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CORPORATE & FINANCIAL
WEEKLY DIGEST

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SEC/COPORATE

SEC to Extend Filing Deadlines for Filers Affected by Hurricane Sandy

On November 5, the Securities and Exchange Commission announced that it would extend filing deadlines for issuers affected by Hurricane Sandy and its aftermath. For filings due during the period from October 29 to November 20, the SEC expects to extend filing deadlines to November 21 for individuals or entities unable to timely file due to Hurricane Sandy and its aftermath. At a Q&A session at the PLI's Annual Institute on Securities Regulation in New York, an SEC staff member indicated that pending the issuance of the more formal statement on filing relief, registrants should file as soon after their regular filing deadlines as practicable. The SEC will also consider requests for additional relief on a case-by-case basis.

Click here to read the full press release.

CFTC

NFA Launches FCM Financial Information Platform

The National Futures Association (NFA) has launched a new service that allows the public to obtain relevant information about any member futures commission merchant (FCM) more easily. NFA's Background Affiliation Status Information Center (BASIC), accessible from NFA's website, has been enhanced to provide a more user-friendly platform to access general information, disciplinary information and publicly available financial information about FCMs. In particular, BASIC now provides monthly financial reports that show each FCM's net capital, the amount of funds held in the customer segregated and foreign secured amount accounts, and the manner in which such funds are held, *e.g.*, cash, US Treasury securities and money markets funds. September 2012 is the first month for which these financial reports are available.

More information on how the new monthly financial reports can be found here.

General information on the new services can be found here.

BROKER DEALER

FINRA Amends Rules Relating to Research Analysts and Research Reports

The Financial Industry Regulatory Authority has issued Regulatory Notice 12-49 regarding the Securities and Exchange Commission's approval of amendments to NASD Rule 2711 and incorporated NYSE Rule 472 relating to research analysts and research reports.

Pursuant to the Jumpstart Our Business Startups Act and SEC staff guidance, the rules have been amended to allow research analysts to attend meetings with management of an issuer that meets the definition of an emerging growth company (EGC), even if investment bankers also attend the meetings. However, during the meetings research analysts must not engage in otherwise prohibited conduct, such as efforts to solicit investment banking business. These changes are effective retroactively to April 5, 2012.

The rules also have been amended to eliminate certain quiet periods after an initial public offering of an EGC, effective retroactively to April 5, 2012. Similarly, certain quiet periods relating to secondary offerings or termination of lock-up agreements also have been eliminated, effective retroactively to October 11, 2012.

More information is available here.

FINRA Amends Stop and Stop Limit Order Rules

The Securities and Exchange Commission approved new Financial Industry Regulatory Authority Rule 5350, which replaces the stop order provisions in FINRA Rule 6140(h). Under new FINRA Rule 5350, firms may accept stop orders and stop limit orders. Additionally, the new rule allows firms to offer alternative orders with different types of triggers, such as a quotation at the stop price, but the order type must be labeled in a way that is clearly distinguishable from a stop order or a stop limit order. The new rule applies to National Market System securities and over-the-counter equity securities.

More information is available here.

LITIGATION

Court Rules That Plaintiffs Failed to Establish “Scheme Liability” in Securities Case

A group of investors in a software company that services the property management industry commenced an action alleging violations of federal securities law and breaches of state law fiduciary duties against directors and officers of the company and individuals who sold securities for the company. Specifically, plaintiffs alleged that certain defendants misled investors by failing to disclose the poor financial condition of the company and further alleged that even those board members who did not make public statements engaged in misconduct by approving new securities offerings knowing that the company was in bad financial condition. A group of director and officer defendants filed separate motions to dismiss. The US District Court for the District of Arizona ruled that the plaintiffs were not successful in establishing liability under Rules 10b-5(a) and (c), known as “scheme liability,” because the plaintiffs could not establish conduct beyond the officers’ alleged omissions related to the company’s securities offerings. The court rejected plaintiffs’ argument that the board approval of the offerings constituted misconduct because even if the directors knew the company was in poor financial condition, they still could have approved securities offerings without being part of a fraudulent scheme. Further, the court granted one defendant board member’s motion to dismiss on the ground that plaintiffs had failed to meet the Private Securities Litigation Reform Act’s specificity pleading requirement with respect to allegedly fraudulent statements and dismissed a claim against another officer for aiding and abetting a breach of fiduciary duty on the ground that such claim was derivative and plaintiffs did not have standing to bring the claim on behalf of the company.

Anderson v. McGrath, No. CV-11-01175, 2012 WL 5381406 (D.Ariz. Nov. 1, 2012).

