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Corporate and Financial Weekly Digest

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Please note that *Corporate and Financial Weekly Digest* will not be published on November 27. The next issue will be distributed on December 4.

SEC/CORPORATE

SEC Issues New Compliance and Disclosure Interpretations

On November 16, the Securities and Exchange Commission's Division of Corporation Finance issued two new Compliance and Disclosure Interpretations (C&DIs) with respect to Section 5 of the Securities Act of 1933 (Questions 139.29 and 139.30). The new C&DIs concentrate on whether, in the context of registered debt exchange offers and negotiated third-party share exchange offers, the issuer or acquirer, as the case may be, may enter into lock-up agreements with holders prior to filing a registration statement on Form S-4 for the exchange. The SEC acknowledged that there were legitimate business reasons for offerors to seek lock-up agreements in these situations.

If an issuer engages in a registered debt exchange offer, the SEC stated that the issuer may enter into lock-up agreements prior to filing a registration statement if: the signing noteholders are accredited investors and own less than 100% of the outstanding principal amount of the particular series of notes; a tender offer will be made to all holders of the particular series of notes; and all note holders will receive the same amount and form of consideration.

If a third-party acquirer engages in a negotiated share exchange offer, the SEC confirmed that the acquirer may enter into lock-up agreements prior to filing a registration statement if: the lock-up agreements only involve executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the securities; the signing holders own less than 100% of the securities; a tender offer will be made to holders of all securities; and all holders of securities will receive the same amount and form of consideration.

The SEC also replaced an existing C&DI with respect to Sections 13(d) and 13(g) of the Exchange Act and Regulation 13D-G (103.10). The new C&DI asserts that for purposes of calculating the 10-day period after the acquisition when a Schedule 13D must be filed, the day after the trade date (rather than the settlement date) should be counted as the first day of such period. The superseded C&DI stated that the 10-day period begins on the trade date.

Click here to view all C&DIs with respect to the Securities Act.
Click here to view all C&DIs with respect to Sections 13(d) and 13(g) of the Exchange Act and Regulation 13D-G.

LITIGATION

SEC's First Regulation G Enforcement Action Results in Injunction, Civil Penalties

The Securities and Exchange Commission's first action pursuant to Regulation G has resulted in settled charges against a technology firm and certain officers and employees who mischaracterized various expenses in order to meet earnings targets in 2004 and 2005.

Regulation G, which was enacted in 2003, applies whenever a company subject to periodic reporting requirements discloses any material information that includes financial measures that do not conform with generally accepted accounting practices (i.e., non-GAAP results). Such non-GAAP financial measures often exclude non-recurring, infrequent, or unusual expenses. Regulation G requires firms that employ such measurements to reconcile them with the most directly comparable GAAP treatments, and also prohibits companies from disseminating false or misleading non-GAAP reports.

The SEC charged that SafeNet, Inc. and individual officers and employees violated Regulation G by mischaracterizing certain expenses as non-recurring costs, improperly reducing other liabilities to bolster earnings, and failing to reconcile these adjustments with GAAP, thereby misleading investors and violating Regulation G. SafeNet continued to exclude approximately $4.6 million in expenses from its non-GAAP earnings statements, even after its auditor determined that such costs were required to be recognized in its GAAP results. In order to explain the disparity between GAAP and non-GAAP earnings, the company allegedly created false reconciliation categories that misrepresented these costs as non-recurring expenses.

SafeNet, Inc. and the individual defendants settled the charges by agreeing to pay penalties and to refrain from future violations. (*SEC v. SafeNet, Inc.*, Civ. No. 09-117 (D.D.C. Nov. 12, 2009))

Delay in Seeking Restraining Order Prompts Denial of Relief

A medical equipment company's request for a temporary restraining order to prohibit former employees from aiding its competitor was denied after the company waited four months to seek the restraint and failed to present evidence showing that further delay would result in irreparable injury.

Ride-Away Handicap Equipment Corporation asserted claims for breach of contract, tortious interference, and defamation against two of its former sales agents, who had non-competition agreements with Ride-Away, after the agents resigned and joined a competitor, Mobility Freedom, Inc. The former sales agents joined Mobility Freedom shortly after their resignations in late June and early July 2009, but Ride-Away did not seek a temporary restraining order until months later. In denying the temporary restraining order, the court held that the company had "waited nearly four months before seeking to enjoin the defendants' behavior" and had "allege[d] no imminent increment of irreparable harm due to occur" before the defendants could be notified. (*Ride-Away Handicap Equip. Corp. v. Tracey*, No. 8:09-cv-2298-T-23TBM, 2009 WL 3761985 (M.D. Fla. Nov. 10, 2009))

