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Corporate and Financial Weekly Digest

October 3, 2008

SEC/Corporate

SEC Extends Emergency Order to Temporarily Amend Rule 10b-18 of the Exchange Act

On September 18, the Securities and Exchange Commission issued an emergency order to temporarily amend Rule 10b-18, generally suspending the time of day requirements and liberalizing the total volume limitations of the Rule 10b-18 safe harbor afforded to issuers in connection with repurchases of their securities. For more detailed information regarding the temporary amendment, see the September 26, 2008 edition of *Corporate and Financial Weekly Digest*.

The temporary amendment was due to expire at 11:59 p.m. ET on October 2. However, on October 1 the SEC extended its emergency order through 11:59 p.m. ET on October 17. No change was made to the September 18 order.

http://www.sec.gov/rules/other/2008/34-58703.pdf

SEC's Division of Corporation Finance Issues New Exchange Act C&DIs

On September 30, the Division of Corporation Finance of the Securities and Exchange Commission issued new compliance and disclosure interpretations (C&DIs).

The new C&DIs comprise the Division of Corporation Finance's interpretations of the registration and reporting provisions of the Exchange Act and republish and update previously published telephone interpretations. The new C&DIs have been published in three sections—Exchange Act Sections, Exchange Act Forms and Exchange Act Rules.

Among the new or republished C&DIs are several relating to the Section 12(g) registration process including guidance on the withdrawal of a Form 10 Registration Statement; the requirement to deregister unsold securities on existing Form S-3 and Form S-8 Registration Statements in order to rely on the automatic reporting suspension contained in Section 15(d) of the Exchange Act; several C&DIs with respect to the use of a Form 8-A; confirmation that although Instruction G(3) to Form 10-K indicates that Regulation S-K Item 401 information be included in Part 1 of Form 10-K, such information may be included in Part 3 of Form 10-K; confirmation that a Form 12(b)-25 should be filed even when the issuer anticipates filing the related periodic report after the Rule 12b-25 extension period terminates; interpretations related to transitions from accelerated filer to smaller reporting company and vice versa; and confirmation that during the Rule 12b-25 extension period a company may continue to use an already effective Form S-3 to make offers and sales

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assuming the Form S-3 contains a valid section 10(a) prospectus.

http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm
http://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps.htm
http://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm

SEC Roundtable on Disclosure Transparency

The Securities and Exchange Commission will hold a roundtable on October 8 to discuss methods of modernizing the financial information disclosure system currently in place. The main objective of the roundtable is to determine how to provide financial information in a useful format that can be easily understood by investors. The roundtable will be organized into two panels. The first panel will discuss methods, technology and processes currently used by companies and other filers to satisfy their SEC disclosure obligations. The second panel will discuss how to improve the organization and operation of the SEC's disclosure system to provide investors with greater access to information and filers with more efficient disclosure procedures.

The roundtable is part of the SEC's newly launched 21st Century Disclosure Initiative, which includes the development of a new disclosure platform called IDEA (Interactive Data, Electronic Applications) that allows investors to more easily access disclosure information.

http://www.sec.gov/rules/other/2008/33-8962.pdf
http://www.sec.gov/news/press/2008/2008-227.htm

Litigation

Allegations Against Individual Defendants Satisfy PSLRA's Pleading Standard

Plaintiffs, a class of investors who purchased LDK Solar Company (LDK) securities, alleged that the defendants, officers and directors of LDK Solar violated section 10(b) of the Securities Exchange Act of 1934 by making false and misleading statements about the company's financial health in the company's IPO prospectus and in a company-issued press release. The defendants moved to dismiss the plaintiffs' claim, contending, among other things, that the plaintiffs failed to (i) identify a single allegedly false statement made by the defendants, and (ii) allege facts giving rise to the requisite strong inference of scienter.

