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SEC/CORPORATE

SEC Outlines Planned Rulemaking Schedule to Implement Provisions of the Dodd-Frank Act

The Securities and Exchange Commission has announced its planned schedule for proposing and adopting rules and taking other action to implement the corporate governance and disclosure provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Certain of the Dodd-Frank Act provisions apply to proxy materials and proxy voting records that are prepared in connection with annual meetings of shareholders that occur after six months following enactment (January 20, 2011). For these provisions, the SEC intends to propose and adopt final rules prior to such date. Other corporate governance provisions of the Dodd-Frank Act are not effective until the SEC adopts rules; of these, some include dates by which the SEC must act, while others are silent. The SEC considers matters with specified dates indicative of congressional priorities and will propose and adopt rules with respect to these areas first. The SEC expects to adopt all rules with dates specified in the Dodd-Frank Act by one year following enactment (July 21, 2011). Below are the time periods set forth in the SEC's planned rulemaking schedule and the rules to be proposed or adopted during such time periods, as well as certain related actions. Section references are to the Dodd-Frank Act.

The following rules or actions will be proposed or implemented in October–December 2010 and finalized in January–March 2011:

- Shareholder votes on executive compensation (Say on Pay), golden parachutes (Say on Parachutes) and disclosure by investment advisers of votes on executive compensation (Section 951)
- Implement a Whistleblower Incentives & Protection Program, report to Congress on such program, establish Whistleblower Office (Sections 922 and 924)
- Disclosure related to "conflict minerals" and mine safety information and disclosure by issuers engaged in the commercial development of oil, natural gas or minerals (Sections 1502-1504)
- Disclosure of, and prohibitions of certain, executive compensation structures and arrangements by covered financial institutions (Section 956)
- Reduction of the costs to smaller issuers (with market capitalization between $75 million and $250 million) for complying with Section 404(b) of the Sarbanes-Oxley Act of 2002, while maintaining investor protections for such companies (Section 989G)

The following rule will be proposed in October–December 2010 and finalized in April–July 2011:

- Exchange listing standards regarding compensation committee independence and factors affecting compensation advisor independence, compensation consultant conflicts (Section 952)

The following rules will be proposed or implemented in April–July 2011:

- Disclosure of pay-for-performance, pay ratios and hedging by employees and directors (Sections 953 and 955)
- Clawback of executive compensation (Section 954)

- Definition of “other significant matters” for purposes of exchange standards regarding broker voting of uninstructed shares (Section 957)

Click here for the SEC’s complete rulemaking schedule for the Dodd-Frank Act.

BROKER DEALER

NYSE Arca Proposes to Adopt Pricing Obligations for Market Makers

On September 20, NYSE Arca, Inc. issued a proposal to amend NYSE Arca Equities Rule 7.23 to adopt pricing obligations for Market Makers. Under the proposal, NYSE Arca will require Market Makers to continuously maintain two-sided Q Order trading interest within a Designated Percentage from the National Best Bid and Offer (NBBO) for each security in which they are registered. These pricing obligations are intended to eliminate trade executions against Market Maker placeholder Q Orders traditionally priced far away from the inside market. Permissible Q Orders will be determined by, among other things, the time of day in which a Q Order is entered and the individual character of the security.

Click here to read Release No. 34-62946.

FINRA Adds New Alert-Reporting Criterion for Leverage in FOCUS Reports

The Financial Industry and Regulatory Authority is adding a new alert-reporting criterion for leverage in Financial and Operational Combined Uniform Single (FOCUS) Reports. FOCUS Reports detail a firm’s operational and financial conditions and are submitted electronically to FINRA. FINRA’s alert-monitoring criteria is designed to more closely surveil those firms that carry customer accounts or self-clear transactions that may be experiencing financial or operational problems that warrant special monitoring.

Click here to read FINRA Regulatory Notice 10-44.

SEC Approves Amendments to Establish Regulation NMS-Principled Rules for OTC Equity Securities

The Securities and Exchange Commission has approved new Financial Industry and Regulatory Authority rules that extend certain Regulation NMS protections to quoting and trading of over-the-counter (OTC) Equity Securities. Effective February 11, 2011, these new rules: (1) set forth permissible pricing increments for the display of quotations and acceptance of orders, (2) require firms to avoid locking and crossing quotations within an inter-dealer quotation system, and (3) establish a cap on access fees imposed against a firm’s published quotation. Effective May 9, 2011, the new rules will require an OTC Market Maker, subject to certain exceptions, to display the full size of customer limit orders that improve the price of the Market Maker’s displayed quotation or that represent more than a de minimis change in the size of the Market Marker’s quote if at the best bid or offer.

