling the matter, chose Mr. Bilek and his law firm to serve as local counsel in the Southern District of Texas.

Mr. Brown filed his complaint on behalf of the putative class of shareholders of Enron Corporation who participated in and received monies as a result of the settlement of the class action. Mr. Brown’s complaint alleged that in connection with the fee application in the Enron litigation, Mr. Bilek had provided false and exaggerated information regarding his work on behalf of the class. Mr. Brown asserted that these fraudulent misrepresentations resulted in Mr. Bilek being awarded attorneys’ fees in the inflated amount of more than $16 million, which ultimately reduced the recovery to the class members. Mr. Brown sought disgorgement of the attorneys’ fees Mr. Bilek received.

The district court dismissed Mr. Brown’s complaint and the Fifth Circuit affirmed, ruling that Mr. Brown’s claims were “inextricably woven” into the Enron litigation and could only have been brought by lead plaintiff in that litigation. The court held that “an unnamed class member may not circumvent a PSLRA lead plaintiff’s authority by filing an independent tort lawsuit on behalf of members of the class complaining of acts and omissions that occurred in the context of the PSLRA-governed litigation.” The court went on to note that, assuming the allegations were worth pursuing and the facts on which the claims were based were not known at the time the fees were approved, the claims should have been made by the lead plaintiff in a Rule 60(b) motion to set aside the judgment. (*Brown v. Bilek*, No. 09-20654 (5th Cir. Nov. 12, 2010))

Owner of Pennsylvania Limited Liability Company Liable for Its Debts Under Alter Ego Theory

Kitchin Associates LLC is a Pennsylvania limited liability company that is no longer in business. Richard Kitchin and his son were the members of Kitchin LLC and each held a 50% ownership interest in the entity. In a bankruptcy court proceeding, the Joan I. Glisson Trust asserted a claim against Mr. Kitchin in the amount of $257,047.63, arising from an unsatisfied mortgage loan to Kitchin LLC, the proceeds of which were used to purchase a property in Pennsylvania. Mr. Kitchin was not a party to the loan transaction, but did execute the loan documents in his capacity as a member of Kitchin LLC. The Trust asserted that Mr. Kitchin should be personally liable for Kitchin LLC's loan, asserting that the corporate veil should be pierced because he directly participated in the company's torts and because he was subject to personal liability under an alter ego theory.

The Bankruptcy Court for the Eastern District of Pennsylvania found that the Trust's attempt to pierce the corporate veil based on Mr. Kitchin's alleged participation in the torts of the company failed as a matter of law because the Trust's claims against Kitchin LLC sounded in contract, not tort. However, applying the equitable remedy of alter ego liability, the court held that the corporate veil should be pierced because the Trust had demonstrated that Mr. Kitchin controlled the company and that injustice would result if the corporate fiction was maintained, the two elements necessary to pierce the corporate veil under Pennsylvania law.

First, the court found that Mr. Kitchin exercised sufficient control over Kitchin LLC to impose alter ego liability because he directed the company to engage in the transactions that depleted the company's assets. In particular, as confirmed by his son, Mr. Kitchin directed that the company transfer money from Kitchin LLC to pay the debts of another company he controlled. In addition, the court held that the second element necessary for alter ego liability was also present because Mr. Kitchin, "along with his son, disregarded the corporate form and acted as though the assets of Kitchin LLC were theirs to manage and distribute without regard to its creditors." As a result, it held that the corporate veil could be pierced to hold Mr. Kitchin liable for the debts of the company. (*In re Richard R. Kitchin, Jr. and Donna Kitchin*, No. 09-17891-MDC (Bankr. E.D. Pa. Nov. 9, 2010))

BANKING

Federal Reserve Issues Large Bank Capital Guidance

On November 17, the Federal Reserve Board issued guidelines for evaluating proposals by large bank holding companies (BHCs) to undertake capital actions in 2011, such as increasing dividend payments or repurchasing or redeeming stock. According to the Board, "The criteria provide a common, conservative approach to ensure that BHCs hold adequate capital to maintain ready access to funding, continue operations, and continue to serve as credit intermediaries, even under adverse conditions." Bank holding companies should consult with Federal Reserve staff before taking any actions that could result in a diminished capital base, including actions such as increasing dividends, implementing common stock repurchase programs, or redeeming or repurchasing capital instruments more broadly (planned capital actions).

