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Corporate and Financial Weekly Digest

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SEC/Corporate

SEC Proposes Roadmap Toward Global Accounting Standards

On August 27, the Securities and Exchange Commission voted to publish for public comment a proposed "Roadmap" that could lead to the required use of International Financial Reporting Standards (IFRS) by U.S. issuers. As proposed in the Roadmap, the SEC would make a decision in 2011 on whether to mandate the filing of IFRS financial statements by U.S. companies beginning with the 2014 fiscal year. IFRS is now required or permitted in over 100 countries, including all of the countries in Europe, according to SEC Chairman Christopher Cox.

The proposed Roadmap sets out milestones which, if achieved, could lead to the SEC's decision on permitted or mandatory use of IFRS by U.S. issuers. The milestones relate to: improvements in accounting standards; the accountability and funding of the International Accounting Standards Committee Foundation; improvement in the ability to use interactive data for IFRS reporting; education and training in the U.S. relating to IFRS among investors, auditors and others; the limited early use of IFRS; the timing of future rulemaking by the SEC; and the implementation of the mandatory use of IFRS, including considerations relating to whether the mandatory use of IFRS should be staged or sequenced among groups of companies based on their market capitalization.

The Roadmap contains a proposal to permit a limited number of eligible U.S. issuers to use IFRS before a mandatory date. The objective is to identify those categories of U.S. issuers for whom the use of IFRS would promote enhanced comparability with their significant global industry competitors. Eligibility would be limited to the 20 largest public companies in one industry on a global basis, assuming IFRS is used more often than any other basis of accounting by the 20 largest companies in that industry on a global basis.

Public comment on the SEC's proposing release should be received by the SEC no later than 60 days after its publication in the Federal Register. The full text of the SEC's proposing release will be posted on the SEC website as soon as possible.

http://www.sec.gov/news/press/2008/2008-184.htm
http://www.sec.gov/news/speech/2008/spch082708ch-jw-pd.htm

SEC Updates Disclosure Requirements for Foreign Private Issuers

On August 27, the Securities and Exchange Commission voted to update and modernize disclosure requirements for foreign companies offering securities in U.S. markets, making it easier for U.S. investors to gain access to timely financial information and make better informed investment decisions.

SEC/CORPORATE

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First, the SEC's rule amendments require foreign private issuers to assess their eligibility to use the special forms and rules available to them once a year, on the last day of their second fiscal quarter, rather than on a continuous basis. These rules require that issuers who no longer qualify as foreign private issuers on the last day of their second fiscal quarter comply with the use of forms prescribed for domestic issuers beginning on the first day of the fiscal year following that determination.

Second, the SEC's rule amendments accelerate the reporting deadline for annual reports filed on Form 20-F by foreign private issuers from six months to four months after the issuer's fiscal year end, consistent with most countries' filing requirements. The SEC adopted this requirement with a three-year transition period so that it will apply for fiscal years ending on or after December 15, 2011.

Third, the SEC amended Item 17 of Form 20-F to eliminate an instruction permitting certain foreign private issuers to omit segment data from the U.S. GAAP financial statements and to have a qualified U.S. GAAP report. The SEC also adopted a requirement for foreign private issuers to report changes in or disagreements with their certifying accountant in their annual reports on Form 20-F, to require disclosure of fees paid in connection with American Depository Receipt facilities, including annual fees and payments made from the depositary to the issuer on Form 20-F, and to disclose significant differences between the issuer's home country's and the U.S.'s corporate governance practices on Form 20-F.

Finally, the SEC adopted technical amendments to Rule 13e-3 of the Securities Exchange Act of 1934 to reference recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

http://sec.gov/news/press/2008/2008-183.htm
http://sec.gov/news/speech/2008/spch082708fhk.htm

SEC Votes to Amend Exemptions for Foreign Companies Trading Securities in U.S. Markets

On August 27, the Securities and Exchange Commission voted to adopt amendments to Securities Exchange Act Rule 12g3-2(b). The Rule provides a foreign private issuer with an exemption from registering its equity securities under the Exchange Act while having its equity securities traded in the U.S. over-the-counter market if it files certain information published outside the U.S. with the SEC. The exemption does not apply if the foreign private issuer's securities are traded on a national securities exchange or the OTC Bulletin Board.

