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SEC/CORPORATE

NYSE's Modified Listing Standards For EGCs; Advisory Committee Proposes Change to NYSE Proxy Distribution Fees

The Jumpstart Our Business Startups Act (the JOBS Act) provides, among many other things, that a company which qualifies as an emerging growth company (EGC) may chose to include only two years of audited financial data in the registration statement for its initial equity public offering rather than three years of audited financial data that would have been required previously. Moreover, for as long as a company remains an ECG, it is not required to file selected financial data for any period prior to the earliest period for which it included audited financial statements in its initial public offering registration statement.

In a May 4 filing with the Securities and Exchange Commission, the New York Stock Exchange (NYSE) proposed to modify its initial financial listing standards to permit an EGC to meet the applicable standard on the basis of two years of audited financial data actually reported, rather than the three years of financial data that would otherwise have been required. In addition, certain financial listing standards would be able to be met on the basis of two, rather than three, years of financial data. The rule changes would only be applicable to EGCs that actually avail themselves of their ability to report only two years of audited financial information. On May 15 the proposed rule changes were declared effective by the SEC.

In a separate development, a proxy fee advisory committee (PFAC) formed by the NYSE has recently released recommendations for changing the fees paid by public companies to banks and brokers for the distribution of proxy material to shareholders holding their stock in "street name." The PFAC's recommendations propose to streamline proxy fees, make them more transparent to issuers and effect a modest decrease in total fees paid of approximately 4%, with some fees increasing and others decreasing. For example, the processing fees for special meetings and proxy contests would increase slightly, but the fee for annual meeting reminder notices would be reduced by half, according to the proposal. The NYSE expects to submit a rule change proposal to the SEC, which would be published for public comment prior to obtaining SEC approval.

To read the NYSE rule change to accommodate the JOBS Act, please click here.
To read the NYSE proxy fee advisory committee report, please click here.

BROKER DEALER

FINRA Proposes Rule Change Regarding Front Running of Block Transactions

The Financial Industry Regulatory Authority has filed a proposed rule change with the Securities and Exchange Commission to adopt NASD Interpretive Material 2110-3 (the Front Running Policy) as FINRA Rule 5270. In connection therewith, FINRA proposes to amend FINRA Rule 5270 in several ways to "broaden its scope and provide further clarity into activity that FINRA believes is inconsistent with just and equitable principles of trade."

The Front Running Policy prohibits the following activity by a member or associated person, subject to certain exceptions:

1. buying or selling security futures or certain options for accounts in which such member or associated person has an interest when such member or associated person has material, non-public market information concerning an imminent block transaction in the underlying security;

2. the activities prohibited in (1) above, in respect of the underlying security when the material, non-public market information regarding a block transaction concerns an option or security future on that underlying security; and

3. providing material, non-public market information concerning an imminent block transaction to customers who then trade on the basis of such information.

The Front Running Policy applies (1) to transactions in equity securities and options that are required to be reported on a last sale reporting system, (2) to any transaction involving a security future, regardless of whether the transaction is reported and (3) only until the information concerning the block transaction has been made publicly available.

FINRA proposes to extend the Front Running Policy's prohibitions to apply (1) to all securities and other financial instruments and contracts that overlay the security that is the subject of an imminent block transaction and "that have a value that is materially related to, or otherwise acts as a substitute for, the underlying security" and (2) until the material, non-public market information is *either* publicly available *or* "otherwise becomes stale or obsolete."

Lastly, the proposed rule change would replace several provisions of the Front Running Policy, including the existing exceptions for certain transactions in automatic executions systems and for positioning the other side of certain orders when a member receives a customer's block order relating to both an option and the underlying security or a security future and the underlying security. These provisions would be replaced with new "Supplementary Material" that would identify certain permitted transactions, as follows:

- transactions that the member can demonstrate are unrelated to the customer block order;

- transactions that are undertaken to fulfill or facilitate the execution of the customer block order; and

- transactions that are executed, in whole or in part, on a national securities exchange and comply with the marketplace rules of that exchange.

Click here to read the full text of the Proposed Rule Change.

SEC Approves Amendment to TRACE Reporting Requirements

The Securities and Exchange Commission approved amendments to Financial Industry Regulatory Authority (1) Rule 6700 Series and Trace Reporting and Compliance Engine (TRACE) dissemination protocols and (2) Rule 7730 regarding TRACE fees. The effective date of the amendments is November 5, 2012.