The criteria for evaluating capital distributions are outlined in a revised temporary addendum to Supervision and Regulation letter 09-4, "Dividend Increases and Other Capital Distributions for the 19 Supervisory Capital Assessment Program Firms." The guidelines state that any capital distribution plan will be evaluated on the basis of a number of criteria, with particular emphasis on:

- the firm's ability to absorb losses over the next two years under several scenarios, including an adverse macroeconomic scenario specified by the Federal Reserve and adverse scenarios appropriate for a particular firm's business model and portfolios;
- how the firm will meet Basel III capital requirements as they take effect in the United States, in the context of the proposed capital distributions as well as any anticipated impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act on the firm's business model or capital adequacy; and
- the firm's plans to repay U.S. government investments, if applicable. BHCs are expected to complete the repayment or replacement of any U.S. government investments in the form of either preferred shares or common equity prior to increasing capital payouts through higher dividends or stock buybacks.

Those large bank holding companies that participated in the Supervisory Capital Assessment Program (SCAP) are encouraged to have their capital plans filed by January 7, 2011, irrespective of whether they intend to undertake any capital distributions. The Federal Reserve expects SCAP BHCs to complete the repayment or replacement of any outstanding U.S. government investment in the form of common equity or preferred shares as well as satisfy any conditions related to Troubled Asset Relief Program repayment plans prior to taking any other capital actions. Further, the Federal Reserve will take Basel III into consideration in reviewing proposed capital actions.

The Federal Reserve expects to respond to capital distribution requests beginning in the first quarter.

Read more.

Federal Reserve Issues Proposed Conformance Period Rules for the Volcker Rule

On November 17, the Federal Reserve Board requested comment on a proposed rule to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act that give banking firms a defined period of time to conform their activities and investments to the Volcker Rule. The Volcker Rule generally prohibits banking entities from engaging in proprietary trading in securities, derivatives or certain other financial instruments, and from investing in, sponsoring or having certain relationships with a hedge fund or private equity fund. The statute generally provides banking entities two years to bring their activities and investments into compliance with the Volcker Rule, and allows the Board to extend this conformance period for specified periods under certain conditions. The proposed rule does not address other aspects of the Volcker Rule that are subject to separate rulemaking requirements by other agencies.

In general, the prohibitions and restrictions of the Volcker Rule do not take effect until the earlier of July 21, 2012, or 12 months after the issuance of final regulations by the rule writing agencies under Section 13(b)(2) of the Bank Holding Company Act. The conformance period generally extends through the date that is two years after the date on which the prohibitions become effective or, in the case of a nonbank financial company supervised by the Board, two years after the company is designated by the Financial Stability Oversight Council for supervision by the Board, if that period is later.

The Volcker Rule permits the Board, by rule or by order, to extend the generally available two-year conformance period by up to three additional one-year periods, for an aggregate conformance period of five years. The proposed rule requires that any banking entity that seeks a one-year extension of the conformance period under this authority submit a request to the Board. Among other things, any such request for an extension must: (1) be submitted in writing to the Board at least 90 days prior to the expiration of the applicable time period, (2) provide the reasons why the banking entity believes the extension should be granted, and (3) provide a detailed explanation of the banking entity's plan for divesting or conforming the activity or investment(s).

The Dodd-Frank Act also includes a special provision to address the difficulty banking entities may experience in conforming investments in illiquid funds. This provision expressly permits a banking entity to request the Board's approval for an additional extension of up to five years in order to permit the banking entity to meet contractual commitments in place as of May 21 to a hedge fund or private equity fund that qualifies as an "illiquid fund." Any extended transition period with respect to an illiquid fund may not exceed five years and may be in addition to the conformance period available under other provisions of the Volcker Rule.

As a general matter, to qualify for the statute's extended transition period, a banking entity's investment in, or relationship with, a hedge fund or private equity fund must meet two sets of criteria. The first set of criteria focuses on the nature, assets and investment strategy of the hedge fund or private equity fund itself. The second set of criteria focuses on the terms of the banking entity's investment in the hedge fund or private equity fund. As provided in the Volcker Rule, the Board may grant a banking entity only one extended transition period with respect to any illiquid fund, which may not exceed five years. The Volcker Rule expressly states that any extended transition period will automatically terminate (unless it already expired by its terms) on the date on which the contractual obligation to invest in, or provide additional capital to, the illiquid fund terminates.

Comments on the proposal must be submitted within 45 days after publication in the *Federal Register*, which is expected shortly. The Dodd-Frank Act requires that the Board issue rules to implement the conformance period no later than January 21, 2011.

Read more.