Although defendants signed LDK's IPO prospectus, which contained numerous allegedly false statements, they argued that these statements could only be attributed to them by applying the "group pleading doctrine," which, they contended, was no longer good law following the United States Supreme Court's *Tellabs* decision. The court disagreed. The court first ruled that it need not determine the viability of the group pleading doctrine, which allows unattributed corporate statements to be charged to individual defendants based solely on their corporate titles, to resolve defendants' motion. Because plaintiffs alleged that the moving defendants had each signed the prospectus, the court held that the complaint sufficiently alleged, pursuant to the Private Securities Litigation Reform Act's pleading standard, that defendants made the allegedly false statements.

Turning to defendants' scienter argument, the court found that a strong inference of scienter as to each defendant had also been adequately alleged. With respect to the two defendants on LDK's Board, the court found that they were personally aware of concerns raised by both the Board's outside auditors and by the company controller who was hired to investigate the auditors'

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concerns, and that they also knew that the controller resigned because his warnings of inaccuracies in LDK's financial reports were ignored. As to the remaining defendant, the plaintiffs' allegations that he was the controller's supervisor, that he was aware of the accounting problems identified by the controller, and that he was aware of other facts calling into question the accuracy of LDK's disclosures were sufficient to allege his scienter. (*In re LDK Solar Securities Litigation*, 2008 WL 4369987 (N.D. Cal. Sept. 24, 2008))

CEO of Subsidiary Could Be Liable for Public Disclosures Made by Parent Company

The defendant, the former CEO of Northwest Communications Solutions (NCS) moved to dismiss, among other things, the claim of the Securities and Exchange Commission that he violated sections 17(a)(1), (2), and (3) of the Securities Act of 1933. NCS was a division of a wholly owned subsidiary of Northwestern Corporation, which was a publicly traded company. The SEC alleged that the defendant directed the accountants at NCS to record unearned revenue and fictitious profits and engage in other actions that caused NCS to make misstatements on its financial statements. The SEC further alleged that these misstatements caused Northwestern to misstate its revenue and net income in its public filings.

The defendant moved to dismiss the complaint, arguing, among other things, that he could not be held liable as a primary violator of section 17(a)(1), (2), or (3) of the Securities Act, which requires that a material misstatement or omission be made in connection with the offer or sale of a security by means of interstate commerce, because he did not have a meaningful connection to Northwestern's public offering of securities. The court rejected this argument, ruling that a person can be charged with making a material misstatement in connection with the offer or sale of a security if the person, acting with the requisite scienter, either makes or causes to be made such a statement which is then used in connection with the offer or sale. After noting that the defendant had not contested a prior ruling that his scienter had been adequately pleaded, the court held that the SEC's allegations that the defendant supplied Northwestern with fraudulent financial information that he knew would be incorporated into Northwestern's publicly filed financial statements sufficiently alleged his connection to Northwestern's sale and offer to sell securities for purposes of its section 17(a) claims. (*S.E.C. v. Thielbar*, 2008 WL 4360964 (D.S.D. Sept. 24, 2008))

Broker Dealer

SEC Extends Short Sale Emergency Orders

The Securities and Exchange Commission extended certain aspects of recent short sale emergency orders to allow time for completion of work on the anticipated passage of the "financial rescue" legislation currently working its way through Congress. The SEC's temporary ban on short selling in certain enumerated financial companies will extend to the third business day after enactment of the "financial rescue" legislation but in any case no later than 11:59 p.m. ET on October 17. The temporary requirement that certain institutional money managers (i.e., "13F filers") make reports regarding new short sale activity in certain publicly traded securities was also extended to 11:59 p.m. ET on October 17; however, the SEC signaled its intention to extend the disclosure requirements beyond that date through an interim final rule (that will provide an opportunity for industry comment). Further, the SEC extended its order temporarily easing restrictions on the ability of issuers to repurchase their securities to 11:59 p.m. ET on October 17.