FINRA's TRACE rules and dissemination protocols require the dissemination of agency pass-through mortgage-backed securities that are traded "to be announced" (TBA transactions) immediately upon receipt of a transaction report. As amended, such FINRA rules and protocols increase transparency in the TBA market and reduce the reporting periods for TBA transactions.

Pursuant to the amendments, FINRA has instituted a pilot program that expires on May 10, 2013. During the pilot program, TBA transactions for which good delivery (GD) may be made must be reported no later than 45 minutes from the time of execution and TBA transactions that are not traded for good delivery (NGD) must be reported no later than 120 minutes from the time of execution, in each case, subject to certain limited exceptions. After the pilot program has expired, TBA transactions GD must be reported no later than 15 minutes from the time of execution and TBA transactions NGD must be reported no later than 60 minutes from the time of execution.

Moreover, the amendment of FINRA Rule 7730 establishes fees for current market data for TBA transactions and aged TBA transaction data (i.e., historic TRACE data). The fees are the same as are currently in effect for other TRACE market data and historic TRACE data, respectively.

Click here to read the full FINRA Regulatory Notice.

CFTC

CFTC Proposes Revised Aggregation Rules for Futures and Swaps Position Limits

On May 18, the Commodity Futures Trading Commission issued a notice of proposed rulemaking that would modify the CFTC's aggregation provisions related to speculative position limits. The proposed rule would amend the rules establishing speculative position limits for physical commodity futures and option contracts traded on a designated contract market and economically equivalent swaps, which were published in the Federal Register on November 18, 2011. The comment period for the proposal will be open for 30 days following publication in the Federal Register.

Subject to certain exceptions, the CFTC's position limit rules generally require a trader to aggregate positions in all accounts in which the trader directly or indirectly has a 10% or greater equity or ownership interest for purposes of applying speculative position limits. However, the proposed rule would, among other things, create a new "disaggregation" exemption under which a person with up to a 50% ownership or equity interest in another entity would not be required to aggregate the positions owned by such underlying entity if both parties: (1) do not have knowledge of each other's trading decisions; (2) trade pursuant to separately developed and independent trading systems; (3) have written procedures that establish an information barrier between the two parties, including documented routing procedures, security procedures, and separate physical locations to maintain independence; (4) do not share employees that control trading decisions; and (5) do not share risk management systems.

The proposed rule would also expand the exemption from aggregation for the underwriting of securities to include ownership interests acquired through market-making activities of an affiliated broker-dealer. Finally, the proposal makes clear that passive investors in commodity pools structured as limited liability companies are eligible to rely on the "Independent Account Controller" disaggregation exemption to the same extent as passive investors in commodity pools that are structured as limited partnerships.

Click here for more information.

CFTC Approves Final Rule on Swap Data Recordkeeping and Reporting Requirements for Pre-Dodd-Frank Swaps

On May 18, the Commodity Futures Trading Commission approved a final rule on swap data recordkeeping and reporting requirements for pre-enactment swaps and transition swaps. The rule expands the swap data recordkeeping and reporting requirements to include swaps entered into before the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) (pre-enactment swaps) and swaps entered into after the Dodd-Frank Act but before the compliance date of the CFTC's previously adopted swap recordkeeping and reporting rule (transition swaps).

Under the rule, each counterparty to a pre-enactment or transition swap that was in existence on or after April 25, 2011 must retain records of all of the primary economic terms of each swap. In addition, each counterparty must retain possession of any of the following information that it has: (1) any confirmation of the swap executed by the counterparties; (2) any master agreement governing the swap, and any modification or amendment; and (3) any credit support agreement or other agreement between the counterparties that has the same function as a credit support agreement. Each counterparty is also required to retain any required record related to a pre-enactment or transition swap that is created after the compliance date.

Swap dealers (SDs) and major swap participants (MSPs) must retain records in electronic form unless the record was originally created and exclusively maintained paper form. Non-SD/MSP counterparties may retain records in either electronic or paper form. All such records required must be kept for a period of at least five years following the termination of the swap.

The reporting requirements vary based on the creation date. The reporting counterparty to each pre-enactment swap or transition swap in existence on or after April 25, 2011 must report the following information by the compliance date: (1) the primary economic terms of the swap; (2) the legal entity identifier; (3) the initial counterparty identifier or legal entity identifier used by the reporting counterparty to identify the non-reporting counterparty; and (4) the internal transaction identifier used by the reporting counterparty to identify the swap. In addition, the reporting counterparty must report certain swap continuation data for all uncleared pre-enactment, and transition swaps. On the compliance date, the reporting counterparty for each pre-enactment or transition swap that expired or was terminated prior to April 25, 2011, must report any information that was in the parties possession on or after October 14, 2010 for pre-enactment swaps or December 17, 2010 for transition swaps. The reporting counterparty is determined in the manner described in the CFTC's previously adopted swap data reporting rules.