Court Finds Defendants Jointly and Severally Liable for Disgorgement and Prejudgment Interest Award in Ponzi Scheme Case

The US District Court for the Northern District of New York granted the Securities and Exchange Commission’s motion for entry of final judgment and monetary relief of disgorgement and prejudgment interest against defendants in a case involving violations of securities laws through the operation of a Ponzi scheme. In September 2011, the court granted the SEC’s motion for default judgment as to liability and injunctive relief, and granted leave for the SEC to seek disgorgement, prejudgment interest and civil penalties following resolution of the criminal case then pending against the individual defendant who operated the Ponzi scheme. In seeking an award of $4,557,632 in disgorgement from all defendants, the SEC submitted exhibits detailing defendants’ bank account activity involving investor funds. The court awarded the amount sought, finding that it was a “reasonable approximation of profits causally connected” to the Ponzi scheme. The court also awarded the SEC $645,422 in prejudgment interest and found that the defendants were jointly and severally liable to the SEC for total amount awarded based on evidence of collaboration and commingling of funds by the defendants.

SEC v. Bass, No. 1:10-CV-00606, 2012 WL 5334743 (N.D.N.Y. Oct. 26, 2012).

BANKING

Banking Agencies Expect to Delay Implementation of New Capital Rules Beyond January 1, 2013

On November 9, the US federal banking agencies announced that they expect to delay implementation of three notices of proposed rulemaking released in June that would revise and replace the current regulatory capital rules. The proposals had suggested an effective date of January 1, 2013. According to the agencies, "Many industry participants have expressed concern that they may be subject to a final regulatory capital rule on January 1, 2013, without sufficient time to understand the rule or to make necessary systems changes. In light of the volume of comments received and the wide range of views expressed during the comment period, the agencies do not expect that any of the proposed rules would become effective on January 1, 2013. As members of the Basel Committee on Banking Supervision, the US agencies take seriously our internationally agreed timing commitments regarding the implementation of Basel III and are working as expeditiously as possible to complete the rulemaking process. As with any rule, the agencies will take operational and other considerations into account when determining appropriate implementation dates and associated transition periods."

The agencies did not release a new expected implementation date.

The release may be viewed here.

EXECUTIVE COMPENSATION AND ERISA

Section 409A Transition Relief Deadline Quickly Approaching

As the end of the year approaches, important transition relief from penalties and excise taxes imposed by Section 409A of the Internal Revenue Code (the Code) is about to expire. If an employer has an employment agreement or other nonqualified deferred compensation plan that provides for severance payments to an employee only if such employee executes a release, there may be a technical violation of Code Section 409A. The Internal Revenue Service allows for correction of such technical violations without penalty, but the correction must occur before December 31, 2012.

In 2010, the IRS issued two notices (IRS Notice 2010-6 and 2010-80) addressing how to fix an employment agreement that was not in compliance with Code Section 409A. In these notices, the IRS stated that by allowing an employee to receive his or her severance payment following the execution of a release, the employee would be able to control the year of such payment by timing when he or she delivered such release to his or her employer. The IRS stated that, to the extent the severance payment is subject to Code Section 409A, the ability to control payment timing is a violation regardless of whether the execution and delivery of the release actually crosses two taxable years.

The IRS provided transitional relief from this technical violation by allowing employers to amend any noncompliant employment agreement or other nonqualified deferred compensation plan in effect as of December 31, 2010. Under the transitional relief, such agreement or plan must comply with the Code Section 409A release requirements by December 31, 2012.

In order to take advantage of the transitional relief, an employer must correct the noncompliant agreement or plan in one of two approved manners and include the names of the employees affected and the correction method used by the employer.

Briefly, if the agreement or plan provides for a defined payment period, the correction must be made to provide for either: (a) payment only on the last day of such defined period or (b) if the defined payment period begins in one taxable year and ends in another taxable year, payment must be made in the later taxable year. If the agreement or plan does not provide for a defined payment period, the correction must be made to provide for either: (x) payment only on a specified date either 60 or 90 days following the employee's separation from service, or (y) payment during a defined period not longer than 90 days following the employee's separation from service, except that the payment must be made in the later taxable year if that period could span two taxable years.

If the agreement or plan is not corrected by the December 31, 2012 deadline, payments made pursuant to such agreement or plan may be immediately included in an affected employee's income, a 20 percent penalty tax will be imposed, and additional interest taxes may apply. Please note that in the case of a bilateral agreement or plan, the affected employee's consent is required to make any change, so employers should allow plenty of time to make these corrections.

A copy of IRS Notice 2010-6 can be found here and a copy of IRS Notice 2010-80 can be found here.

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