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CORPORATE & FINANCIAL
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SEC/CORPORATE

SEC Approves NYSE and NASDAQ New Compensation Committee and Adviser Listing Standards

On January 11, the Securities and Exchange Commission approved final amendments to listing standards submitted by NYSE Regulation, Inc. and NASDAQ Stock Market LLC with regard to the independence of compensation committees and the authority to retain and independence of, compensation consultants and other compensation advisers. The adoption of these listing standards was mandated by Rule 10C-1 under the Securities Exchange Act of 1934.

In general, the listing standards require a listed company to have a compensation committee with specific responsibilities and authority to engage a compensation consultant, independent legal counsel or other advisers; to be provided sufficient funding for that purpose; and to select such compensation legal counsel or other adviser only after taking into consideration a list of enumerated independence factors. The final amendments submitted by both the NYSE and NASDAQ make clear that a compensation committee is not required to conduct the independence assessment with respect to a compensation adviser that acts in a limited role, providing information that is either not customized for a particular company or that is customized based on parameters that are not developed by the adviser and about which the adviser does not provide advice or with respect to an adviser whose role is limited to consulting on any broad based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees.

These exceptions are identical to the current language in the SEC's Regulation S-K Item 407(e)(3)(iii), which exempts those specific categories of compensation advisers from the disclosure requirements of that provision.

In addition, the NYSE amendment clarified that while the compensation committee is required to consider the independence of compensation advisers, the compensation committee is not precluded from selecting or receiving advice from compensation advisers that are not independent. The NASDAQ' listing standards had already included such a provision.

For both NASDAQ and the NYSE these listing standards will become effective beginning on July 1, 2013.

The NASDAQ rule approval is available here.

The NYSE rule approval is available here.

BROKER DEALER

SEC Extends No-Action Letter Permitting Broker-Dealers to Rely on Certain Investment Advisers to Conduct Customer Identification Program Obligations

The Securities and Exchange Commission has extended a no-action letter dated February 12, 2004 (the 2004 Letter) from the Securities Industry Financial Markets Association (SIFMA) that permits broker-dealers, subject to certain conditions, to rely on registered investment advisers to perform some or all of a broker-dealer's customer identification program (CIP) obligations. The 2004 Letter allows broker-dealers, in certain circumstances, to treat investment advisers as if they are subject to an anti-money laundering (AML) program even though the Department of Treasury's Financial Crimes Enforcement Network has yet to adopt an AML program rule for investment advisers. The 2004 No-Action Letter was to be withdrawn on the earlier of (i) the date on which an AML program rule for investment advisers became effective, or (ii) February 12, 2005. Since an AML program rule has yet to become effective, the 2004 Letter was extended, at SIFMA's request, multiple times. In response to SIFMA's most recent request to extend the 2004 Letter, the SEC has extended the 2004 Letter's no-action relief to January 11, 2015.

The CIP obligations require a broker-dealer to adopt written procedures for verifying the identities of customers (CIP Procedures). Broker-dealers may rely on certain financial institutions with mutual customers of the broker-dealer to perform CIP Procedures if the institution is subject to an AML program rule and is federally regulated. Under the 2004 Letter, a broker-dealer may treat an investment adviser as if it is subject to an AML program rule if (i) the broker-dealer's reliance on the investment adviser to conduct CIP Procedures is reasonable and proper due diligence is conducted, (ii) the investment adviser is an SEC-registered US investment adviser, and (iii) the investment adviser agrees in a written contract with the broker-dealer to (a) implement a proper AML program and update it as necessary, (b) perform the required CIP Procedures, (c) disclose promptly to the broker-dealer potentially suspicious or unusual activity, (d) certify annually that representations in such agreement remain accurate and (e) comply with requests for its books and records relating to its CIP Procedures from the broker-dealer, the SEC, the broker-dealer's self-regulatory organization or any authorized law enforcement agency.

Click here to read the SEC's February 2004 No-Action Letter.

FINRA Issues Annual Regulatory and Examination Priorities Letter for 2013

On January 11, the Financial Industry Regulatory Authority (FINRA) issued its annual letter outlining FINRA's regulatory and examination priorities for 2013 to FINRA-registered firms. The letter is meant to highlight to FINRA-registered firms' areas of significance to FINRA's regulatory programs.