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The SEC also announced an extension of certain provisions relating to the existing ban on naked short selling. The “Hard T+3” close-out requirements from a previous order (including the prohibition of further short sales without a pre-borrow for firms that are in the “penalty box”) were extended until 11:59 p.m. ET on October 17. However, the SEC made clear that it intends to adopt interim final rules to ensure these “Hard T+3” close-out rules extend past the October 17 date without interruption. These interim final rules will provide an opportunity for industry comment on this initiative.

http://www.sec.gov/news/press/2008/2008-235.htm

BATS Exchange Proposes Rule Changes Regarding Market Maker Registration, Obligations and Definitions

On September 19, BATS Exchange, Inc. (the Exchange) submitted a proposal to the Securities and Exchange Commission to amend the Exchange’s rules to provide members the ability to register as market makers and to register their officers, partners, employees or other associated persons as market maker authorized traders. In addition to proposing that definitions of “Market Maker” and “Market Maker Authorized Trader” be included in Rule 1.5 – Definitions, the Exchange proposes to amend Rules 11.5 through 11.8 regarding, respectively, (i) registration as and requirements of a Market Maker; (ii) registration as and requirements and obligations of a Market Maker Authorized Trader; (iii) registration of Market Makers in a security; and (iv) obligations of Market Makers.

Because the proposal was filed as a “non-controversial” rule change, it was effective upon filing with the SEC but does not become operative for 30 days from the filing date.

http://www.sec.gov/rules/sro/bats/2008/34-58644.pdf

SEC Approves FINRA’s Proposed Rule Change to Adopt Certain NASD and NYSE Rules into the Consolidated FINRA Rulebook

The Securities and Exchange Commission has approved a proposed rule change advanced by the Financial Industry Regulatory Authority (FINRA) (f/k/a/ National Association of Securities Dealers, Inc. (NASD)) to adopt NASD Rule 3013 and IM-3013, and to delete the corresponding provisions found in Incorporated New York Stock Exchange (NYSE) Rule 342.30 and NYSE Rule Interpretations 311(b)(5)/04 through /05 and 342.30(d)/01 through (e)/01. FINRA will renumber NASD Rule 3013 (Annual Certification of Compliance and Supervisory Processes) and IM-3013 (Annual Compliance and Supervision Certification) as FINRA Rule 3130 in the Consolidated FINRA Rulebook.

Currently, NASD Rule 3013 and Incorporated NYSE Rule 342 require each member to designate one or more principals to serve as chief compliance officer (CCO) and require that a chief executive officer (CEO) annually certify that the member has a mechanism in place to establish, maintain, review, modify and test policies designed to achieve compliance with applicable NASD or NYSE rules and regulations. The certification requires, in part, that the CEO has conducted at least one meeting with the CCO within the previous 12 months discussing the mechanism and its effectiveness.

Though there are several differences between the NASD and NYSE rules, FINRA has determined which provisions to retain for the Consolidated FINRA Rulebook. For instance, NYSE Rule 342.30 requires that the member submit its annual certification to the NYSE whereas the corresponding NASD rule merely requires that the certification be maintained for inspection. FINRA has determined to retain the NASD requirement of keeping the certification on file for a potential future inspection.

http://www.sec.gov/rules/sro/finra/2008/34-58661.pdf

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Investment Companies and Investment Advisers

SEC Issues Interim Clarifications on FAS 157 Fair Value Accounting

On September 30, staff from the Securities and Exchange Commission and the Financial Accounting Standards Board issued interpretive guidance in question and answer form on the application of fair value measurements in accordance with FASB Statement No. 157, Fair Value Measurements (FAS 157). The guidance is being issued to provide immediate assistance, given the current turbulence in market conditions; the FASB is expected to issue more extensive interpretive guidance on FAS 157 in the coming week. The following is a summary of the Q & A. Please see the release below for full text of the responses.

Can management's internal assumptions (e.g., expected cash flows) be used to measure fair value when relevant market data does not exist?

