SCHIFF HARDIN LLP

Spring 2013

Our Valued Friends and Clients:

We are happy to present the latest edition of *The Schiff Hardin Public Company Adviser*, the quarterly newsletter of Schiff Hardin's Public Companies Group. Each quarter we issue a collection of articles to provide information and insights on certain legal issues applicable to public companies, to update you on recent developments and to highlight some of the key work Schiff Hardin is doing in the public companies arena.

In this Spring 2013 edition, we present the following articles generally relevant to public companies and the operation of your businesses.

- ***Amgen and Gabelli Decisions*** — We first discuss the implications of two recent Supreme Court decisions concerning the securities laws. *(See Page 2)*
- ***SEC Guidance on Use of Social Media*** — We then summarize recent guidance issued by the SEC concerning the use of social media in light of the requirements of Regulation FD. *(See Page 3)*
- ***Rule 10b5-1 Plans*** — We next provide some commentary on the need for the use of waiting periods in connection with Rule 10b5-1 Plans. *(See Page 5)*
- In the ***Also Of Interest*** section, we highlight a few additional developments in the public companies arena. *(See Page 8)*
- Finally, in the ***Spotlight on Schiff Hardin*** section, we provide a brief review of some recent additions at Schiff Hardin. *(See Page 10)*

We hope you enjoy this edition of *The Schiff Hardin Public Company Adviser* and find its content both informative and useful.

Review and Implications of Recent Supreme Court Securities Law Decisions

On February 27, 2013, the Supreme Court decided two cases under the federal securities laws, one a victory for plaintiffs in class actions for damages, the other a victory for defendants who may be the subject of an SEC enforcement action.

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), the Court held, in a six to three decision, with Justice Ginsburg writing for the majority in a fascinating debate with Justice Thomas in dissent, joined by Justices Scalia and Kennedy.

In a class action under Rule 10b-5, the plaintiff class representative often relies on the fraud-on-the-market ("FOM") presumption to prove the substantive element of reliance on the defendant's deceptive statements. This presents an issue common to all class members, thereby avoiding the potentially class certification-defeating argument that reliance is a predominant individual issue.

Amgen held that although the materiality of the deceptive conduct at the heart of the claim is an essential element for invoking the FOM presumption, materiality is not a litigable issue at the class certification stage. It need not be proven at that stage; it need only be alleged sufficiently to survive a motion to dismiss. Materiality will first be addressed on the merits on summary judgment or at trial. Accordingly, at the certification stage, the defendant cannot rebut the FOM presumption, and thus defeat certification, by disproving the materiality of the deception or showing that the market was not deceived because the truth had been disclosed (the truth-on-the-market defense).

It is generally recognized that if a securities case is certified for class action treatment, the pressure on the defendant to settle is substantially increased. This concern did not sway the majority. Thus, while other recent decisions of the Court have made class certifications more difficult, *Amgen* was a victory for securities class action plaintiffs.

When certiorari was granted some among the defense bar hoped that the Court would use the case as a vehicle to revisit the FOM doctrine itself, especially in light of the fact that the case that approved that presumption in cases under Rule 10b-5, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), was a four-to-two decision with three (conservative) justices not participating. In *Amgen* the Court did not reassess *Basic*. However, four justices expressed views suggesting that there may be the necessary votes to grant certiorari in a case that raises that issue. Justice Alito joined the majority opinion but separately stated that the FOM presumption "may rest on a faulty economic premise." Justice Scalia, dissenting, observed that the presumption was "invented by the Court" in *Basic* and that the majority in *Amgen* accepted what "some consider the regrettable consequences of the four-Justice opinion in *Basic*." The principal dissent, by Justice Thomas, joined by Justices Scalia and Kennedy, stated that the decision in *Basic* is "questionable."

Optimism that the FOM presumption will be reconsidered any time soon must be tempered by recognition of the practical hurdles to getting such a case before the Court. Very, very few securities class actions go to trial, and fewer still result in a judgment adverse to the defendant which is then affirmed on appeal before settling. The likelihood of a case reaching the Court after trial is thus very small.

Many of the securities law cases heard by the Court are at an interlocutory stage. For a substantive FOM issue to get to the Court, however, the defendant would have to argue in opposition to class certification in the district court that the FOM presumption should not be applied as a matter of law. Because *Basic* is still good law, one would expect a district court to reject that argument. If the class is certified applying FOM, the defendant would then have to seek leave from the court of appeals to present that issue on an interlocutory basis under Rule 23(f) of the Federal Rules of Civil Procedure. Again, because *Basic* is the governing law, if that were the only issue presented for appeal, the court of appeals is not likely to grant leave to appeal, unless the motions panel saw the case as a vehicle to set the stage for a petition for certiorari after affirming class certification on FOM grounds. Only then would the case be ripe for a petition for certiorari.