The rule will become effective 60 days after publication in the Federal Register. The compliance date for SDs and MSPs with respect to credit swaps and interest rate swaps is 60 calendar days after publication of the CFTC's rule defining "swap". The compliance date for SDs and MSPs with respect to equity swaps, foreign exchange swaps, and other commodity swaps is 90 days after the compliance date for credit swaps and interest rate swaps. The compliance date for non-SD/MSP counterparties is 90 days after the equity swaps, foreign exchange swaps, and interest rate swaps compliance for SDs and MSPs.

Click here for more information.

LITIGATION

Ninth Circuit Affirms Jury Verdict in Options Backdating Enforcement Action

The U.S. Court of Appeals for the Ninth Circuit affirmed a jury verdict against Carl Jasper, the chief financial officer of Maxim Integrated Products, Inc., that held him liable for the violations of several securities laws stemming from the improper accounting of backdated options.

Jasper challenged the jury verdict on several evidentiary grounds, including that Maxim's 2006 Annual Report on Form 10-K was erroneously admitted as a business record. The Ninth Circuit found, however, that the district court did not abuse its discretion in admitting the Form 10-K because the Form 10-K is a "business record of the accounting review itself, not of the misconduct that gave rise to the need for the restatement," and therefore does not impermissibly implicate the makers' state of mind. In addition, the Form 10-K was not created in anticipation of litigation because the filing of a Form 10-K is a legal requirement for a public company like Maxim.

The Ninth Circuit also affirmed the district court's decision to require Jasper to reimburse Maxim $1.8 million in bonuses and profits from the sale of Maxim stock that Jasper received during the time he certified false financial statements, pursuant to Section 304 the Sarbanes-Oxley Act of 2002. Jasper argued that the jury verdict was not factually specific enough to support such a penalty but the Ninth Circuit found that the reimbursement penalty was an equitable remedy, not a legal remedy, and therefore the district court could impose the penalty without having a jury find all of the facts necessary to support it.

SEC v. Jasper, No. 10-17064 (9th Cir. May 15, 2012).

Court Considers Adequacy of Pleading Tortious Interference Counter-Claims

Defendants and counter-claimants Elliot Landy and Landyvision, Inc. (the counter-claimants) asserted several counter-claims, including for tortious interference with business relationships and tortious inference with contract. In response, counter-defendants Barry Z. Levine, Linanne G. Sackett, and The Brunswick Institute (the counter-defendants) moved to dismiss the counter-claims. The dispute arose when Levine and Landy, both photographers who attended and photographed the Woodstock Music Festival, disagreed as to whether Landy's use of Levine's photographs in several publications was proper.

The U.S. Circuit Court for the Northern District of New York granted in part and denied in part the counter-defendants' motion to dismiss certain counter-claims. The court found the tortious inference with business relationships claim to be adequately pled because the counter-claimants asserted that the counter-defendants

interfered with their business relationships by intentionally and falsely representing to several companies that Landy was not authorized to license Levine's photographs, thereby damaging the counter-claimants' reputations. As a result, the court denied the motion to dismiss that claim.

However, the court found that the counter-claimants did not adequately plead the elements of the tortious interference with contract the claim because counter-claimants did not set forth a specific contract, but merely alleged that they had "oral and/or written contracts." The counter-claimants also failed sufficiently to allege a breach of the contract, asserting only that they no longer had a business relationship with certain corporations. Consequently, the court granted the motion to dismiss that claim.

Levine v. Landy, No. 1:11-CV-1038 (N.D.N.Y. May 18, 2012).

BANKING

Federal Reserve Tells Borrowers How to Apply for Foreclosure Review

On May 23, the Board of Governors of the Federal Reserve System issued a video that gave instructions to borrowers who may have been injured by improper foreclosures on how to seek relief. Both English and Spanish versions of the video are available for viewing on the Federal Reserve Board's website and on YouTube. The brief announcement reminds borrowers that, as part of the enforcement actions taken in April 2011 by federal banking regulatory agencies, they may be eligible to receive compensation if an independent review finds evidence of direct financial injury due to servicer error. Borrowers are eligible for a review if their primary residence was in the foreclosure process in 2009 or 2010 and their mortgage loan servicer is participating in the Independent Foreclosure Review. The deadline to request a foreclosure review is July 31.

The announcement continues the trend of federal banking agencies taking measures to demonstrate their commitment to protecting consumers.