Yes. FAS 157 discusses numerous valuation techniques, including expected cash flows from an asset, to estimate fair value when relevant market data is unavailable. The staff notes that in some instances (e.g., when market conditions require significant adjustments to level 2 observable inputs) it may be more appropriate to estimate an asset's value using primarily unobservable inputs or a combination thereof.

How should the use of "market" quotes be considered when assessing the mix of information available to measure fair value?

In weighing a broker quote as an input to fair value, less reliance should be placed on quotes that do not reflect the result of actual market transactions (e.g., where a broker quote is based upon models with inputs obtained using information available only to the broker). In addition, the nature of the quote (e.g., whether the quote is an indicative price or a binding offer) should be considered.

Are transactions that are determined to be disorderly representative of fair value? When is a distressed sale indicative of fair value?

Distressed or forced liquidation sales are not orderly transactions, and the fact that the transaction was distressed or forced should be considered when weighing the evidence of value. Preparers must use judgment in determining whether a particular transaction is forced or disorderly.

Can transactions in an inactive market affect fair value measurements?

Yes. Orderly transactions in inactive markets may be inputs when measuring fair value, but would likely not be determinative. Where the price in an inactive market does not reflect the current price for the same or similar assets, adjustments will be required. Factors to consider in determining whether a market is inactive include a significant increase in the bid-ask spread, or the presence of a relatively small number of "bidding" parties.

What factors should be considered in determining whether an investment is other-than-temporarily impaired?

Factors to consider include (i) the length of time and extent to which the market value has been less than cost, (ii) the financial condition and near-term prospects of the issuer, and (iii) the intent and ability of the holder to retain its

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investment for a period of time sufficient to allow for any anticipated recovery in market value.

http://sec.gov/news/press/2008/2008-234.htm

Structured Finance and Securitization

Senate Passes Troubled Asset Relief Program (TARP) Legislation

On October 1, the Senate passed a revised version of legislation authorizing the Treasury Department's Troubled Asset Relief Program (TARP), and sent it back to the House of Representatives. The core of the original TARP legislation remains essentially unchanged, but additions have been made to the bill in an attempt to ensure its passage.

The bill now includes the Energy Improvement and Extension Act of 2008, which, among other things, provides tax credits and incentives to the alternative energy industry. Also included is a tax extenders package that extends relief from the alternative minimum tax, as well as individual and business tax deductions and research-and-development tax credits. The Senate also added a provision that would place mental illness on a par with physical illness for insurance purposes. Finally, the bill increases the deposit insurance offered by the Federal Deposit Insurance Corp. from $100,000 to $250,000, and creates unlimited authority in the FDIC to borrow taxpayer money to support the higher coverage.

http://banking.senate.gov/public/_files/latestversionAYO08C32_xml.pdf

HOPE for Homeowners Program Becomes Effective

On October 1, the HOPE for Homeowners Program became effective. HOPE for Homeowners, which will be in effect until September 30, 2011, is a federal program created in order to help homeowners avoid foreclosure by allowing qualifying mortgagors, with the consent of the lender, to refinance into a government-insured fixed-rate thirty-year mortgage loan. In connection with the program's launch, the Federal Housing Administration posted information on its website, including disclosure forms, fact sheets, links to mortgagee letters, and general information and guidance relating to the program.

http://portal.hud.gov/portal/page?_pageid=73,7601299&_dad=portal&_schema=PORTAL
http://portal.hud.gov/portal/page?_pageid=73,7601299&_dad=portal&_schema=PORTAL
http://portal.hud.gov/portal/page?_pageid=73,7606147&_dad=portal&_schema=PORTAL

CFTC

CFTC Issues Statement Regarding Bankruptcy Treatment of Cleared-Only Contracts

In an interpretive statement, the Commodity Futures Trading Commission has taken the position that "cleared-only contracts," over-the-counter contracts submitted for clearing through a futures commission merchant to a derivatives clearing organization, should be included within the definition of "net equity" for purposes of U.S. Bankruptcy Code provisions applicable to commodity brokers. The CFTC's interpretation generally would treat cleared-only contracts in the same manner as exchange-traded futures contracts in the event of a futures commission merchant bankruptcy.

http://edocket.access.gpo.gov/2008/pdf/E8-23277.pdf

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BM&F Granted No-Action Relief to Permit Electronic Access in U.S.