Under the amendments, instead of complying with the current rule's written application and paper submission requirements for exemption, a foreign private issuer that meets the following conditions will automatically be exempt from registration under Rule 12g3-2(b):

i. Foreign Exchange Listing: The foreign private issuer must maintain listing of the subject class of securities on at least one foreign exchange in no more than two foreign jurisdictions, such jurisdictions constituting its primary trading market. At least 55% of the foreign private issuer's average daily trading volume must be in its primary trading market, thus ensuring the foreign private issuer is held accountable by a foreign jurisdiction that principally regulates and oversees the foreign private issuer's securities issuances and trading.

ii. Non-U.S. Disclosure Documents in English: The foreign private issuer is required to provide a full English translation of specified non-U.S. disclosure documents, whether on its website or through a public and generally available electronic information delivery system, from the

beginning of the most recently completed fiscal year. In order to maintain its exemption, the foreign private issuer must continue to electronically publish such specified non-U.S. disclosure documents in English.

iii. No Reporting Obligations: In order to prevent an issuer from claiming the Rule 13g3-2(b) exemption when it has otherwise incurred Exchange Act reporting obligations, the foreign private issuer must not have any reporting obligations under Exchange Act Sections 13(a) or 15(d). However, under the amendments, the foreign private issuer no longer need look back to the past 18 months to determine whether or not it has any such reporting obligations. By eliminating the 18-month look-back period under the current rule, the amendment hastens a foreign private issuer's publishing of its non-U.S. disclosure documents in English.

The final rule amendments do not include one condition to exemption contained in the SEC's proposing release of February 2008, which would have required that the foreign private issuer's average daily trading volume in the U.S. not exceed 20% of the average daily trading volume worldwide for the foreign private issuer's most recently completed fiscal year.

http://www.sec.gov/news/speech/2008/spch082708ebs.htm
http://www.sec.gov/news/digest/2008/dig082708.htm

SEC Votes to Adopt Changes to Its Cross-Border Exemptions

On August 27, the Securities and Exchange Commission voted to adopt, largely as proposed in May 2008, changes to its cross-border exemptions to expand and enhance the utility of the exemptions for business combination transactions, tender offers and rights offerings; to encourage offerors and issuers to permit U.S. security holders to participate in the transactions on the same terms as other security holders; and to reduce or eliminate the need for parties to such transactions to seek individual exemptive or no-action relief.

Specifically, the SEC voted to adopt significant changes to the current look-through test for identifying beneficial owners when determining eligibility to rely on cross-border exemptions. The specific recommendations are as follows:

- Changing the timing of and reference date for the eligibility calculation of U.S. ownership so that an acquiror seeking to rely on the cross-border exemptions may calculate U.S. ownership as of any date no more than 60 days before and no more than 30 days after the public announcement of the cross-border transaction.
- Eliminating the current requirement to exclude from the U.S. ownership calculation securities held by persons who hold more than 10 percent of the subject securities; however, securities held by the bidder would continue to be excluded from the calculation.
- Creating an alternate eligibility test where the acquiror is unable to perform above-referenced look-through tests, based in part on a comparison of the average daily trading volume of the subject securities in the United States as compared to the trading volume worldwide. In addition to the comparison of trading volumes for the subject securities, this alternate test would require the acquiror or issuer to take into account U.S. ownership figures reported in filings with the SEC, the home country regulator or in the jurisdiction of the primary trading market for the subject securities, as well as other information about U.S. beneficial ownership that the acquiror or issuer knows or has reason to know from other sources.

Also, the SEC voted to adopt detailed rule changes to the Tier and Tier II exemptions for cross-border transactions, expanding the scope of the exemptions and relaxing a number of rules and restrictions governing such transactions. The recommendations also included allowing certain kinds of foreign institutions to file on Schedule 13G to the same extent as their domestic counterparts and making corresponding changes to beneficial ownership rules under Section 16.

Furthermore, the SEC voted to provide interpretive guidance on a number of issues on which the staff receives frequent inquiries.

http://www.sec.gov/news/speech/2008/spch082708chalk.htm

Litigation

DOJ Revises Corporate Fraud Charging Guidelines

The Department of Justice has revised its corporate fraud charging guidelines, which, among other things, address how corporations can potentially avoid indictment and prosecution by cooperating with government investigations. The revisions arose from criticism that the former guidelines were being applied coercively.