For more information, click here.

OCC Rescinds Former OTS Guidance

The Office of the Comptroller of the Currency (OCC), in its new role as supervisor of federal savings associations (including federal savings banks, collectively referred to as FSAs), has rescinded much guidance that had been issued by the Office of Thrift Supervision (OTS), the former regulator of FSAs. In Bulletin 2012-15, the OCC lists the rescinded OTS documents and the OCC documents, if any, that replace the rescinded documents, in Attachment A. While the specific OCC documents now applicable to FSAs in place of the rescinded items are identified in the attached table, the OCC points out that "several [other] key Comptroller's Handbook booklets warrant close review. These booklets—"Bank Supervision Process," "Community Bank Supervision," and "Large Bank Supervision,"—explain the foundation of the OCC's supervisory philosophy and contain minimum examination procedures that apply to FSAs. As the OCC continues its progress toward one integrated policy platform for national banks and FSAs, it is increasingly important for FSAs to have a thorough understanding of the supervisory philosophy contained in these booklets and how the OCC organizes this guidance."

Despite rescission of many OTS initiatives, the Bulletin states that the OCC and the OTS shared many objectives. "Even before the policy integration is completed, FSAs and national banks may find guidance issued to the other charter type useful for informational purposes. For example, an FSA may find more detailed OCC guidance on a particular topic, such as commercial lending, or a national bank may find more current guidance issued by the OTS on a particular topic, such as mortgage banking. In the course of ongoing supervision the OCC may direct national banks and FSAs to consult such guidance for further information on the subject area or to address supervisory concerns."

It is notable, however, that the Bulletin states that "OCC will not cite noncompliance with the requirements included in such guidance, however, until application of these requirements has been officially communicated and related OTS-issued guidance, if any, has been rescinded." Thus, presumably, non-compliance during the period preceding the issuance of the rescission notice will not be used against institutions.

For more information, click here and here.

FFIEC Implements New InfoBase Technology for The Information Technology Examination Handbook

The Federal Financial Institutions Examination Council (FFIEC) recently upgraded the functions and features of the InfoBase for the FFIEC Information Technology Examination Handbook (IT Handbook). The FFIEC is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau, and to make recommendations to promote uniformity in the supervision of financial institutions. In 2006, the State Liaison Committee (SLC) was added to the FFIEC as a voting member. The SLC includes representatives from the Conference of State Bank Supervisors, the American Council of State Savings Supervisors, and the National Association of State Credit Union Supervisors.

The IT Handbook consists of 11 booklets covering a variety of technology and technology-related risk management guidance for financial institutions and examiners.

The new architecture provides the FFIEC member agencies with new capabilities, including the ability to make updates on a more frequent basis. This new architecture will enable the agencies to respond to changes in technology and the risk environment on an as-needed basis rather than waiting for the next revision of a particular booklet or booklets. Included in the recent upgrade is a "What's New" function on the InfoBase home page that may be used to monitor recent changes and, going forward, to access a historical listing of all changes. As a result of this new dynamic environment, the individual booklets will no longer be available in hard copy. In addition to reducing costs and saving resources, users will now have the ability to select the materials they wish to print--from a single page to the entire booklet.

To read the IT Handbook, click here.

CFPB Issues Proposal to Regulate Prepaid Cards Under the Electronic Fund Transfer Act and Regulation E

On May 23, the Consumer Financial Protection Bureau (CFPB or the Bureau) announced that it is seeking comment, data, and information from the public about general purpose reloadable prepaid cards (GPR cards).

"[General Purpose Reloadable] cards are a prepaid financial product that have been increasing in popularity and that some consumers now use in a manner similar to a debit card that is linked to a traditional checking account. The Bureau is particularly interested in learning more about this product, including its costs, benefits, and risks to consumers. The Bureau intends to issue a proposal to extend the Regulation E protections to GPR cards."

The CRPB also explained its reasoning behind the request: "Recently, the GPR card market has benefited from competition and economies of scale, leading many market participants to voluntarily provide some protections for consumers. The Bureau is gathering information about GPR cards, however, in order to ensure that consumers are protected regardless of the economic environment. Three factors in particular command greater attention to GPR cards: the growth of the market for GPR cards, consumer use, and the lack of comprehensive federal regulation."

The CFPB indicated the similarity between pre-paid open loop cards (closed loop cards are excluded from the proposal): "The Bureau has also observed some GPR cards marketed as a substitute for a checking account. While consumers may be using GPR cards as a substitute for checking accounts, GPR cards do not carry the same protections given to checking accounts and electronic transactions involving checking accounts under federal law…. Unlike some other "general-use prepaid cards" such as payroll cards, Regulation E generally does not apply to GPR cards. Many GPR card market participants offer contractual protections similar to those provided in Regulation E for payroll cards, though such provisions may vary, and are subject to unilateral change."

