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SEC/Corporate

SEC Proposes Revisions to Rules Governing U.S. Investors' Rights in Overseas Mergers and Acquisitions

On May 8, the Securities and Exchange Commission proposed revisions to its cross-border tender, exchange offer and business combination rules. Many of the proposed rule changes would represent an expansion and refinement of current exemptions and, in certain cases, would codify relief previously granted on an individual basis.

The rule proposals include:

- Refinement of tests for calculating U.S. ownership of the target company for purposes of determining eligibility to rely on cross-border exemptions in both negotiated and hostile transactions;
- For Foreign Issuers where no more than 10% of the target securities are held in the U.S., expanding the relief offered with respect to affiliated transactions subject to Rule 13e-3 not covered under current cross-border exemptions;
- For Foreign Issuers where more than 10% but no more than 40% of the target securities are held in the U.S., expanding relief to eliminate recurring conflicts between U.S. and foreign law and practice; and
- Requiring that all Form CB's and Form F-X's be filed electronically.

In addition to the rule changes, the Commission provided guidance or solicited comments regarding:

- The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a schedule expiration date;
- The ability of bidders in tender offers to waiver or reduce the minimum tender condition without providing withdrawal rights;
- The application of all-holders provisions of SEC tender offer rules to foreign target security holders; and
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers.

http://www.sec.gov/rules/proposed/2008/33-8917.pdf

SEC/CORPORATE

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Commissioner Atkins Announces Resignation from SEC, Paredes Nominated for Open Slot

On May 5, Securities and Exchange Commissioner Paul Atkins announced his intention to leave the SEC following the end of his term, effective upon his successor taking office. Commissioner Atkins served with the SEC for nearly 10 years, first on the staff of two former SEC chairmen from 1990-1994, and then as a commissioner from 2002 until 2008.

In response to Atkins' resignation, on May 6, President George W. Bush nominated Troy Paredes, a law professor from Washington University in St. Louis, to fill Atkins' Republican slot at the SEC. The approval of Professor Paredes and two pending democratic nominees awaiting their Senate hearings (described in the April 4, 2008 edition of *Corporate and Financial Weekly Digest*), would return the SEC to full strength for the first time since last September.

http://www.sec.gov/news/press/2008/2008-78.htm

http://www.whitehouse.gov/news/releases/2008/05/20080506-12.html

SEC Sets Fee Rates for Fiscal 2009

On April 30, the Securities and Exchange Commission announced that effective October 1, 2008, or 5 days after the date on which the SEC receives its fiscal year 2009 regular appropriation, whichever date comes later, the Section 6(b) fee rate applicable to the registration of securities, the Section 13(e) fee rate applicable to the repurchase of securities, and the Section 14(g) fee rates applicable to proxy solicitations and statements in corporate control transactions will be set at $55.80 per million dollars. The Section 6(b) rate is also the rate used to calculate the fees payable with the Annual Notice of Securities Sold Pursuant to Rule 24f-2 under the Investment Company Act of 1940.

In addition, effective October 1, 2008, or 30 days after the date on which the SEC receives its fiscal year 2009 regular appropriation, whichever date comes later, the Section 31 fee rate applicable to securities transactions on the exchanges and certain over-the-counter markets will be fixed at $9.30 per million dollars. The assessment on security futures transactions under Section 31(d) will remain unchanged at $0.0042 for each round turn transaction.

http://www.sec.gov/news/press/2008/2008-70.htm

Delaware Court Allows Unilateral Elimination of Director's Advancement Rights

On March 28, the Delaware Chancery Court ruled that an amendment to company bylaws eliminating advancement rights for former directors is effective, so long as the amendment is made prior to the former directors' involvement in litigation relating to their prior board service.