A notable example of such criticism is *United States v. Stein*, 435 F. Supp.2d 330 (S.D.N.Y. 2006), which concerned charges filed against individual defendants following a DOJ investigation of KPMG and its employees for corporate fraud. During the investigation, KPMG sought to avoid prosecution by cooperating with the DOJ by, among other things, capping the amount of attorneys' fees that it would advance to its employees and refusing to pay the attorneys' fees of any employee who did not cooperate with the DOJ investigation. The government ultimately elected to only pursue charges against the individual defendants, all of which were dismissed after the District Court ruled that the government had put undue pressure on KPMG and violated the individual defendants' Sixth Amendment rights. The Second Circuit recently affirmed that ruling, holding that the government "unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment." (*United States v. Stein*, 2008 WL 3982104 (2nd Cir. Aug. 28, 2008))

The revised guidelines address various factors through which a corporation's level of cooperation may be evaluated. For example, the new guidelines forbid the DOJ from considering a corporation's advancement of attorneys' fees to employees when evaluating the corporation's cooperation. In addition, under the revised guidelines, corporations that provide relevant facts can now receive cooperation credit regardless of whether they also choose to waive their attorney-client privilege. Previously, the DOJ took into account a corporation's willingness to waive its attorney-client privilege when disclosing facts relevant to an investigation. Further, the DOJ can no longer request a corporation provide non-factual, attorney-client privileged communications and work product generated independently from the government investigation that were made for the purpose of seeking or dispensing legal advice.

Among the other changes to the guidelines, two more warrant mention here. First, the revised guidelines now prohibit prosecutors from taking into account whether a corporation has sanctioned the employees under investigation when evaluating a corporation's cooperation. Second, the corporation's participation in a joint defense agreement, even one that impacts its ability to provide information, will not render a corporation ineligible to receive cooperation credit. The revised guidelines took effect August 28.

http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

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District Court Dismisses ERISA Claims Based on Alleged FLSA Violation

Plaintiffs, a group of infrastructure analysts employed by defendant, routinely worked over forty hours per week but were not paid overtime wages. Plaintiffs alleged that defendant's decision to classify them as "exempt" from overtime wages violated the Fair Labor Standards Act (FLSA). Based on these allegations, plaintiffs asserted claims against their employer for violation of the FLSA and breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) for failure to credit their retirement benefits plans with overtime wages that allegedly should have paid. The court dismissed the ERISA claim after ruling that defendant's decision to exempt plaintiffs from overtime was a business decision and therefore not within the scope of defendant's fiduciary duties under ERISA.

The court found that the benefits plans at issue only required defendant to credit its employees with wages that were "actually paid" and not also wages that allegedly should have been paid. Accordingly, the court ruled that defendant had complied with its ERISA obligation to adhere to the provisions of its benefit plans. The court also found that defendant's decision to classify plaintiffs as "exempt" from overtime wages was a business decision that defendant made in its capacity as an employer—and not also in its separate capacity as an ERISA fiduciary. The court rejected the plaintiffs' argument that ERISA imposes a fiduciary obligation on a plan administrator to investigate business decisions to ensure that they do not deprive participants of pension benefits, ruling that Congress did not intend for an ERISA fiduciary to be required to regulate purely corporate behavior or second-guess an employer's business judgment. To the contrary, the court held that Congress "only sought to impose fiduciary duties on decisions dealing with plan management and administration to ensure that the funds promised to employees would be invested wisely and managed honestly." (*Steavens v. Electronic Data Systs. Corp.*, 2008 WL 3540070 (E.D.Mich. August 12, 2008))

Broker Dealer

Rule Change Allows Non-Broker-Dealer Customers to Have Their Orders Categorized as Broker-Dealer Orders

The Securities and Exchange Commission has approved a proposed rule change filed by the Chicago Board Options Exchange (CBOE) which permits non-broker-dealer customers to voluntarily have their orders categorized as broker-dealer orders for, among other things, order handling, order execution and cancellation fee calculation purposes, affecting approximately a dozen CBOE rules.