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) generally transferred the Federal Reserve Board's rulemaking authority for Regulation E to the Bureau, effective July 21, 2011. Pursuant to the Dodd-Frank Act and the Electronic Fund Transfer Act, as amended, in December 2011 the Bureau republished Regulation E as an interim final rule, 12 CFR Part 1005.

In its proposal, the Bureau stated that, "Regulation E defines an 'account' as 'a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household

purposes. 12 CFR 1005.2(b)(1).'" The Bureau noted that in 2006 the Federal Reserve Board, which then had jurisdiction over Regulation E, declined to expand the regulation's reach, in the Board's words, " 'to cover additional cards used to deliver important household funds, such as emergency benefit payments, income tax refunds, or loan proceeds, as well as other cards marketed or used as deposit account substitutes.'" The Bureau also noted that after the 2009 passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009, "the definition of “account” in Regulation E remained unaltered."

The proposal requests comment on ten broad questions regarding GPR cards which fall into four categories: regulatory coverage of products by some or all of Regulation E, product fees and disclosures, product features, and other information on GPR cards. Comments will be due 60 days from the official publication of the proposal in the Federal Register.

For more information, click here.

UK DEVELOPMENTS

Bank of England Announces Reviews of its Performance

On May 21, the Court of the Bank of England announced that it had ordered reviews of certain areas of the Bank’s performance with reference to the 2008 financial crisis:

- The provision of emergency liquidity assistance to certain UK banks in 2008;
- The Bank’s framework for providing liquidity to the banking system as a whole in 2008; and
- The forecasting capability of the Bank’s Monetary Policy Committee.

In its announcement of the reviews the Bank stated that it will concentrate on areas where the Bank had sole responsibility and on lessons to improve the way that the Bank operates. Accordingly, the reviews will not consider actions taken by the Financial Services Authority or HM Treasury, the other two tripartite authorities involved in regulation of financial institutions. It will also not address the initial stage of the crisis in 2007, as the Bank considers that the Treasury Committee’s January 2008 report on the collapse of Northern Rock in September 2007 established the relevant lessons for the Bank to be drawn from those events.

The review conclusions will be presented to the Court of the Bank of England in October 2012, with publication “soon after that”.

For more information, click here.

Appeal Tribunal Upholds FSA Ban and Fine on Former Investment Bank Advisers

On May 21, the Upper Tribunal (Tax and Chancery Chamber) published related decisions upholding the Financial Services Authority's decision notices imposing fines and bans on both Sachin Karpe and Laila Karan.

Mr. Karpe and Ms. Karan, former advisers in the international wealth management division of a leading investment bank, had both referred FSA decision notices to the Tribunal relating to penalties imposed for their involvement in unauthorized trading. The FSA had decided to:

- Fine Mr. Karpe £1.25 million (approximately $2 million) for breaches of the FSA's Statements of Principle for Approved Persons and to ban him from performing any role in regulated financial services on the grounds that he was not a fit and proper person as his conduct demonstrated a lack of honesty and integrity.
- Fine Ms. Karan £90,000 (approximately $140,000) for breaches of the FSA's Statements of Principle and to ban her from performing any role in regulated financial services on the grounds that she was not a fit and proper person as her conduct demonstrated a lack of honesty and integrity.

Tracey McDermott, acting director of enforcement and financial crime, said: "Karpe exploited and abused his position of trust, and persuaded more junior employees to engage in misconduct to assist him. Such behaviour is in breach of his obligations to his employer, his clients and his colleagues as well as to the regulator. It has no place in the financial services industry. We welcome the Tribunal's confirmation that as well as banning Karpe, a significant financial penalty should also be imposed. This sends a clear message of the consequences of such behaviour.

"Karan sought to categorise herself as a victim in this matter. The Tribunal (as had the FSA) recognised that she did not initiate the misconduct, and was placed in a difficult position by Karpe. However, the findings and the resulting sanctions send a clear message that an approved person must take responsibility for their own actions. Where an approved person is aware that colleagues are engaging in misconduct, we expect them to blow the whistle, not to become involved themselves.

"Those who take on the responsibility of being an approved person should be in no doubt about our commitment to take the strongest action to tackle behaviour which falls below the high standards we expect."

For more information regarding Mr. Karpe, click here. For more information regarding Ms. Karan, click here.

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