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SEC/CORPORATE

SEC Roundtable Discusses Current Securities Law Topics at 33rd Annual Ray Garrett Jr. Corporate and Securities Law Institute

On May 2, Lona Nallengara and Shelley E. Parratt, the acting director and the deputy director, respectively, of the Securities and Exchange Commission's Division of Corporation Finance, participated in a roundtable discussion of current securities law topics, including recent and pending SEC rulemaking, at the 33rd Annual Ray Garrett Jr. Corporate and Securities Law Institute. The following is a brief summary of some of the issues covered at the roundtable discussion.

Mr. Nallengara and Ms. Parratt (the Panelists) discussed Iran disclosures pursuant to Section 13(r) of the Securities Exchange Act of 1934 (Exchange Act) and, in particular, what the staff is doing with this new information from issuers. Section 13(r) of the Exchange Act requires issuers to disclose specified activities "knowingly" engaged in by an issuer or any of its "affiliates" involving Iran, the government of Iran or other specified persons. The Panelists remarked that, while they are receiving this disclosure and distributing relevant information to the Office of the President and others as required, the staff is still in the process of working on a plan for what to do with this additional information. The moderators further raised the question of how issuers should be addressing the application of this disclosure requirement to an issuer's "affiliates." Specifically, while the term "affiliate" is defined pursuant to Exchange Act Rule 12b-2 as a person that "controls or is controlled by, or is under common control with" the specified person (which definition is used for many purposes, including resale restrictions pursuant to Rule 144 under the Securities Act of 1933), the roundtable moderators noted that some issuers and practitioners appear to be applying different standards in determining "affiliate" status for purposes of Section 13(r) of the Exchange Act. The moderators noted that there is great debate regarding how an issuer is required to determine its affiliates for purposes of these requirements. The Panelists acknowledged this question and potential issues with differing interpretations of the term "affiliate," but were unable to provide further guidance on the matter.

The Panelists also addressed conflict minerals disclosure. In response to the moderators' questions on whether the public should expect the SEC to release formal guidance regarding these disclosure requirements (particularly in light of the pending legal challenges to the conflict minerals disclosure rule), Mr. Nallengara acknowledged the desire of the staff to release guidance on this topic. Mr. Nallengara noted, however, that because of the pending legal challenges, the staff will need to be careful in preparing and releasing any such guidance. The Panelists did not indicate any specific timeline for releasing such guidance.

The Panelists also discussed the SEC's Report of Investigation pursuant to Section 21(a) of the Exchange Act regarding the investigation of Netflix, Inc. and its chief executive officer's disclosure of Netflix information through social media outlets and possible violations of Regulation FD, as reported in *Corporate and Financial Weekly Digest* of April 5, 2013. Mr. Nallengara briefly summarized the findings of the report and commented on the importance of clarifying the staff's views through the release of the report regarding the use of social media when disclosing material non-public information. Panelists emphasized that, if an issuer is planning to disclose material non-public information, the public needs to know how the issuer plans to disclose it and, if the social media channel is not one that the market is aware that the issuer uses to disseminate information, the issuer needs to tell shareholders about its plan to do so.

In closing, the Panelists discussed current and anticipated rulemaking, including rulemaking required under the Jumpstart Our Business Startups Act (such as the proposed elimination of the ban on “general solicitation” in private offerings made in reliance on Rule 506 of Regulation D or Rule 144A of the Securities Act of 1933). The Panelists remarked that the SEC has established independent teams to work through each anticipated or proposed rulemaking. However, while the Panelists discussed the various anticipated or currently proposed rulemaking projects, they did not provide any firm timetable for when any such rulemakings would be released.

BROKER DEALER

SEC Reopening Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, regulatory authority over derivatives is divided between the Securities and Exchange Commission and the Commodity Futures Trading Commission. The SEC has regulatory authority over security-based swaps, the CFTC has regulatory authority over swaps, and the SEC and the CFTC have joint regulatory authority over mixed swaps.