BROKER DEALER

FINRA Reminds Firms to Have Policies Governing Transmission and Withdrawal of Assets from Customer Accounts

In light of recent cases involving the misappropriation of customer assets, the Financial Industry Regulatory Authority has issued Regulatory Notice 09-64 reminding firms of the importance of having adequate procedures for verifying the validity of instructions to transmit or withdraw securities or other assets from customer accounts. Under National Association of Securities Dealers Rule 3012 and the incorporated New York Stock Exchange Rule 401, firms (including both clearing and introducing firms) must establish, maintain and enforce written supervisory control policies and procedures with respect to customer accounts. These policies and procedures must include a "means or method of customer confirmation, notification or follow up that can be documented." The Regulatory Notice sets forth "questions to consider" to assist firms in their review of their current policies and procedures.

Click here to read Regulatory Notice 09-64.

FINRA Delays Changes Regarding Options on Leveraged ETFs

The Financial Industry Regulatory Authority has issued Regulatory Notice 09-65 announcing that it is deferring until April 30, 2010, the increased maintenance margin requirements for options overlying leveraged exchange-traded funds (ETFs) and the application of day-trading margin requirements for leveraged ETFs. FINRA is delaying these effective dates to allow firms time to accommodate ongoing changes in options symbology and other systems-related concerns. December 1, 2009, however, remains the effective date for increased maintenance margin requirements for leveraged ETFs.

Click here to read Regulatory Notice 09-65.

FINRA Proposes Consolidated Rule Governing Discretionary Accounts and Transactions

The Financial Industry Regulatory Authority is requesting comment on a proposed consolidated FINRA rule governing discretionary accounts and transactions. FINRA proposes to transfer National Association of Securities Dealers Rule 2510, which governs the obligations of firms that have discretionary power over customer accounts, into the Consolidated FINRA Rulebook as FINRA Rule 3260. The proposed rule would also incorporate certain requirements under New York Stock Exchange Rule 408, which regulates similar conduct. The proposed rule adopts and clarifies most of NASD Rule 2510's requirements regarding transactions by and the discretionary

activities of members and their associated persons and customer agents, and also adds additional supplementary material. FINRA must receive comments by December 28.

Click here to read Regulatory Notice 09-63.

Please see “Federal Regulators Issue Final Model Privacy Notice Form” in **Financial Markets** below.

FINANCIAL MARKETS

Federal Regulators Issue Final Model Privacy Notice Form

Eight federal regulatory agencies on November 17 released a final model privacy notice form that will make it easier for consumers to understand how financial institutions collect and share information about consumers. Under the Gramm-Leach-Bliley Act, institutions must notify consumers of their information-gathering and information-sharing practices and inform consumers of their right to opt out of certain sharing practices. The model form issued today can be used to comply with these requirements by financial institutions, including investment advisors, broker-dealers, mutual funds and other investment companies.

The final rule provides that a financial institution that chooses to use the model form obtains a “safe harbor” and will satisfy the disclosure requirements for notices. The rule also removes, after a transition period, the sample clauses now included in the appendices of the agencies’ privacy rules. For privacy notices provided after December 31, 2010, regulated financial institutions must reevaluate whether their disclosure will comply with privacy notice requirements vetted in the new rule and model form.

The final model privacy form was developed jointly by the Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission.

Read more.

CFTC

Comments Requested on KCBOT Proposal to Clear Wheat Calendar Swaps

The Commodity Futures Trading Commission has requested public comment on a request by the Kansas City Board of Trade and Kansas City Board of Trade Clearing Corporation (collectively, KCBOT) for exemptions (i) under section 4(c) of the Commodity Exchange Act (CEA) to permit KCBOT to list cleared-only over-the-counter (OTC) wheat calendar swaps, and (ii) under section 4d of the CEA, to commingle collateral deposited by customers for such swaps with funds segregated on behalf of futures customers. The OTC wheat swaps would be negotiated between “eligible swap participants” (as defined in CFTC Regulation 35.1) and cleared by KCBOT clearing members on behalf of their own customers, or on behalf of the customers of other non-clearing or non-member Futures Commission Merchants.

The comment period for the KCBOT proposal closes on December 14.

A copy of the Federal Register release regarding the proposal is available here.

CFTC Approves Mini TOPIX, TOPIX Core30 and TSE REIT Index Futures for Trading by U.S. Persons

Commodity Futures Trading Commission staff has issued a no-action letter to the Tokyo Stock Exchange (TSE) approving TSE’s mini futures contract based on the Tokyo Stock Price Index (TOPIX), as well as TSE’s futures contracts based on the TOPIX Core30 and TSE REIT indexes, for trading by U.S. persons.