Click here to read FINRA Regulatory Notice 10-42.

CFTC

CFTC to Hold Public Meeting on Proposed Rules Under the Dodd-Frank Act

The Commodity Futures Trading Commission announced that it will hold a public meeting on October 1 regarding the first series of rule proposals pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. The meeting will be held at 9:30 a.m. EDT in the CFTC Hearing Room at 1155 21st Street NW, Washington, D.C. The CFTC will consider proposed rules relating to: (1) financial resource standards for systemically important central counterparties, and (2) governance and conflicts of interest standards for designated clearing organizations, designated contract markets and swap execution facilities. The CFTC will also consider an interim final rule regarding the timing of reporting pre-enactment unexpired swaps to a swap repository or the CFTC.

The CFTC press release about the meeting is available here, and the *Federal Register* release is available here.

CFTC Requests Comment on NFA Petition to Amend Rule 4.5

The Commodity Futures Trading Commission has published a request for comment (the Notice) with respect to a National Futures Association (NFA) petition for rulemaking asking the CFTC to amend Rule 4.5 to restore certain limitations on the activities of registered investment companies (RICs) that claim an exclusion from registration as a commodity pool operator under that rule. The amendments requested by NFA would reinstate the requirements that any RIC claiming an exclusion from registration under Rule 4.5: (1) will not market the RIC as a means of obtaining exposure to commodity futures or options, and (2) will limit its commodity futures and options positions (other than positions held for bona fide hedging purposes) to no more than 5% of the liquidation value of the portfolio. The comment period for the Notice expires on October 18.

The *Federal Register* release of the Notice is available here, and the June NFA petition is available here.

CME Group Response to CFTC Letter in Support of EFF Transactions on ELX

CME Group, Inc. has sent a letter to the Commodity Futures Trading Commission reaffirming its position that it is not required to accept for clearing ELX Futures "exchange of futures for futures" (EFF) transactions.

Last year, the Chicago Board of Trade (CBOT) issued a Market Regulation Advisory Notice stating that CBOT rules do not allow the execution of EFF transactions. CFTC staff subsequently took the position that neither the Commodity Exchange Act (CEA) nor CFTC regulations prohibit such transactions, and the CFTC sent a letter to CME in August restating this position. In addition, the CFTC Division of Market Oversight (DMO) sent a second letter requesting from CBOT a written response and the production of records addressing whether the CBOT Advisory Notice complies with Core Principle 18 of Section 5(d) of the CEA (antitrust considerations).

In its September 13 reply, CME defended CBOT's ban on EFF transactions and reiterated its position that such transactions are wash sales and/or fictitious trades. CME also responded to the DMO's letter addressing its inquiries regarding antitrust considerations and detailing CBOT's legal and economic rationale for prohibiting EFF transactions.

Copies of both letters, with attachments, are posted on the CFTC's website, available here.

CME Publishes Reminder of New Cleared OTC Customer Sequestered Regulatory Class

CME Group, Inc. issued an Advisory Notice regarding CME Clearing's new Cleared over-the-counter (OTC) Customer Sequestered regulatory class, which is set to replace the use of 30.7 Secured status for customer positions in certain swaps and forwards on October 4.

The Advisory Notice, which includes links to further information regarding the new regulatory class, is available here.

LITIGATION

Second Circuit Holds That Corporations Cannot Be Sued under Alien Tort Statute

The U.S. Court of Appeals for the Second Circuit has ruled that corporations are not subject to liability under "customary international law", otherwise known as the "law of nations" and that, as such, corporations cannot be held liable under the U.S. Alien Tort Statute. Although he concurred in the result, Judge Leval vigorously disputed the majority's conclusion on this issue.