The rule change should allow for the flexibility of those sending orders to the CBOE to voluntarily designate their orders as broker-dealer orders because this is more suitable to their trading strategies, which involve high-volume order submission and cancellation. Those who wish to take advantage of the rule change will be charged a transaction fee, the amount of which has yet to be established.

http://www.sec.gov/rules/sro/cboe/2008/34-58327.pdf

CBOE Proposes Rule Changes Related to its Demutualization

On August 21, the Chicago Board Options Exchange (CBOE) filed proposed rule changes with the Securities and Exchange Commission relating to the CBOE's plan to demutualize by restructuring from a mutually owned membership organization to a wholly owned subsidiary of a new holding company. Current members of the CBOE will receive stock in the new holding

BROKER DEALER

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company. While that stock will not provide its holders with physical or electronic access to the CBOE and its trading facilities, as CBOE membership has, such access will be available following the demutualization via “trading permits” obtained by individuals and organizations from the CBOE. The proposed rule changes reflect the use of trading permits but do not contemplate a significant change to CBOE’s trading operations.

http://edocket.access.gpo.gov/2008/E8-20464.htm

NYSE Proposes Sponsored Participant Rules

The New York Stock Exchange (NYSE) has filed a proposed rule change with the Securities and Exchange Commission to amend NYSE Rule 123B so that it would allow member organizations to provide direct “sponsored” access to the exchange on an agency basis. Although NYSE currently has sponsored access provisions that govern certain products or facilities, it does not have a general sponsored access rule. Other exchanges, including its affiliate, NYSE Arca, and the Nasdaq Stock Market, have already adopted general sponsored access provisions. The proposed rules set forth the requirements for a member firm to provide sponsored access to a non-member firm or customer, including the requirement to implement internal controls (e.g., controls to prevent unauthorized use or access). As is the case with the other NYSE-sponsored access rules, all orders entered by the “sponsored” firm are binding on the “sponsoring” member.

http://www.sec.gov/rules/sro/nyse/2008/34-58429.pdf

CBOE Proposes New Order Type

The Chicago Board Options Exchange (CBOE) proposed to modify its Rule 6.53 to allow for the submission of attributable orders (i.e., orders that allow users to voluntarily display firm IDs), in connection with certain CBOE order processes. The rule change was proposed in response to requests by those routing orders to the CBOE users who believe that voluntary attribution will lead to enhanced execution opportunities. The CBOE noted that the Nasdaq Options Market currently allows its participants to submit attributable orders.

http://www.sec.gov/rules/sro/cboe/2008/34-58394.pdf

Structured Finance and Securitization

Financial Accounting Standards Board Will Issue Exposure Drafts Amending FAS 140 and FIN 46(R)

On September 3, the Financial Accounting Standards Board (FASB) announced it will issue on or around September 15 for public comment exposure drafts regarding amendments to Statement No. 140, "Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities" (FAS 140) and FASB Interpretation No. 46 (revised December 2003), "Consolidation of Variable Interest Entities" (FIN 46(R)). The FASB will also issue a proposed Staff Position No. 140-e and FIN 46(R)-e on "Disclosures about Transfers of Financial Assets and Interests in Variable Interest Entities."

The exposure draft regarding FAS 140 would abolish the concept of a qualifying special-purpose entity (QSPE) and delete the exception from applying FIN 46(R) to QSPEs, and the exposure draft regarding FIN 46(R) would amend the guidance for determining whether an enterprise must consolidate a QSPE, including those previously considered qualifying QSPEs. The FASB Staff Position amends FAS 140 to require public entities to provide additional disclosures about transfers of financial assets and amends FIN

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46(R) to require public enterprises to provide additional disclosures about their involvement with variable interest entities.

http://www.fasb.org/news/media_advisory090308.shtml

CFTC

CFTC Requests Comments on DCO Application

The Commodity Futures Trading Commission has issued a request for public comment regarding the application of the Natural Gas Exchange Inc. (NGX) for registration as a derivatives clearing organization (DCO). NGX seeks registration to clear physically settled and cash-settled transactions in electricity, natural gas and other energy commodities that are entered into on NGX's own exempt commercial market (ECM), on other ECMs, or in the over-the-counter markets.

The comment period for the NGX application closes on September 17.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5537-08.html
http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/ngx_dco_application.pdf

CFTC Allows Nord Pool to Provide Electronic Access in U.S.