In *Schoon v. Troy Corp.* (C.A. 2362-VCL (Del. Ch. March 28, 2008)), the company denied a request by William J. Bohnen, a former director of Troy Corporation, for advancement of defense expenses after the company brought an action against him alleging various breaches of fiduciary duty. While Bohnen was a director of Troy, the company's bylaws provided that Troy would advance the expenses incurred by a present or former director. However, after Bohnen left the board, and prior to the litigation relating to his prior board service, the company's board amended the bylaws removing the reference to former directors. Bohnen argued that his right to advancement could not be terminated because it vested at the commencement of his board service.

The Court rejected Bohnen's argument, holding that Bohnen's right to advancement had not vested, because no proceeding for which advancement and indemnification were available had commenced prior to the amendment to the bylaws eliminating that right for former directors. Prior to the commencement of an action that would trigger a director's rights to advancement and indemnification, such rights are not vested and can be terminated at any time by an amendment to the bylaws eliminating such right.

Schoon strongly reinforces the need for each director to have their own separate indemnification agreement with the company. While it is likely that a former director for whom corporate advancement and indemnification has been eliminated, as in *Schoon,* would still have right to seek defense expense protection and indemnification under the company's D&O liability policy and it is possible to draft certificate of incorporation and bylaw provisions that would impede a unilateral change in director and officer advancement and indemnification protections, without a separate contractual undertaking, directors and officers may have no assurance that their rights to advancement and indemnification cannot be unilaterally changed.

http://courts.delaware.gov/opinions/(152m0w55pcjycnrafjq05lu5)/download.aspx?ID=104940

Litigation

Securities Fraud Claim Based Upon Forward-Looking Statements Dismissed

A United States district court dismissed a shareholder class action alleging that a company and certain of its officers violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 by making false statements during an analysts' call assuring investors that they could expect continued growth in the upcoming quarter. Plaintiff further alleged that defendants' actual growth and projected future growth figures, as reported in the conference call, violated Generally Accepted Accounting Principles by improperly pulling transactions and revenue from the subsequent quarter into the previous quarter's results.

In dismissing plaintiff's complaint, the court found, among other things, that plaintiff failed to plead facts demonstrating scienter and that the statements were protected by the Private Securities Litigation Reform Act's safe harbor protection afforded to forward-looking statements. In determining that plaintiff failed to allege scienter, the court noted that plaintiff failed to allege any facts implicating either of the individual defendants in the decision to engage in the allegedly improper activity. Rather, plaintiff's complaint amounted to "boilerplate allegations that the [d]efendants had access to reports about transaction volumes," allegations the court found insufficient to establish that the defendants even knew about the accounting irregularity at the time, let alone that defendants acted with scienter. The court made this finding notwithstanding the fact that one defendant sold his shares immediately following the alleged misstatements. (*Skubella v. Checkfree Corp.*, 2008 WL 1902118 (N.D. Ga. Apr. 25, 2008))

Plaintiffs Denied Summary Judgment in Securities Fraud Action

The United States District Court for the Southern District of New York granted in part and denied in part plaintiffs' motion for partial summary judgment in an action against a company and certain of its former officers, for, among other things, claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5. Plaintiffs alleged defendants committed securities fraud by improperly backdating stock option grants made to company executives, a practice that subsequently led to the restatement of certain Securities and Exchange Commission filings and losses for company shareholders.

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Plaintiffs contended that summary judgment was appropriate because there existed no issues of material fact as to whether there was (i) a material misrepresentation or omission (ii) made in connection with the purchase or sale of a security, (iii) scienter, and (iv) reliance. Addressing each of these elements in turn, the Court held that only the "in connection with" element was undisputed and hence appropriate for summary judgment. As to the other three elements, the Court found issues of fact stemming from, among other things, statements made by financial experts that properly accounted financial statements would not have affected investors' behavior with respect to the company's stock. Because this raised a question as to materiality, plaintiffs' attempt to obtain summary judgment on a "fraud on the market" presumption failed since such presumption applies only where the defendant misrepresents or omits a material fact. Finally, despite various criminal pleas and deferred prosecution arguments, the Court found issues of fact remaining as to defendants' scienter. (*In re Monster Worldwide, Inc. Sec. Litig.*, 2008 WL 1867969 (S.D.N.Y. Apr. 28, 2008))

