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CORPORATE & FINANCIAL
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SEC/CORPORATE

SEC Launches Public Website for Analyzing Exchange Data

On October 9, the Securities and Exchange Commission launched a new website (www.sec.gov/marketstructure) designed to provide investors and other market participants with the ability to analyze market metrics and to access the SEC's empirical research and analyses on market structure. The new website disseminates aggregated data drawn from the SEC's Market Information Data Analytics System (MIDAS), which provides the SEC with a billion records each day from the consolidated tapes and feeds of national securities exchanges. The SEC's new website makes data available to users in customizable charts and graphs, including:

- Ratios related to the number and volume of orders that are canceled instead of traded;
- Percentage of on-exchange trades and volume that are not disseminated on the public tape (odd-lot trades);
- Percentage of on-exchange trades and volume that are the result of hidden orders; and
- Quarterly distributions analyzing the lifetime of quotes ranging from one millionth of a second to one day.

The website also allows users to compare and contrast data series according to a number of metrics, to explore detailed quote lifetime distributions and to download data to perform their own evaluations. Additionally, this new website includes SEC staff research papers.

The SEC's MIDAS website launch announcement is available here.

New York Stock Exchange Proposes New Rules to Harmonize Quantitative Continued Listing Standards and Modify Reverse Merger Listing Requirements

On October 8, the New York Stock Exchange proposed an amendment to Section 802.01B of the NYSE Listed Company Manual that would apply the same financial compliance standards for continued listing on the NYSE to all operating companies. While all NYSE-listed operating companies are subject to continued listing requirements to maintain a minimum stock price and minimum total market capitalization, currently all listed operating companies are subject to additional continued listing standards that vary based on the initial listing standard under which a company was originally listed. Under the proposed rule, a listed operating company would not meet the compliance standards if "its average global market capitalization over a consecutive 30 trading-day period is less than $50,000,000 and, at the same time, its total stockholders' equity is less than $50,000,000."

In its proposal, the NYSE noted that under the current regime, there is potential for disparate and unfair treatment of companies that may be deemed noncompliant under the continued listing standards applicable to them, but would be considered compliant under other continued listing standards. The NYSE noted that, although the proposed continued listing standard for the minimum average market capitalization is lower than quantitative requirements under other current continued listing standards, they believe the change will not result in any meaningful weakening of the quality of listed companies.

The NYSE has requested approval of the proposed rule change by the Securities and Exchange Commission on an accelerated basis.

In addition, on September 16, the NYSE proposed an amendment to Section 102.01F of the NYSE Listed Company Manual to modify, in one respect, the circumstances under which a company that emerges from a “reverse merger” with a “shell company” may be eligible to list on the NYSE (to harmonize with requirements imposed by the NASDAQ Stock Market). Prior to the NYSE’s amendment proposal, a “reverse merger company” was first eligible to list on the NYSE only if it had timely filed with the SEC all required reports *since the consummation of the reverse merger* (including the filing of at least one annual report containing all required audited financial statements for a full fiscal year commencing on a date after the date of filing with the SEC the company’s “super Form 8-K” or other applicable form containing the requisite Form 8-K information). As modified by the amendment, a reverse merger company may list if, as of the date of listing, it has filed all required reports since the reverse merger, including (i) the filing of at least one annual report containing all required audited financial statements for a full fiscal year commencing on a date after the date of filing with the SEC of the “super Form 8-K” and (ii) the timely filing of all required reports *for the most recent 12-month period prior to the listing date*. This amendment has become effective.

To read the text of the proposed rule changes, click here.

To read additional text of the proposed rule changes, click here.

BROKER DEALER

SEC Re-opens Comment Period for Amendments to Regulation D, Form D and Rule 156

As reported in the *Corporate & Financial Weekly Digest* of July 12, 2013, we summarized proposed amendments to Regulation D, Form D and Rule 156. The expiration of the original comment period relative to the proposed amendments was September 23, 2013. However, in light of public interest in the proposed amendments, the Securities and Exchange Commission has re-opened the comment period until November 4, 2013.