In the letter, FINRA stated that it is focusing its resources on how firms are supervising the development of algorithms and trading systems and the need to have adequate testing and controls related to high-frequency trading and other algorithmic trading strategies and trading systems. Potential areas of review will include, among other things: (i) pre-implementation testing of algorithms and trading systems; (ii) design and development of the firm's algorithms and trading systems; (iii) procedures and controls to monitor algorithms and trading systems to detect potential trading abuses; (iv) controls with respect to changes made after an algorithm and trading system is placed into production; (v) firmwide disconnect or "kill" switches; and (iv) procedures for responding to widespread system malfunctions. FINRA also remains focused on the proper use of order origin codes across the options industry

In light of the current market environment, FINRA is concerned about sales practice abuses, yield-chasing behaviors and the potential impact of a market correction, external stress event or market dislocation. FINRA is continuing to focus its efforts in areas such as suitability and complex products and firms' and brokers' understanding of such products. Among the products FINRA listed in its letter as those on which FINRA will focus its examination efforts include private placement securities, business development companies, leveraged loan products, commercial mortgage-backed securities, high-yield debt instruments, structured products, exchange-traded funds and notes, non-traded REITS, closed-end funds, municipal securities and variable annuities. In addition, FINRA remains concerned about firms' ability to fund their activities under stress conditions and is focusing its efforts on net capital issues and protection of customer funds and assets.

Click here to read FINRA's January 11, 2013 Letter.

CFTC

CFTC Issues Exemptive Order to ICE Clear Credit Permitting Commingling and Portfolio Margining of Cleared Credit Default Swaps and Security-Based Swaps

The Commodity Futures Exchange Commission has issued an exemptive order (Order) that permits the commingling and portfolio margining of cleared credit default swaps (CDS) and security-based swaps (SB CDS). The Order was issued in response to a request submitted by ICE Clear Credit LLC (ICC) in late 2011, and follows a complementary exemptive order issued by the Securities and Exchange Commission on December 19, 2012 (as reported in the December 21, 2012, edition of *Corporate and Financial Weekly Digest*), in which the SEC exempted dually registered broker dealers (BDs) and futures commission merchants (FCMs) from provisions of the Securities Exchange Act of 1934 and SEC regulations that would otherwise prohibit the commingling and/or portfolio margining of customer positions in cleared CDS and SB CDS that are held in customer accounts maintained in accordance with Section 4d(f) of the Commodity Exchange Act.

Subject to the conditions outlined in the Order, ICC and its clearing members that are dually registered as BDs and FCMs may hold in the same Section 4d(f) cleared swaps account customer collateral securing positions in cleared CDS and SB CDS. The Order further allows for the portfolio margining of such cleared CDS and SB CDS.

The Order can be found here.

LITIGATION

Life Sciences Company Obtains Dismissal of Shareholder Class Action

The US District Court for the Middle District of Tennessee recently granted BioMimetic Therapeutics Inc.'s motion to dismiss the class action against it, and denied plaintiffs leave to amend their complaint. Shareholders claimed that BioMimetic violated the Securities and Exchange Act of 1934 because it knowingly made material representations about the development process and approval prospects of its flagship product, Augment, a synthetic bone-growth factor for the surgical treatment of foot and ankle bone defects.

Specifically, plaintiffs alleged that the Food and Drug Administration (FDA) sent BioMimetic a deficiency letter detailing the regulatory agency's concerns about Augment's clinical trials, and in particular the company's decision to change the study population so the resulting data would cast the product in a more favorable light. BioMimetic, however, allegedly failed to disclose those issues, and instead painted an unjustifiably rosy picture of Augment's progress towards approval. When the FDA later convened a panel of experts to review the product, the contents of the deficiency letter came to light and caused a 35% drop in BioMimetic's share price. After the panel narrowly voted to approve Augment, shares sunk another 12%.

Notwithstanding plaintiffs' identification of confidential witnesses, the court found the overall allegations did not satisfy the pleading requirements of the Private Securities Litigation Reform Act. First, the court determined that the company made no false statements because it disclosed and sought to explain the change in Augment's study population. Second, BioMimetic's single stock offering—months before it received the deficiency letter—did not give rise to an inference of scienter. Moreover, the court noted that the company never suggested FDA approval was certain, and instead consistently framed its statements with a forward-looking-statement disclaimer.

Most significantly, the court sought to define when a life sciences company must disclose the contents of a deficiency letter. Though it remains an open question, the decision strongly suggests that no such duty exists. Noting that "a deficiency letter is not a final FDA decision, but a request for more information," the court explained that not "every critical comment by a regulatory agency has to be seen as material for securities law reporting purposes." If companies were obligated to report everything, the "flood of data" would ultimately be unhelpful, as uninformative noise would drown out key facts.