The Commodity Futures Trading Commission has granted no-action relief to BM&F Bovespa S.A. – Bolsa de Valores, Mercadorias e Futuros, the Brazilian derivatives exchange (BM&F), to permit direct electronic access to BM&F's electronic trading and order matching system (GTS) to U.S. persons without BM&F's designation as a contract market. The no-action relief applies to (i) persons located in the U.S. who are authorized by the Chicago Mercantile Exchange to access GTS through a Globex terminal, (ii) registered futures commission merchants (FCMs) who enter orders directly in GTS for their proprietary account or on behalf of U.S. customers, and (iii) authorized customers of an FCM or Rule 30.10 Firm that have been authorized by an entity with access rights to BM&F (as well as such entity's BM&F clearing member, who must agree to guarantee and assume certain responsibilities with respect to the customer's activities) to enter orders directly into GTS.

http://www.cftc.gov/stellent/groups/public/@lrlettergeneral/documents/letter/08-18.pdf

Comments Requested on DCO Application of International Derivatives Clearinghouse

The Commodity Futures Trading Commission has requested public comment on the application by the International Derivatives Clearinghouse, LLC (IDC) for registration as a derivatives clearing organization. IDC proposes to clear both interest rate swap futures contracts to be listed on the Philadelphia Board of Trade (PBOT), as well as certain over-the-counter interest rate swap transactions submitted through PBOT to IDC for clearing. Such over-the-counter contracts would be replaced by the corresponding PBOT listed swap futures contract.

The comment period for the IDC application closes on October 17.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5560-08.html

International Task Force on Commodities Markets to Be Co-Chaired by CFTC and FSA

The Commodity Futures Trading Commission and the U.K. Financial Services Authority will co-chair the Task Force on Commodity Markets (TFCM), which was recently created by the International Organization of Securities Commissions. The TFCM was created in response to recent volatility in various commodity markets and will study various approaches to the oversight of commodity markets worldwide.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5561-08.html

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EU Developments

European Commission Publishes Revised Capital Requirements Proposals

On October 1, the European Commission published its proposals to revise the EU Capital Requirements Directive. The revisions are stated to have been prompted by the current financial market turbulence and to be aimed at ensuring adequate protection of creditor interests and overall financial stability.

The proposals focus on large exposures, risk retention in securitizations, the use of so-called supervisory "colleges", and consistent treatment of tier one capital and liquidity risk.

The Commission believes that the current large exposures regime leads to high costs and a lack of clarity. Particularly, the Commission is concerned that the present regime fails to tackle potential market failures such as inter-bank exposures. An amended limit-based backstop regime for large exposures is to be introduced and the Commission proposes to limit inter-bank exposures to the higher of 25% of the lending bank's own funds or €150 million.

The proposals include a requirement designed to address potential conflicts of interest in the "originate to distribute" model by requiring originators and sponsors of credit risk transfer to retain at least 5% of the risks they have underwritten. The Commission has also made proposals aimed to create an efficient structure for supervisory colleges to facilitate information sharing and coordination among the supervisors of large cross-border groups of companies.

The proposals will amend European Directives 2006/48/EC and 2006/49/EC and now pass to the European Parliament and the European Council of Ministers for consideration under the EU's co-decision procedure.

ec.europa.eu/internal_market/bank/docs/regcapital/crd_proposal_en.pdf

EU DEVELOPMENTS

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