UK DEVELOPMENTS

FSA Seeks Details of Bankers' Pay

On November 10, the UK Financial Services Authority (FSA) circulated its proposals for increased disclosure requirements for bankers' remuneration. Under these proposals, British banks will have to provide a more detailed breakdown of the pay of senior managers and employees who have a material impact on each bank's risk profile in any single year. Banks will be obliged to supply the total amount paid in cash and share bonuses, deferred remuneration (awarded and outstanding) and severance payments made to employees. The proposals will enter into force at the start of 2011, and their requirements will begin to apply with respect to pay awarded for work during 2010.

There is a short consultation period of a month for these proposals, which are designed to implement European provisions enacted earlier this year as part of the revised Capital Requirements Directive.

As several other member states (including Germany and France) have not yet produced their equivalent rules, the FSA has been criticized in some quarters for compromising London's status as a European financial center by providing for its rules to be effective from January 2011.

Read more.

FSA Announces New Policy on Mobile Phone Taping

On November 11, the UK Financial Services Authority (FSA) published its Policy Statement 10/17 (feedback on its "taping of mobile phones" consultation and final rules). This follows the FSA's consultation paper CP10/7 of March 2010, which proposed the removal of the mobile phone exemption from the FSA taping rules. The CP10/7 consultation period ended in June of this year.

The FSA confirmed that the exemption will be removed. As a result, from November 14, 2011, the following will be required of FSA regulated firms:

- all relevant communications made with, sent from or received on mobile phones and other handheld electronic communication devices that are issued by firms for business purposes must be recorded and stored for six months; and
- reasonable steps must be taken to ensure that such communications do not take place on personal devices that cannot be recorded for privacy reasons.

To read the policy statement, click here.

Post-FSA Regulator Consumer Protection and Markets Authority to Take Dual Role

On November 17, the UK government announced another step towards the creation of the new "post-Financial Services Authority" (FSA) UK regulatory regime (as described in the June 18 and July 30 editions of *Corporate and Financial Weekly Digest*). The projected Consumer Protection and Markets Authority (CPMA) will take responsibility for criminal prosecution of insider dealing as well as the listing role currently handled by the FSA in its capacity as UK Listing Authority.

The UK Treasury emphasized that the government was "absolutely committed to prosecuting financial crime," adding that "after much consideration we have decided that for the moment the FSA's powers of prosecution will lie with the new CPMA rather than the new Economic Crime Agency (ECA). The government recognizes the importance to the City of London of a strong markets division being established within the CPMA and giving it these powers will make it a stronger and more credible regulator."

The Treasury added that the government "remains committed to the creation of a strong and powerful new ECA to tackle serious economic crime coherently and effectively." The ECA will combine the Serious Fraud Office with parts of the Office of Fair Trading and several smaller agencies.

Read more.

EU DEVELOPMENTS

European Parliament Supports Harsher Trading Regulations

Two of the European Parliament's groupings, the Socialists and the European People's Party (EPP), have expressed their approval of the report of Dr. Kay Swinburne MEP, which recommended tougher rules on high-frequency trading and dark pools.

The report suggested that a lack of transparency in the financial system was an "aggravating factor" in the financial crisis. It also blamed the Markets in Financial Instruments Directive (MiFID) for problems in the financial market that have arisen since its adoption in 2007.

Although the economic and monetary affairs committee will not directly impact regulatory changes or legislation, this support for harsher rules is indicative of the European Parliament's views at a time when the European Commission is preparing for a much-anticipated formal review of the MiFID in 2011.

To read Dr. Swinburne's report, click here.

European Parliament Adopts AIFM Directive

On November 11, the European Parliament announced that it had adopted the Alternative Investment Fund Managers Directive (AIFMD) by a vote of 513 to 92 with three abstentions.

The deadline for member state implementation will be a date in 2013, two years after the final approved version of the Directive is published in the EU Official Journal.

The detailed implementation of many areas of the Directive will depend on "level 2" rules and guidelines which will be prepared over the coming months by the European Securities and Markets Authority.

To read the provisional version of the AIFMD, click here.

European Council Approves the European Securities and Markets Authority

On November 17, the European Council announced that it had approved the regulation establishing the European Securities and Markets Authority (ESMA). The Council also adopted without debate the so-called "Omnibus I Directive" concerning the powers of other new European supervisory authorities for the banking and insurance industries.

The ESMA will be established with effect from January 1, 2011. As indicated above (in "European Parliament Adopts AIFM Directive"), one of its first priorities will be the preparation of regulations setting out detailed provisions of the regime under that Directive.

Read more.

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