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SEC/CORPORATE

FTC Announces New Filing Thresholds for Hart-Scott-Rodino Pre-Merger Notifications

The Federal Trade Commission (FTC) has announced the new notification thresholds for pre-merger notification reports that must be filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The notification thresholds are adjusted every year for inflation. The new thresholds go into effect on February 24, 2014. The filing fees remain unchanged.

Under the HSR Act, mergers or acquisitions of voting securities, interests in unincorporated entities such as limited liability companies and assets are subject to pre-merger notification filing with the FTC and the Department of Justice if the transaction and the parties to the transaction exceed a certain size.

Under the new notification thresholds, the "Size of Transaction" test will increase from $70.9 million to $75.9 million. Thus, no HSR filing will be required if, as a result of the acquisition, the acquiring person will hold less than $75.9 million of voting stock, unincorporated entity interests and assets of the acquired person.

The thresholds used for the "Size of Person" test have increased as well. Under the revised thresholds, one of the "Persons" involved in the transaction, as defined in the HSR Rules, must have net sales or total assets of at least $15.2 million and the other "Person" must have net sales or total assets of at least $151.7 million. It should be noted that the "Size of Person" test does not apply for transactions valued above $303.4 million.

Under the new thresholds, the HSR filing fees apply as follows:

Fee	Transaction Size
$45,000	$75.9 million or more – less than $151.7 million
$125,000	$151.7 million or more – less than $758.6 million
$280,000	$758.6 million or more

Read more.

SEC Division of Corporation Finance Issues Three C&DIs Relating to "Unbundling Rule"

On January 24, the Securities and Exchange Commission's Division of Corporation Finance issued three new Compliance and Disclosure Interpretations (C&DIs) with respect to the SEC's so-called unbundling rule (Rule 14a-4(a)(3) under the Securities Exchange Act of 1934), which requires that a form of proxy used in a stockholder vote identify clearly and impartially each "separate matter" on which the stockholders intend to act.

To see these new C&DIs, click here.

CFTC

NFA Members Must Provide Suspicious Activity Reports to NFA Upon Request

On January 27, the National Futures Association (NFA) issued a notice to its members indicating that the Commodity Futures Trading Commission has authorized it to request suspicious activity reports (SARs), information revealing the existence or non-existence of SARs and supporting documentation related to SARs. The Bank Secrecy Act (BSA) requires financial institutions, including futures commission merchants (FCMs) and introducing brokers (IBs), to report detailed information about transactions that appear to be suspicious by filing an SAR with the Financial Crimes Enforcement Network. FCMs and IBs are prohibited from disclosing the existence of an SAR to NFA unless such disclosure is permitted by the CFTC. On January 8, the CFTC submitted a letter to NFA that authorizes it to request SARs and information related to SARs from its members.

More information is available here.

CFTC Certifies Available-to-Trade Determinations

In October, TW SEF LLC (TW SEF) and MarketAxess SEF Corporation submitted self-certified determinations that certain interest rate and credit default swaps are made available to trade (MAT) for purposes of the Commodity Exchange Act (CEA) and Commodity Futures Trading Commission regulations. The CFTC's Division of Market Oversight has announced that TW SEF's and MarketAxess SEF's MAT determinations are deemed certified, meaning that all swaps covered by the determinations will be subject to the trade execution requirement in CEA Section 2(h)(8).

As a result of these certifications, certain credit default swaps and fixed-to-floating interest rate swaps referencing US dollar London Interbank Offered Rate (USD LIBOR), Euro Interbank Offered Rate (EURIBOR) and Sterling London Interbank Offered Rate (GBP LIBOR) will be MAT as of February 26, 2014. These swaps include: USD LIBOR swaps that have spot or IMM start dates with a par fixed rate and a tenor of 4 or 6 years; EURIBOR swaps that have T+2 start dates with a par fixed rate and a tenor of 4 or 6 years; GBP LIBOR swaps that have T+0 start dates with a par fixed rate and a tenor of 2, 3, 4, 5, 6, 7, 10, 15, 20 or 30 years; and untranched credit default swaps on the CDX.NA.IG, CDX.NA.HY, iTraxx Europe or iTraxx Europe Crossover indices with a tenor of 5 years.

TW SEF's MAT determination also covers certain fixed-to-floating interest rate swaps that were previously made available to trade (as reported in the *Corporate and Financial Weekly Digest* edition of January 24, 2014).

Counterparties must execute swaps that are subject to the MAT determinations on or pursuant to the rules of a swap execution facility (SEF) or designated contract market. A swap subject to the MAT determinations cannot be executed over the counter unless one or both of the parties invokes a valid exemption from clearing for the swap, which also operates as an exemption from the trade execution requirement. MAT swaps executed on or pursuant to the rules of an SEF are "required transactions," and therefore must be executed through either the SEF's order book or request-for-quote system unless the swap qualifies as a block trade.

TW SEF's MAT filing, which was amended on November 29, is available here.

MarketAxess SEF's MAT filing is available here.