Broker Dealer

FINRA Proposes Changes to NASD Rule 2220 Concerning Options Communications with the Public

The Financial Industry Regulatory Authority (FINRA) filed with the Securities and Exchange Commission a proposed rule change to NASD Rule 2220, which concerns options communications with the public. The purpose of the proposal is to better address current needs for regulating options communications practices and promote consistency across the options communications rules of other self-regulatory organizations (SROs). Specifically, FINRA proposes to: (i) use, as appropriate, the same terminology and definitions as are currently used in its general communications rules; (ii) make the requirements for principal review of correspondence concerning options the same as for correspondence generally; and (iii) update the standards on the content of communications that precede the delivery of the options disclosure document.

The proposed rule change would amend the definitions in NASD Rule 2220(a) to adopt definitions of certain terms, such as "sales literature," "correspondence," and "public appearance" that would be consistent with how those terms are defined in FINRA's general advertising rules, found in NASD Rule 2210 and NASD 2211. FINRA believes that the proposed rule change will better address the needs for regulating current options communications practices and promote consistency across SROs. Moreover, it will protect investors and the public interest by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between FINRA's and other SROs' options communications rules.

http://www.sec.gov/rules/sro/finra/2008/34-57720.pdf

NYSE Proposes Changes to NYSE Rule 92 Concerning Riskless Principal Orders

The New York Stock Exchange LLC has filed with the Securities and Exchange Commission a proposed rule change to NYSE Rule 92(c)(3), which permits NYSE member organizations to submit riskless principal orders to the NYSE but requires them to submit a report of the execution of the facilitated order to a designated NYSE database. NYSE member organizations must also submit to the same database an electronic report that will provide an electronic link of the execution of the facilitated order to all of the underlying orders.

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In order to provide the NYSE and the Financial Industry Regulatory Authority sufficient time to review their respective rules and to develop a harmonized rule set, the NYSE has proposed to delay the effective date of the amended NYSE Rule 92(c)(3) to March 31, 2009. Until then, the NYSE will continue to require that NYSE member organizations continue to have in place systems and controls that allow it to easily match and riskless principal executions on the NYSE to the underlying orders, and that such member organizations be able to provide such information to the NYSE upon request.

http://www.sec.gov/rules/sro/nyse/2008/34-57682.pdf

ISE and PHLX Amend Position and Exercise Limits for Options on DIAMONDS

The International Securities Exchange (ISE) and the Philadelphia Stock Exchange (PHLX) both proposed rule changes to amend their rules to increase the position and exercise limits applicable to options on the DIAMONDS Trust, Series 1 (DIA). The rule proposals became effective when filed and increased position limits for DIA Options to 300,000 contracts on the same side of the market. The Exchanges stated that the new limits would encourage a more liquid and competitive market environment to the benefit of customers interested in the product. The amendments bring the ISE and PHLX in line with the position and exercise limits for DIA on the Chicago Board Options Exchange and the Boston Options Exchange.

http://www.sec.gov/rules/sro/phlx/2008/34-57737.pdf

http://www.sec.gov/rules/sro/ise/2008/34-57736.pdf

CBOE Files a Rule Change Proposal Relating to DPMs and LMMs

The Chicago Board Options Exchange proposed to amend CBOE rules relating to Designated Primary Market-Makers (DPMs) and Lead Market-Makers (LMMs). Rules 8.3 (Appointment of Market-Makers), 8.85 (DPM Obligations) and 891 (Limitations on Dealings of DPMs and Affiliated Persons of DPMs), will be amended to permit Market-Maker(s) affiliated with a DPM to hold an appointment and submit electronic quotations in the same class provided CBOE uses an allocation algorithm in the class that does not allocate electronic trades, in whole or in part, in an equal percentage based on the number of market participants quoting at the best bid or offer.