Sarafin v. BioMimetic Therapeutics Inc. et al., No. 3:11-06533 (M.D. Tenn. Jan. 10, 2013).

Delaware Supreme Court Refines Standard for Missed Pre-Trial Deadlines

The Delaware Supreme Court recently announced a new standard refining the rules that govern litigants' requests for extensions. Since 2010, the "*Drejka* analysis" provided a six-factor test to apply when considering whether to dismiss a case for discovery violations. However, the Delaware Supreme Court realized that trial courts have struggled to apply those factors consistently.

Now, the Delaware Supreme Court has provided useful "practice guidelines" that aim to prevent courts from having to engage in a *Drejka* analysis at all. In the most important of four appeals decided together, plaintiffs were the wife and children of a man who committed suicide shortly after visiting the defendant health care provider. Both sides agreed informally that plaintiffs could file their expert report *after* the deadline set in the court's scheduling order.

Plaintiffs did not file the expert report within the extended deadline, but they did request a conference with the court to discuss, among other things, the discovery schedule. The trial court refused to hold a conference, and the parties then resolved scheduling issues on their own. Five weeks before trial was set to begin, however, defendants filed a motion to preclude plaintiffs' expert testimony, which had only recently been identified. The court granted the motion, and defendants won on summary judgment. Plaintiffs appealed.

In reversing the judgment, the Delaware Supreme Court highlighted the inconsistency in permitting a party to demand enforcement of deadlines when it previously granted extensions. To strike the proper balance between fairness to litigants and efficient court administration, the Delaware Supreme Court advised that, in the future, parties who act without court approval "do so at their own risk."

If one side misses a discovery deadline, opposing counsel has two choices: (1) promptly notify the court by a motion to compel, proposal to amend the scheduling order or request for a conference; or (2) resolve the matter informally, thereby waiving the right to contest late filings from that time forward. Though litigants may continue to resolve scheduling issues informally, they are now expected to file timely proposed amended scheduling orders. The Delaware Supreme Court believes this approach will best support the state's strong public policy of deciding cases on the merits.

Christan v. Counseling Resource Associate, Inc., C.A. No. 09C-10-202 (Del. Supr. Jan. 2, 2013).

BANKING

Consumer Financial Protection Bureau Releases Final Mortgage Servicing Rules

On January 17, the Consumer Financial Protection Bureau (CFPB or Bureau) published its final rules related to consumer mortgage loan servicing.

Typically, mortgage servicers are responsible for collecting payments from mortgage borrowers on behalf of loan owners and are responsible for collecting borrower payments and handling issues related to customer service, escrows, collections, loan modifications and foreclosures on behalf of the loan owner. Most often, such servicers are selected by mortgage note holders, not consumers.

The final rule contains a number of protections for consumers who are having difficulty with their mortgage obligations, including the following: (1) a provision that prevents "dual tracking" of delinquent loans, which involves the commencement of a foreclosure proceeding at the same time a consumer seeks a loan modification; (2) a provision that prevents servicers from making the first notice or filing required in the foreclosure process until a mortgage loan account is more than 120 days delinquent; (3) a requirement that servicers provide consumers with personnel responsible for assisting them when repayment difficulties arise; and (4) a requirement that servicers consider and respond to a borrower's application for a loan modification if it arrives at least 37 days before a scheduled foreclosure sale.

In addition, the final rule requires that mortgage servicers provide to all consumer borrowers enhanced disclosures, including monthly mortgage statements that contain prescribed information (including a breakdown of

payments by principal, interest, fees and escrow amounts) as well as an "early warning" disclosure to most consumers before their interest rate adjusts.

The final rule includes certain exemptions for small servicers that service 5000 or fewer mortgage loans that they or an affiliate either own or originated.

The final rule goes into effect mid-January 2014.

For more information, click here.

ANTITRUST

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

The Federal Trade Commission 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 11, 2013.

Under the HSR Act, mergers or acquisitions of voting securities, interests in unincorporated entities such as LLCs, 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 $68.2 million to $70.9 million. Therefore, no HSR filing will be required if, as a result of the acquisition, the acquiring person will hold less than $70.9 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 $14.2 million and the other "Person" must have net sales or total assets of at least $141.8 million. It should be noted that the "Size of Person" test does not apply for transactions valued above $283.6 million.

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

Fee	Transaction Size
$45,000	$70.9 million - $141.8 million
$125,000	$141.8 million - $709.1 million
$280,000	$709.1 million and above

Read more.

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