Title VII of the Dodd-Frank Act (Title VII) amends the Securities Act of 1933 and the Securities Exchange Act of 1934 to expand the regulation of security-based swaps. The SEC has proposed substantially all of the rules required to be adopted by Title VII. In light of the substantially complete picture of the proposed security-based swap regulatory regime and the adoption by the CFTC of many of the rulemakings creating the swaps regulatory regime, the SEC is reopening the comment periods for its outstanding rulemaking releases concerning security-based swaps and security-based swap market participants (the Proposed Rules).

The SEC specifically is seeking comments on, among other things: (i) the economic consequences and effects, including costs and benefits, of the Proposed Rules; and (ii) the relationship of the Proposed Rules to any similar requirements of other authorities, and specifically whether and to what extent the SEC should emphasize consistency with the CFTC’s rules.

The SEC is reopening the comment periods of the Proposed Rules until 60 days after publication in the *Federal Register.*

Click here to read the SEC Release on the reopening of the comment periods.

FINRA Provides Guidance on Communications with the Public Concerning Unlisted Real Estate Investment Programs

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 13-18 (Regulatory Notice) to provide guidance to member firms on communications with the public concerning real estate investment programs that are not listed on a national securities exchange, including unlisted real estate investment trusts (REITs) and unlisted direct participation programs (DPPs) that invest in real estate. FINRA noted in the Regulatory Notice that its recent reviews of communications with the public regarding real estate programs have revealed deficiencies, such as communications that (i) contained inaccurate or misleading statements regarding the potential benefits of investing in real estate programs; (ii) emphasized the distribution paid by a real estate program while failing to adequately explain that some of the distribution constitutes return of principal; and (iii) have not provided sufficient discussions of the risks associated with investing in the products in order to balance the presentation of benefits. The Regulatory Notice provides guidance on communications concerning real estate investment programs with respect to disclosures, use of distribution rates, claims of stability, redemption and liquidity features, prior performance, use of indices and comparisons, use of pictures of specific properties and inclusion of capitalization rates.

Regulatory Notice 13-18 is available here.

LITIGATION

Whistleblower's Claims Against Former Employer Survive Summary Judgment

In a case involving "several questions of first impression," the US District Court for the Southern District of New York denied summary judgment for all but one of the defendants in a case alleging violations of the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).

Plaintiff Phillip Leshinsky brought an action alleging that he was fired after objecting to his employer's proposed scheme to use false overhead information in connection with a bid to obtain a Metropolitan Transit Authority contract. Plaintiff contended that he was first "marginalized" and then later terminated as a result of his objections. Defendants moved for summary judgment on the grounds that plaintiff could not demonstrate the elements of a Sarbanes-Oxley wrongful retaliation claim.

To establish a *prima facie* case of wrongful retaliation, a plaintiff must demonstrate that (1) he engaged in a protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.

The court made three significant rulings defining the scope and elements of a Sarbanes-Oxley retaliation claim. First, for purposes of determining whether the employee engaged in a protected activity, the court rejected the "definitive and specific" information test and instead found that an employee need only report conduct that he or she reasonably believes constitutes a violation of federal law. Second, the court found that the reported violation need not be an "existing" violation; a violation likely to occur in the near future is sufficient. Finally, the court found that a report made by the employee to his or her superior is sufficient even if that superior is implicated in the alleged wrongdoing.

Leshinsky v. Telvent GIT, S.A. et al., No. 10-cv-04511 (S.D.N.Y. May 1, 2013).

Delaware Chancery Court Finds Settlement Agreement Enforceable Despite Lacking Signature

The Delaware Court of Chancery recently ruled that a settlement agreement does not have to be fully executed by all parties to be enforceable.