Click here for SEC release.

FINRA Discusses Suitability Rule Examination Findings

The Financial Industry Regulatory Authority, Inc. has released a Regulatory Notice regarding Rule 2111 (Suitability). Regulatory Notice 13-31 does not create or alter existing guidance and interpretations with respect to the suitability rule, rather it shares common findings and observations of effective practices implemented by member firms. Although the Regulatory Notice stresses that there is no “one-size-fits-all approach to compliance and supervision[,]” it sets forth observations regarding effective practices, such as:

- New product vetting processes;
- Product-focused training of associated persons, supervisors and compliance staff;
- Updated customer account forms;
- Use of electronic customer relationship management systems;
- Heightened customer-specific suitability requirements or specific suitability profiles; and
- Account opening documents tailored to institutional customers or use of certifications with respect to the institutional-customer exemption.

Additionally, FINRA noted that the most common examination deficiency was inadequate procedures with respect to recommendations to customers to hold particular investments. In this regard, the Regulatory Notice also notes effective practices with respect to hold recommendations, such as: use of hold tickets or blotters to capture recommendations, maintaining notes of discussions with customers and modification of customer account forms.

Click here for the Regulatory Notice.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

Government Publishes Study of Systemic Risks in Asset Management

On September 30, the US Treasury's Office of Financial Research published a study (Study) commissioned by the Financial Stability Oversight Council (FSOC) that explores possible ways in which asset management firms and their activities might pose, amplify or transmit threats to financial stability. The Study, which is entitled "Asset Management and Financial Stability", is the first concrete step taken by FSOC towards considering whether large asset managers should be subjected to enhanced prudential standards and supervision under Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Study concludes that (i) the asset management industry has some unique vulnerabilities to financial shocks, (ii) asset managers can transmit risks across the financial system, and (iii) there are some significant data gaps that impede effective macroprudential analysis and oversight of asset management firms and activities.

The Study is available here.

The chairperson of the Securities and Exchange Commission is a member of FSOC, but the SEC was not otherwise involved in commissioning or writing the Study. Nevertheless, the SEC has made a request for public "feedback" on the Study via a website that will be open until November 1, 2013.

The SEC request for feedback is available here. No request for comments or feedback has been made by FSOC.

LITIGATION

Second Circuit Affirms Canadian Mining Company's Victory in Securities Fraud Suit

A three-judge panel of the US Court of Appeals for the Second Circuit recently upheld the dismissal of a multidistrict class action against Canadian mining company Agnico-Eagle Mines Limited (Agnico) and its executives, who allegedly concealed and misrepresented structural issues with a particular mine and caused a $2.2 billion shareholder loss.

According to plaintiffs, in March 2010, Agnico conducted a major blast at its Goldex mine in Quebec. This excavation caused immediate and lingering structural issues. In October 2011, the company made a surprise announcement that it was shutting down Goldex. In response, Agnico's share price dropped nearly 25 percent within two days. Multiple plaintiffs sued, and the cases were consolidated in the US District Court for the Southern District of New York.

In January 2013, US District Judge J. Paul Oetken granted the defendants' motion to dismiss and denied plaintiffs' request for leave to amend the complaint. By summary order dated October 3, 2013, the Second Circuit panel affirmed the lower court's "thorough" opinion, which held that plaintiffs failed to plead facts sufficient to support a strong inference of scienter.

The court found plaintiffs' "very general" allegations insufficient to support an inference of fraudulent intent under a "motive and opportunity" theory. Moreover, given the timing of the Goldex announcement just prior to a major deal closing, the court noted that plaintiffs' improper motive argument "runs aground when tested by common sense."