Plaintiffs asserted claims against corporate defendants affiliated with the Royal Dutch Petroleum Company for aiding and abetting violations of the law of nations. According to the plaintiffs, Royal Dutch engaged in extensive oil exploration and production in a region of Nigeria since 1958. During this period, a local movement was organized to protest the environmental effects of oil exploration. The plaintiffs alleged that from 1993 to 1994, the Nigerian military, with the assistance of the defendants, organized and executed a brutally violent campaign against the local resistance and asserted claims against the defendants, all of whom were corporations, under the Alien Tort Statute in an action in the Southern District of New York.

Under the Alien Tort Statute, a unique statute passed by the first Congress of the United States in 1789, "district courts have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. Section 1350. The Second Circuit held that in order to determine whether jurisdiction existed under the Alien Tort Statute, the court first had to determine whether corporations were subject to liability under the law of nations. The court, in an extensive opinion, found that while international law recognized individual liability in cases under the law of nations, such as for human rights violations, liability under the law of nations had never been extended to include a corporation. Accordingly, the court held that claims against corporations could not be asserted under the Alien Tort Statute and ruled that dismissal of all claims against the defendants was warranted. (*Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06 Civ. 4800, 06 Civ. 4876, 2010 WL 3611392 (2d Cir. Sept. 17, 2010))

SEC Case Against Mark Cuban Revived

The U.S. Court of Appeals for the Fifth Circuit reversed a lower court ruling that had dismissed the Securities and Exchange Commission's securities complaint against Mark Cuban. The SEC alleged that Mr. Cuban violated the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as Rule 10b-5, by trading stock in Mamma.com based on confidential information he allegedly misappropriated from its chief executive officer.

According to the complaint, Mr. Cuban, a significant minority shareholder in Mamma.com, was contacted by the company's CEO about a private investment in public equity, or PIPE, offering. The CEO allegedly told him that the information he was going to provide was confidential and must be kept confidential. Mr. Cuban became upset when he heard the offer because he understood that the PIPE offering would dilute his ownership stake in Mamma.com. At the close of the initial call, Mr. Cuban allegedly told Mamma.com's CEO: "[n]ow I'm screwed. I can't sell." Thereafter, the CEO emailed Mr. Cuban, referring him to a representative to provide additional details. Mr. Cuban called the representative and, the Fifth Circuit held, there is a reasonable inference that he obtained the details of the offering, including the prices available to PIPE participants. One minute later, Mr. Cuban contacted his broker and sold his entire position.

Once the PIPE offering was announced, Mamma.com's share price declined by as much as 39%. By selling when he did, Mr. Cuban saved $750,000. Reading these allegations in a light most favorable to the SEC, as required on a motion to dismiss, the Fifth Circuit determined that the complaint provided a plausible basis to find that the CEO and Mr. Cuban agreed that Mr. Cuban was not to trade on the information he learned about Mamma.com's PIPE offering. By trading in violation of that agreement, he allegedly misappropriated the confidential information for his own benefit, providing the basis for the SEC's claims. As a result, the circuit court remanded the case for further proceedings, including discovery, consideration of summary judgment and, if reached, trial. (*SEC v. Cuban*, No. 09 Civ. 10996, 2010 WL 3633059 (5th Cir. Sept. 21, 2010))

One day after this opinion was issued, Mr. Cuban prevailed against the SEC with respect to an action under the Freedom of Information Act that he filed to obtain certain documents relating to Mamma.com, as well as other businesses he was affiliated with, at least some of which, according to the U.S. District Court for the District of Columbia, had been improperly withheld. (*Cuban v. SEC*, No. 09-0996 (D.D.C. Sept. 22, 2010))

BANKING

Congress Passes Small Business Lending Bill

The Senate and the House of Representatives have passed the small business lending bill. The legislation, among other things, creates a $30 billion fund to provide capital for banks with assets under $10 billion to increase their small business lending. Assuming that the President signs the bill, which is expected shortly, the U.S. Treasury Department is expected to begin working with regulators within a week to develop the program's term sheet and application. The bill also includes provisions that increase the Small Business Administration 7(a) guarantee program's maximum loan size from $2 million to $5 million, and provide $505 million to maintain its temporary 90% loan guarantee. Other provisions in the legislation provide $1.5 billion in grants to support $15 billion in new small business lending through already successful state programs, and reduce small business taxes by allowing firms to carry back general business tax credits to offset their taxes from the previous five years. Among the critical issues that will be considered by regulators is whether to treat the capital investments made through the new fund as Tier 1 capital.

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