The CFTC's press releases are available here and here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

FinCEN Issues MSB Guidance for Bitcoin Miners, Investors and Software Developers

On January 30, the Financial Crimes Enforcement Network (FinCEN) published two administrative rulings (Administrative Rulings) clarifying that certain participants in the Bitcoin economy (and other convertible virtual currency economies) do not constitute money services businesses (MSBs) under the Bank Secrecy Act (BSA). The Administrative Rulings elaborate upon guidance issued by FinCEN on March 18, 2013 (Guidance), which excluded from the definition of MSB "users" (Users) that obtain convertible virtual currency and use such

convertible virtual currency to purchase real or virtual goods or services. In the Guidance, FinCEN established that Users are not MSBs since they are not engaged in money transmission services (i.e., "accepting" and "transmitting" currency, funds or other value).

In its first Administrative Ruling, FinCEN ruled that a Bitcoin miner does not constitute an MSB to the extent that it uses the Bitcoins it mines solely for its own purposes and not for the benefit of any other person. FinCEN further ruled that such Bitcoin miner may convert Bitcoin into a real currency or another convertible virtual currency provided that the conversion is executed for the Bitcoin miner's own purposes and not as a business service performed for the benefit of another. A Bitcoin miner that limits its activities to the foregoing constitutes a User under the terms of the Guidance and is therefore excluded from the definition of MSB. Similarly, in its second Administrative Ruling, FinCEN ruled that an investor in convertible virtual currencies constitutes a User under the Guidance to the extent that such investor purchases and sells convertible virtual currency exclusively as investments for its own account. FinCEN also addressed the activities of software providers in its second Administrative Ruling, concluding that the production and distribution of software, standing alone, do not constitute money transmission services even when the software is intended to facilitate the sale of virtual currencies.

Professionals at Katten Muchin Rosenman LLP will soon release a Client Advisory addressing the recent developments concerning Bitcoin, including the hearings held on January 28 and 29 by the New York Department of Financial Services. Please click here to be added to the Financial Services mailing list.

The Administrative Ruling regarding virtual currency mining operations is available here.

The Administrative Ruling regarding virtual currency software development and certain investment activity is available here.

The Guidance is available here.

LITIGATION

Second Circuit Upholds Insider Trading Claim for Unregistered Securities

The US Court of Appeals for the Second Circuit recently held that the duty of corporate insiders to either disclose material nonpublic information or abstain from trading applies to unregistered securities. The Second Circuit vacated a decision by the US District Court for the District of Connecticut dismissing an insider claim by a former minority shareholder of Xcelera Inc.

Plaintiff, Gloria Steginsky, was a minority shareholder in Xcelera who sold her shares in 2011 in response to a tender offer for $0.25 per share. Steginsky alleged that Xcelera insiders repurchased stock through a shell corporation without disclosing information about the company's financial situation. According to the complaint, Xcelara's common stock traded for as high as $110 per share on the American Stock Exchange in 2000, but by 2004 was down to about $1. Around that time, Xcelera insiders stopped making required filings with the Securities and Exchange Commission, which caused the company to be delisted. In April 2011, Steginsky sold over 100,000 shares after a tender offer by OFC Ltd., allegedly owned by the Xcelera insiders. The complaint alleged a breach of fiduciary duty and violations of the Exchange Act through market manipulation and insider trading. The District Court dismissed the insider trading claim, holding that the insiders had no duty to disclose information before trading because the rule does not apply to unregistered securities.

The Second Circuit reversed, holding that the duty of corporate insiders to either disclose material inside information or to abstain from trading applies to unregistered securities. The court held that defendant insiders had no general affirmative duty to disclose, but could not trade the shares based on undisclosed material inside information they possessed. The court vacated the dismissal of the insider-trading claims and remanded to the District Court.

Steginsky v. Xcelera Inc., Nos. 13-1327-cv, 13-1892-cv (2d Cir. Jan. 27, 2014).

Shareholder Derivative Suit Dismissed for Failure to Show Demand Futility

The Supreme Court of the State of New York, County of New York recently dismissed a shareholder derivative suit on behalf of Travelzoo, Inc. because plaintiff shareholder failed to plead that demand on the board to sue would be futile. In 2009, Travelzoo, a global internet company, sold its Asia Pacific division to its then-chairman, founder and majority shareholder, Ralph Bartel, for $3.6 million. According to Travelzoo's public filings, Bartel and Azzurro Capital, Inc.—a company owned 100% by Bartel—controlled the company and elected each of its board members at the time of the sale. Plaintiff's claim alleged breach of fiduciary duties and unjust enrichment arising out of the sale.

Applying Delaware law, the court ruled that plaintiff did not plead facts sufficient to show that the required pre-suit demand on the board to take remedial action was futile as required by *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). Examining both *Aronson* prongs, the court first held that plaintiff did not challenge the independence of the Special Committee, which recommended the sale. Next, the court held that the complaint did not plead with particularity sufficient facts to raise a reasonable doubt that the board acted in good faith. The court emphasized that plaintiffs should address allegations based on lack of information by examining the corporation's books and records before filing suit; doing so will help plaintiffs plead with particularity the facts justifying demand excusal. The court dismissed the complaint and denied plaintiff's request to replead.

Kebis v. Azzurro Capital Inc., No. 650253/2012 (N.Y. Sup. Ct. Jan. 21, 2014).

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