A copy of the CFTC no-action letter is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

Please see “Federal Regulators Issue Final Model Privacy Notice Form” in **Financial Markets** above.

BANKING

Federal Reserve Proposes Gift Card Rules

The Federal Reserve Board on November 16 announced proposed rules that would restrict the fees and expiration dates that may apply to gift cards. The rules, according to the Federal Reserve, would protect consumers from certain unexpected costs and would require that gift card terms and conditions be clearly stated. The proposed rules would prohibit dormancy, inactivity, and service fees on gift cards unless: (i) there has been at least one year of inactivity on the certificate or card; (ii) no more than one such fee is charged per month; and (iii) the consumer is given clear and conspicuous disclosures about the fees. Expiration dates for funds underlying gift cards must be at least five years after the date of issuance, or five years after the date when funds were last loaded. The proposed rule would not apply to other types of prepaid cards, including reloadable prepaid cards that are not marketed or labeled as a gift card or gift certificate, and prepaid cards received through a loyalty, award or promotional program. The expiration date restrictions would apply to a consumer's funds, and not to the certificate or card itself. The proposal includes provisions intended to help ensure consumers have at least five years to use a certificate or card from the date of purchase. The proposed rule also prohibits the imposition of any fees for replacement of an expired card or certificate if the underlying funds remain valid

The Board's proposed rules generally cover retail gift cards, which can be used to buy goods or services at a single merchant or affiliated group of merchants, and network-branded gift cards, which are redeemable at any merchant that accepts the card brand. The proposed rules are issued under Regulation E (Electronic Fund Transfers) to implement the gift card provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009.

Comments on the proposal must be submitted within 30 days after publication in the Federal Register, which is expected shortly.

Read more.

FDIC Board Approves Final Rule on Prepaid Assessments

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) on November 12 voted to require insured institutions to prepay slightly over three years of estimated insurance assessments. The prepayment allows the FDIC to strengthen the cash position of the Deposit Insurance Fund (DIF) immediately without immediately impacting earnings of the industry. Payment of the prepaid assessment, along with the payment of institutions' regular third quarter assessment, will be due on December 30. Unlike a special assessment, which the FDIC collected on September 30, this prepayment will not immediately affect bank earnings. Banks will book the payments at the end of each quarter. While the prepayment will immediately improve the FDIC's liquidity, it will not have an impact on the fund balance.

Read more.

Please see "Federal Regulators Issue Final Model Privacy Notice Form" in **Financial Markets** above.

ANTITRUST

Google and Authors Propose New Book Settlement Terms to Satisfy DOJ and Others

The parties to the copyright lawsuit over the Google Books project have modified their proposed settlement terms in response to pushback from the Obama administration and other outside groups. A group of authors and publishers sued Google in 2005, claiming that Google violated their copyrights by scanning books, creating an electronic database of them, and displaying short excerpts without the permission of the copyright holders. In October 2008, the parties proposed a settlement under which Google would be allowed to sell advertisements on its site and sell digital versions of books that are out of print but still under copyright in exchange for paying 63% of the revenues it earns to a registry that would distribute royalties to copyright owners.

Numerous external parties objected to the proposed settlement. Most notably, in September, the U.S. Department of Justice (DOJ), which had already been separately investigating the competitive impact of the proposed settlement, filed a brief outlining its antitrust concerns. The DOJ concluded that the settlement appeared to restrict price competition among authors and publishers and had the potential to foreclose other digital distributors from competing with Google in the sale of digital library products.

In response, last week the two sides proposed a revised settlement. The changes include the following: (i) the agreement now covers only books with copyrights registered in the United States, the United Kingdom, Canada, and Australia, while excluding other foreign titles; (ii) the registry will search for rightsholders for unclaimed works and hold revenues on their behalf, (iii) the works covered by the settlement would be syndicated to Google's competitors; (iv) the agreement limits the forms of additional access models that Google and the registry may agree on in the future; and (v) the agreement clarifies the algorithm for competitively pricing books to consumers. The court will consider the revised settlement proposal after affected and interested parties once again have the opportunity to make objections.

The DOJ's action in this private civil suit serves as a key example of how the Obama administration is actively engaging antitrust issues, even where they arise in complex new digital arenas. (*The Authors Guild, Inc., et al. v. Google Inc.*, Case No. 05-CV-8136 (S.D.N.Y.))