The Commodity Futures Trading Commission has granted no-action relief to Nord Pool ASA (NP), a Norwegian exchange that offers electric power derivatives and EU Emission Allowances, allowing NP to provide access to its electronic trading system in the U.S. without registering with the CFTC as a designated contract market or derivatives transaction execution facility. Access to NP's systems in the U.S. will be limited to members of NP that are (i) either "Professional Clients" (as defined in the EU Markets in Financial Derivatives Directive) or "eligible contract participants" (ECPs) (as defined in the Commodity Exchange Act), trading for their proprietary accounts; (ii) registered futures commission merchants or Rule 30.10-exempt firms acting on behalf of U.S. customers that are Professional Clients or ECPs; or (iii) registered or exempt commodity pool operators and commodity trading advisors acting on behalf of U.S. pools or clients that qualify as Professional Clients or ECPs.

http://www.cftc.gov/stellent/groups/public/@lrlettergeneral/documents/letter/08-14.pdf

NFA Proposes Amendments to Implement CEA Changes Regarding Retail Forex

In separate requests, National Futures Association (NFA) has proposed amendments to its rulebook to implement recent amendments to the Commodity Exchange Act (CEA) relating to retail foreign exchange (forex) transactions. In its first request, NFA has proposed to increase the adjusted net capital requirement for Forex Dealer Members (FDMs) from $5 million to $10 million and then gradually increase the requirement to $20 million by May 2009. These increases, which are anticipated to take effect starting October 31, 2008, are intended to mirror the requirements set out in recent amendments to the CEA.

NFA's second proposal integrates the CEA's new retail foreign exchange dealer (RFED) registration category into the NFA's forex regulatory framework and provides that all RFEDs will be regulated by NFA as FDMs. The proposed amendments also extend FDM regulation to NFA members that are broker-dealer affiliates primarily or substantially engaged in retail forex transactions; such members may satisfy their FDM net capital requirements in part by way

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of a guarantee from an affiliated Futures Commission Merchant or broker-dealer.

http://www.nfa.futures.org/news/PDF/CFTC/FR1_11a_12_082208.pdf
http://www.nfa.futures.org/news/PDF/CFTC/Bylaw306_FR11a_c082208.pdf

CFTC Grants CPO Exemption from Certain Reporting and Recordkeeping Requirements for Publicly Offered Pool

The Commodity Futures Trading Commission has granted no-action relief to the commodity pool operator (CPO) of certain publicly offered commodity pools with respect to certain of the CFTC's disclosure, reporting and recordkeeping requirements. Shares in these pools are to be offered pursuant to an effective registration statement with the Securities and Exchange Commission and will be listed for trading on a national securities exchange. Specifically, the CFTC exempted the CPO from the following requirements: (i) obtaining a signed acknowledgment of each investor's receipt of a Disclosure Document, (ii) providing monthly account statements to investors and (iii) maintaining required books and records at the CPO's main office. Instead, investors would be given access to a CFTC-compliant Disclosure Document and information consistent with that required in a monthly account statement through posting on the CPO's website, and the required records would be retained by the pools' administrator and custodian.

http://www.cftc.gov/stellent/groups/public/@newsroom/documents/letter/08-15.pdf

Banking

OTS Issues HELOC Account Management Guidance

On August 26, the Office of Thrift Supervision (OTS) issued guidance to chief executive officers of federal savings associations with respect to home equity lines of credit (HELOCs).

As stated in the guidance, a federal savings association's HELOC program "should employ fully articulated policies that address marketing, credit exposure, underwriting standards, collateral valuation management, and loss mitigation." In addition, in discussing actions by federal savings associations to manage credit risk from HELOCs (such as the reduction, suspension or termination of such a loan), the OTS stated that federal savings associations must follow federal laws and rules designed to protect HELOC customers, including those laws that protect consumers from discrimination based upon race, sex/gender, or other protected characteristics when making such credit decisions. Moreover, actions to modify HELOCs must not violate the Federal Trade Commission Act's prohibition against unfair or deceptive practices or the OTS rule that prohibits inaccurate representations or advertising. Such rule prohibits statements that are technically accurate but misleading (such as statements that describe credit opportunities related to HELOCs but fail to mention that such loans may be modified or terminated).

http://files.ots.treas.gov/481121.pdf

EU Developments

CESR Members Enhance Supervisory Cooperation for Branch Supervision

On September 3, the European Union's Committee of European Securities Regulators (CESR) published a progress report on the protocol for branch supervision which was introduced as part of the implementation of the EU

BANKING

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Markets in Financial Instruments Directive (MiFID). CESR has reported that 16 agreements for cooperation on the supervision of branches have been concluded between CESR members.

The protocol created two models for cooperation between CESR members: (i) joint supervision conducted through common oversight programs, or (ii) joint supervision through requests for assistance based on efficient allocation of supervisory tasks.

www.cesr.eu/popup2.php?id=5183

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