The court found in favor of plaintiff Frank Whittington and entered judgment for him in an underlying lawsuit in the amount of approximately $630,000. The defendants appealed to the Delaware Supreme Court. While the appeal was pending, the parties reached a settlement which was formalized in a signed writing executed by plaintiff and all of the defendants (the Agreement). Several days before the parties finalized the terms of the Agreement, Whittington's attorneys, Cross & Simon, LLC (C&S) stopped representing him. C&S asserted an attorneys' lien (Lien) of approximately $65,000 against any amount paid to Whittington by the defendants. C&S was reluctant to sign the Agreement and instead provided plaintiff with written assurances that payment under the Agreement would satisfy C&S's claims for attorneys' fees.

Defendants paid the agreed-upon settlement figure of $396,000 and voluntarily dismissed their appeal, but plaintiff refused to execute a general release of claims and satisfaction of judgment as required under the Agreement. The defendants moved for enforcement of the Agreement and an award of their attorneys' fees pursuant to a provision of the Agreement. Whittington responded by disputing the validity of the Agreement, seeking a declaration that the Agreement is not enforceable, an order enforcing the original judgment amount and an award of $1.1 million in attorneys' fees. Whittington argued that the Agreement was unenforceable because C&S did not sign it.

Despite lacking C&S's signature, the court held that the Agreement was enforceable because there was no evidence that the parties "positively agreed" that the Agreement would not be enforceable until C&S formally executed it. C&S's signature was only required to ensure that C&S discharged the Lien. While C&S did not sign the Agreement, the court found that Whittington accepted C&S's written assurances that payment under the Agreement would satisfy C&S's claims. The court also found that because the Agreement was binding and enforceable, the defendants were entitled to recover their reasonable attorneys' fees and costs as the "prevailing party" pursuant to the Agreement.

Whittington v. Dragon Group LLC, No. 2291-VCP (Del. Ch. May 1, 2013).

BANKING

Consumer Financial Protection Bureau Releases Final Rule on International Remittance Transfers

On April 30, the Consumer Financial Protection Bureau (CFPB) issued its final rule amending subpart B of Regulation E, which implements the Electronic Fund Transfer Act, and the official interpretation to the regulation. This release modifies the final rules issued by the CFPB in February, July and August 2012.

The final rule amends the prior releases with respect to three specific issues. First, it makes optional, in certain circumstances, the requirement to disclose fees imposed by a designated recipient's institution for transfers to the designated recipient's account. Related to this, the final rule makes optional the requirement to disclose taxes collected by a person other than the remittance transfer provider, allowing providers to instead include disclaimers on the disclosure forms provided to senders of remittance transfers indicating that the recipient may receive less than the disclosed total due to recipient institution fees and taxes collected by entities other than the remittance transfer provider. Finally, it includes an exception with respect to error resolution regulations where a sender provides an incorrect account number or recipient institution identifier and that results in funds being deposited into the wrong account. In this case, the final rule states that the transferring bank (the remittance transfer provider) must try to get the improperly transferred money back to the customer, but that the bank is not required to compensate the customer if the funds cannot be retrieved.

The final rule is effective October 28, 2013.

For more information, click here.

UK DEVELOPMENTS

UK Extends AIFMD Transitional to Non-EEA Fund Managers

On April 29, HM Treasury issued a Question and Answer publication which stated its intention to extend the transition period of the Alternative Investment Fund Managers Directive (AIFMD) to existing third-country Alternative Investment Fund Managers (AIFMs) and existing non-UK European Economic Area (EEA) AIFMs.

Third-country (i.e., non-EEA) and non-UK EEA AIFMs will now be able to market their funds in the United Kingdom under the United Kingdom's existing private placement regime until July 22, 2014. If HM Treasury had not extended the transitional period these AIFMs would have had to market their funds in accordance with the AIFMD as of July 22, 2013 (unless the AIFM qualifies for an exemption).

Unless other European states follow the United Kingdom's lead in extending the transitional period, any AIFMs that market into these jurisdictions will need to ensure their marketing activities comply with the AIFMD by July 22, 2013.

The Questions and Answers are available here.

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* Click here to access the *Corporate and Financial Weekly Digest* archive.

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