EXECUTIVE COMPENSATION AND ERISA

IRS Issues Final Regulations Governing Incentive Stock Option Information Reporting

Internal Revenue Code (Code) Section 6039 imposes certain reporting requirements on corporations that issue statutory stock options (also known as incentive stock options or ISOs). Before 2006, Code Section 6039 required such corporations to provide a written statement to each employee, in a manner prescribed by regulations, regarding the corporation's transfer of stock as a result of an employee's exercise of an incentive stock option described in Code Section 422(b). The Tax Relief and Health Care Act of 2006 (Act) amended Code Section 6039 to require corporations to file an information return with the Internal Revenue Service in addition to providing employees with the information statement that was previously required.

The IRS has issued final regulations under Code Section 6039 that are effective November 17, 2009, and apply as of January 1, 2007 (the effective date of the amendments to Section 6039), except that they waive the information return requirements for 2007, 2008 and 2009 stock transfers. However, employers are still required to provide information statements to employees regarding stock transfers in those years. When providing information statements for stock transfers that occurred during the 2007 or 2008 calendar years, employers may rely on the former final regulations under Code Section 6039 (which were issued in 2004) or the 2008 proposed regulations. When providing information statements for transfers occurring during the 2009 calendar year, employers may rely on the 2004 final regulations, the 2008 proposed regulations or the final regulations.

The final regulations require the following information for return reporting:

- the name, address, and employer identification number of the corporation transferring the stock (or the same information for the transferring entity if it is not the same corporation);
- the name, address, and social security number of the stock recipient;
- the date the option was granted;
- the exercise price per share;
- the date the employee exercised the option;
- the fair market value of the stock on the date of exercise; and
- the number of shares of stock transferred to the employee.

The information return reporting requirements are triggered by the first transfer of legal title to stock upon the exercise of an option. Under the final regulations, the transfer of stock to an employee's brokerage account upon the exercise of an option is treated as the first transfer of legal title, necessitating the corporate filing of the information return required by Code Section 6039(a)(2). Alternatively, if the corporation issues a stock certificate directly to an employee or registers the employee's name in the corporation's record books and the corporation holds the certificate in book-entry form, the first transfer of legal title (and the triggering of the filing requirement under Section 6039(a)(2)) would not occur until the employee sells the stock or transfers it to a brokerage account.

The IRS plans to issue Form 3921, Exercise of an Incentive Stock Option Under Section 422(b), to be used to satisfy the filing requirements under Code Section 6039.

A copy of the final regulations is available here.

UK DEVELOPMENTS

Regal Petroleum Plc Fined £600,000 by LSE

On November 17, the London Stock Exchange (LSE) fined Regal Petroleum plc (Regal), a company listed on the Alternative Investment Market (AIM), the LSE's secondary market, £600,000 (approximately $990,000). The sanction was imposed for numerous serious breaches of AIM's rules.

In particular it was found that on 11 separate occasions, Regal breached AIM Rule 9 by failing to take reasonable care to ensure that its announcements were not misleading, false or deceptive and did not omit material information. In a period running from 2003 to 2005, Regal had made a series of announcements to the market about a drilling opportunity in the Aegean Sea. During this period Regal's share price rose by almost 500% and it raised over £100 million (approximately $165 million) through three separate placings on AIM. In May 2005, Regal announced that following testing on the drilling opportunity, the well was "non-commercial." As a result Regal's share price immediately fell by 61% amid significant press coverage, and the LSE initiated an investigation. The fine imposed is the highest in the history of AIM.

To read the LSE's announcement in full, click here.

FSA Fines Former Stockbroker £24,000 for Market Abuse

On November 17, the UK Financial Services Authority (FSA) published the final notice which it has issued to Alexei Krilov-Harrison, a former stockbroker at Pacific Continental Securities UK Ltd. The FSA has fined Mr. Krilov-Harrison £24,000 (approximately $40,000) for market abuse relating to the use of inside information.

The FSA had found that Mr Krilov-Harrison had received inside information about a publicly traded company relating to a major contract it was about to sign. During the 24 hours following receipt of this information, Mr. Krilov-Harrison encouraged several of his clients to invest in the company using the inside information as a sales tactic. The FSA found that Mr. Krilov-Harrison's actions were deliberate and motivated by a desire for profit.

To read the FSA's notice in full, click here.

UK Government Announces Financial Services Bill

A new Financial Services Bill is one of the measures announced by the UK Government for the new parliamentary session. The main elements of the Bill announced on November 19 include:

- the establishment of a new Council for Financial Stability to be comprised of the UK Treasury, the Bank of England and the UK Financial Services Authority (FSA);
- the strengthening of the FSA's powers, including the provision of an explicit objective to promote financial stability;
- the introduction of new rights for the FSA to take action, nationally and internationally, on remuneration; and
- requirements for systemically important firms to establish recovery and resolution plans that will make them safer and easier to wind down.

To read the announcement from the UK Government in full, click here.

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