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SEC/CORPORATE

Federal Court Rules Investment Fund is 10 Percent Owner in Section 16 Case

On August 20, a federal magistrate judge in the Eastern District of New York granted a motion for summary judgment in a derivative case brought against purported 10 percent stockholders of 1-800-Flowers.com, Inc. Pursuant to Section 16 of the Securities Exchange Act of 1934, as amended, the judge found a hedge fund liable as a 10 percent owner, despite the fact that it had delegated voting and investment authority to its investment adviser.

By way of background, Raging Capital Master Fund (the "Master Fund") owned more than 10 percent of the common stock of 1-800-Flowers.com. The Master Fund then delegated voting and investment authority in the shares to its registered investment adviser, Raging Capital Management. The stock holdings were publicly reported by the Master Fund, Raging Capital Management and its managing member, William Martin, on a Schedule 13G, but no Forms 3 or 4 were ever filed.

The plaintiff alleged that the defendants, as 10 percent owners, were required to disgorge short-swing profits under Section 16(b).

The defendants argued that 1) the Master Fund did not have beneficial ownership over the shares and accordingly was not subject to Section 16 because it had delegated voting and investment authority to Raging Capital Management and could not acquire voting and investment authority within 60 days; 2) Raging Capital Management was not subject to Section 16 because it was a registered investment adviser pursuant to Rule 16a-1(a)(1)(v); and 3) Martin was not subject to Section 16 because he was a qualifying control person pursuant to Rule 16a-1(a)(1)(vii).

In finding that the Master Fund was a 10 percent owner within the meaning of Section 16, the judge noted that the investment management agreement explicitly provided for Raging Capital Management to act as the "agent" of the Master Fund for all purposes and the parties had the power to alter or even terminate the management agreement at any time. Finally, the judge emphasized that the three defendants were not unaffiliated (or independent) parties, indicating that a delegation of voting and investment authority to an unaffiliated third party may be treated differently. Accordingly, the judge found that there was no effective delegation for purposes of Section 16 and the Master Fund was held liable for short-swing profits. The fact that Raging Capital Management and Martin could rely on exemptions from Section 16 did not alter the final result. The judge found it unnecessary to resolve whether the Master Fund, Raging Capital Management and Martin constituted a "group" whose holding should be aggregated for purposes of the 10 percent owner determination, because the Master Fund alone held in excess of 10 percent of the 1-800-Flowers.com common stock.

Finally, the judge found that the plaintiff was not entitled to any prejudgment interest because there was no showing the defendants acted in bad faith. The judge observed that the matter was complex and that the defendants had acted in good faith, publicly disclosing their ownership in a Schedule 13G filing.

The case is captioned *Brad Packer*, derivatively on behalf of *1-800-Flowers.com, Inc. v. Raging Management, LLC, Raging Capital Master Fund, Ltd, William C. Martin and 1-800-Flowers.com, Inc.*

SEC Increases Registration Statement Filing Fees for Fiscal Year 2020

On August 23, the Securities and Exchange Commission announced that, effective October 1, the fees that public companies and other issuers pay to register their securities with the SEC will increase from $121.20 per million dollars to $129.80 per million dollars, an increase of approximately 7.1 percent. This increase in the SEC registration statement filing fee follows a 2.6 percent reduction in fees from fiscal year 2018 to fiscal year 2019. The fee rate adjustment applies to the filing fee required under Section 6(b) of the Securities Act of 1933 applicable to the registration of securities, the filing fee required under Section 13(e) of the Securities Exchange Act of 1934 (Exchange Act) applicable to the repurchase of securities, and the filing fee rates required under Section 14(g) of the Exchange Act applicable to proxy solicitations and statements in corporate control transactions.

More information on the SEC's fee advisory is available here.

The SEC's order setting the registration fees is available here.

BROKER-DEALER

FINRA Issues Guidance on Member Firms' Supervisory Obligations When Participating in Investment-Related Activities With Municipal Clients

On August 16, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 19-28 (Notice) reminding member firms of their supervisory obligations under FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System) if they 1) hold or transact in customer accounts owned by municipal entities or obligated persons (i.e., municipal clients), as defined in Section 15B of the Securities Exchange Act of 1934, as amended; and 2) participate in investment-related activities with municipal clients (e.g., recommending or selling non-municipal securities products to such municipal clients).

The Notice advises that member firms with municipal clients should evaluate whether such firms must register with the Securities and Exchange Commission and the Municipal Securities Rulemaking Board (MSRB) as "municipal advisors" or if they can rely upon an applicable exclusion from registration and/or a registration exemption.

The Notice also reminds member firms engaging in investment-related activities with municipal clients that they must establish, maintain and enforce supervisory systems and controls pursuant to FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System) that are reasonably designed to prevent and detect unregistered municipal advisory activity and non-compliance with its attendant obligations. In establishing and maintaining a supervisory system and controls that account for the municipal advisor registration requirements, member firms are advised to consider the unique risks of their business activities with municipal clients.

The Notice does not create any new requirements or expectations. Rather, the Notice is intended to assist member firms in complying with their existing obligations under FINRA, SEC and MSRB rules.

The Notice is available here.

CFTC

CFTC Seeks Nominations and Public Comment on Priorities for the Energy and Environmental Markets Advisory Committee

On August 26, the Commodity Futures Trading Commission published a request for nominations (including self-nominations) for associate members of the Energy and Environmental Markets Advisory Committee (EEMAC). The EEMAC is an advisory committee that conducts public meetings and submits recommendations to the CFTC regarding energy and environmental markets and regulation. The CFTC also invited public comment on potential topics for future EEMAC meetings.

The deadline for both submissions is September 20.

More information is available here.

CFTC Announces Market Risk Advisory Committee Meeting on September 9

On August 23, the Commodity Futures Trading Commission announced that its Market Risk Advisory Committee (MRAC) will hold a public meeting via teleconference on September 9 from 3:00 p.m. to 5:00 p.m. (ET).

At the meeting, the MRAC will vote on its recommendation with respect to the disclosures recommended by the Interest Rate Benchmark Reform Subcommittee for new derivatives that reference London Inter-bank Offered Rate (LIBOR) and other inter-bank offered rates. The MRAC also will discuss other issues involving the transition from LIBOR to other rates.

Members of the public may listen to the meeting using the domestic toll-free number +1.866.844.9416 and the conference password 4136858. Lines are limited and available on a first-come first-serve basis.

More information and international dial-in numbers are available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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