Additionally, Rules 8.3 and 8.15A (Lead Market-Makers in Hybrid Classes) will be amended to make it clear that it is permissible for Market-Maker(s) affiliated with an LMM to hold an appointment and submit electronic quotations in the same class provided CBOE uses an allocation algorithm in the class that does not allocate electronic trades, in whole or in part, in an equal percentage based on the number market participants quoting at the best bid or offer.

http://sec.gov/rules/sro/cboe/2008/34-57742.pdf

Approval of Proposed ISE Rule Relating to Complex Orders

The Securities and Exchange Commission has approved a proposed rule change previously filed by the International Securities Exchange to provide an opportunity for marketable complex orders to receive price improvement and to describe the execution of complex orders on the ISE in greater detail. The ISE proposes to amend Rule 722 to specify that a complex order will be executed automatically against orders on the complex order book in price priority and in time priority at the same price. A complex order that is not executed against another complex order will be executed automatically against bids and offers for the individual legs of the complex order, provided that the complex order may be executed in full or in a permissible ratio by such bids and offers.

Another amendment to Rule 722 would allow members to choose to provide complex orders with an opportunity for price improvement by marking such orders for price improvement.

http://sec.gov/rules/sro/ise/2008/34-57706.pdf

Banking

OCC Issues Final Rule Reducing Regulatory Burden and Updating Its Rules

On April 24, the Office of the Comptroller of the Currency (OCC) published a final rule in the Federal Register to reduce unnecessary regulatory burden and revise and update various OCC regulations.

The OCC final rule includes measures updating and revising the qualifying standards and after-the-fact notice procedures that apply to national bank operating subsidiaries. It also expands the list of operating subsidiary activities that are permissible upon filing an after-the-fact notice. Other revisions reduce the burden associated with applications for fiduciary powers and intermittent branches, with change in bank control notices, and with requirements to make securities filings.

The final rule also includes other measures to incorporate previously published interpretive opinions concerning, for example, electronic banking activities, and to harmonize the OCC rules with rules issued by other Federal agencies, to update OCC rules to reflect recent statutory changes, and to make technical and conforming amendments to improve clarity and consistency.

The OCC final rule is effective on July 1. National banks, and foreign banks taking actions with respect to Federal branches and agencies, may elect to comply voluntarily with any applicable provision of the rule prior to this effective date.

http://www.occ.treas.gov/ftp/release/2008-47a.pdf

Agencies Issue Proposed Rules on Risk-Based Pricing Notices

The Federal Reserve Board and the Federal Trade Commission, on May 8, announced proposed regulations that generally would require a creditor to provide a consumer with a risk-based pricing notice when, based in whole or in part on the consumer's credit report, the creditor offers or provides credit to the consumer on terms less favorable than the terms it offers or provides to other consumers.

Risk-based pricing refers to the practice of using a consumer's credit report, which reflects his or her risk of nonpayment, in setting or adjusting the price and other terms of credit offered or extended to a particular consumer. Many creditors offer more favorable terms to consumers with better credit histories. The proposed rules would apply, with certain exceptions, to all creditors that engage in risk-based pricing. Under these rules, a risk-based pricing notice would generally be provided to the consumer after the terms of credit have been set, but before the consumer becomes contractually obligated on the credit transaction.

The proposal provides a number of different approaches that creditors may use to identify the consumers to whom they must provide risk-based pricing notices. In addition, the proposed rule includes certain exceptions to the notice requirement. The most significant of the exceptions permits creditors, in lieu of providing a risk-based pricing notice to those consumers who receive less favorable terms, to provide all of their consumers with their credit scores and

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explanatory information.

The proposal would implement section 311 of the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act.

http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20080508a1.pdf

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