Nor was the court persuaded by plaintiffs' claim that Agnico and its executives knew or should have known facts about Goldex that they deliberately or recklessly did not disclose. Declining to permit a "fraud by hindsight" theory, the court held that there was no evidence—and even contrary evidence—that defendants knew before October 2011 that the mine might need to be closed. And, even if they had such knowledge, the court explained that the defendants reasonably considered the risk entailed by available information and believed they need not share that information with the public.

Finally, the court noted that plaintiffs declined earlier opportunities to amend, and made their request in a single sentence. Consequently, the court explained that it had no information as to what changes any amendment would effect, nor any sense of what additional facts might entitle plaintiffs to relief. As such, the court denied plaintiffs leave to amend on the grounds of futility.

In re Agnico-Eagle Mines Ltd. Securities Litig., Case No. 13-0511 (2d Cir. 2013).

Admissions of Wrongdoing in SEC Settlement Lead to Ban From Managing Any New York Licensed Insurer

The New York State Department of Financial Services (DFS) recently announced that hedge fund advisor Philip Falcone (Falcone), and all employees of his firm Harbinger Capital Partners (Harbinger Capital), are banned for seven years from exercising direct or indirect control over Fidelity & Guaranty Life, a New York insurer partly owned by Falcone and Harbinger.

As reported in the *Corporate & Financial Weekly Digest* of August 30, 2013, Falcone settled two enforcement actions with the Securities and Exchange Commission. The settlements filed with the US District Court for the Southern District of New York were significant because the SEC required Falcone and Harbinger Capital to admit to allegations concerning improper loans, preferential treatment for certain investors and an illegal "short squeeze" of one company's bonds to punish a financial services firm.

These admissions marked a departure from the SEC's policy of permitting defendants to settle cases while neither admitting nor denying the relevant factual allegations. The DFS decree illustrates one of the many collateral consequences that may arise from the SEC's new policy.

According to DFS, the SEC settlement raised "serious issues" as to Falcone's fitness to oversee or participate in the management and operations of an insurance company. As a result, DFS ordered that he and all Harbinger Capital employees be banned from such activity for seven years.

The DFS decree raises the possibility that defendants in SEC enforcement proceedings will be less willing to settle due to the risk of unforeseen collateral consequences arising from SEC settlements with mandatory factual admissions.

The DFS Announcement is available here.

BANKING

OCC Updates Bank Accounting Advisory Series

On October 10, the Office of the Comptroller of the Currency (OCC) released an update to the Bank Accounting Advisory Series (BAAS).

The BAAS covers a variety of topics and promotes consistent application of accounting standards among national banks and federal savings associations. The update includes recent answers to frequently asked questions from the industry and examiners covering areas such as acquired loans, other real estate owned, transfers of servicing and fair value accounting. According to the OCC, "the BAAS does not represent official rules or regulations of the OCC. Rather, it represents the OCC's Office of the Chief Accountant's interpretations of generally accepted accounting principles and regulatory guidance based on the facts and circumstances presented." National banks and federal savings associations that deviate from these stated interpretations "may be required to justify those departures to the OCC."

The OCC plans to update the BAAS at least annually.

The OCC BAAS of September 2013 is available here.

FFIEC Warns on Windows XP

On October 7, the Federal Financial Institutions Examination Council (FFIEC) issued a joint statement alerting financial institutions that the discontinuation of support (also known as “end of life”) for the Microsoft Windows XP operating system (XP) could present operational risks to financial institutions, technology service providers (TSPs), and to activities supported by other third parties.

Effective April 8, 2014, Microsoft will no longer market, support or provide regular security patches for XP. The Office of the Comptroller of the Currency (OCC), for its part, “expects national banks, federal savings associations, and their TSPs to identify, assess, and manage these risks to ensure that safety, soundness, and the ability to deliver products and services are not compromised.”

Questions regarding the FFIEC statement should be directed to the OCC’s Bank Information Technology Division at +1.202.649.6340.

The joint statement is available here.

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