For now, plaintiffs' ability to achieve certification where the FOM presumption is available is undiminished. There are other hurdles, but proving materiality is no longer one of them.

Gabelli v. SEC, 133 S. Ct. 1216 (2013), also answered a direct question, but left others unanswered. For some time it has been settled that the statute of limitations applicable to an SEC enforcement action seeking a penalty is five years from the date when the claim first accrued. The question addressed in *Gabelli* was whether that time period commences when the violation is complete or only when the violation is discovered by the SEC.

In a unanimous opinion written by Chief Justice Roberts, the Court held that the claim is barred five years after the violation, with no gloss that the claim does not accrue until the claim is first discovered or could have been discovered in the exercise of reasonable diligence.

The import of the decision is that a potential subject of an SEC enforcement action for a penalty can rest easily once five years have elapsed after the violation. (Of course, the Division of Enforcement may seek a tolling agreement from someone who is under investigation.) Nothing in *Gabelli*, however, affects the principle that there is *no* statute of limitations where the relief sought is remedial; the Court expressly noted that the question was not before it, because the only relief at issue when the case reached the Court was a civil monetary penalty. Likewise, the Court did not have to explain the distinction between what relief is punitive and what is remedial, something that is not always clear. For example, is a director and officer bar imposed to protect the public (remedial) or to punish the wrongdoer (penalty)?

The Court also did not address whether affirmative action by a defendant to conceal the wrongful conduct, beyond any self-concealing feature of the violation itself, would toll the statute of limitations. The SEC had abandoned any reliance on that argument in the case. *Gabelli* thus resolved one important issue, and left others for another day.

SEC Issues Guidance on Social Media and Regulation FD

Noting its awareness of the increased use by public companies of social media outlets such as Facebook and Twitter as a means to disseminate information and a perceived lack of certainty as to the application of Regulation FD and prior SEC guidance in the area, on April 2, 2013 the SEC published its Report of Investigation (the "Report") resulting from its investigation of disclosure by the CEO of Netflix of data regarding customer usage of streamed content on his personal Facebook page in July 2012. A copy of the report is available **here**. The Facebook posting stated that monthly viewing had exceeded one billion hours for the first time, a nearly 50% increase from data announced six months earlier. In the wake of the posting, the Netflix stock price had increased from $70.45 to $81.72 within a two day period. The information was not otherwise disseminated by Netflix via press release or Form 8-K. Nor had investors been previously notified that the CEO's Facebook page would be used as a source of significant information concerning the company.

In the Report, the SEC cautioned that public companies must consider whether the dissemination of material nonpublic information through social media outlets is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" as required by Regulation FD. The SEC concluded that dissemination of material nonpublic information through a personal social media site, without advance notice that such a site would be used for such purposes, is unlikely to meet this broad, non-exclusionary distribution test. Further, the Commission noted that the principles outlined in its prior "2008 Guidance on Web Site Usage" apply "with equal force to corporate disclosures made through social media channels."

Regulation FD generally prohibits a public company from selectively disclosing material nonpublic information to certain enumerated persons, including securities market professionals and holders of the company's securities, who may trade on the basis of the information. Regulation FD "is intended to ensure that all investors have the ability to gain access to material information at the same time." Accordingly, pursuant to Regulation FD, whenever a public

company or a person acting on its behalf intentionally discloses material nonpublic information to the persons enumerated in Regulation FD, the company must disseminate the information to the public simultaneously. If the information is unintentionally disclosed to any enumerated persons, the information must be publicly disseminated promptly.

In 2008, the SEC published its "2008 Guidance on Web Site Usage" (the "2008 Guidance"). In this 2008 Guidance, a copy of which is available **here**, the SEC addressed whether disclosures on a company Web site should be considered "public" for purposes of Regulation FD. The SEC noted that information posted on a company's Web site is "public" if it is a "recognized channel of distribution." The 2008 Guidance provided a non-exhaustive list of factors to consider in evaluating whether a posting to the company's Web site qualifies under Regulation FD. Among the key factors noted are: (i) whether and how the company has let investors and the market know that it uses the particular Web site and that it will disseminate information through that Web site; (ii) the prominence and accessibility of the information disclosed through the Web site to investors and the market; (iii) the extent to which the company keeps the information on the Web site current; and (iv) whether the market readily picks up the information disclosed through the Web site.

Based on the 2008 Guidance and the SEC's more recent Report, before utilizing social media outlets to disseminate material nonpublic information, public companies should provide adequate advance notice of those outlets that they plan to use for disclosure of significant company information. Companies should also determine whether information disclosed through such social media outlets will be considered "disseminated" to investors and the securities market in light of the 2008 Guidance and the Report. Furthermore, even if a company determines that it can effectively disseminate material information via social media outlets, it should consider whether to also continue to disseminate material nonpublic information through "traditional" distribution channels, such as press releases and Form 8-K reports in order to meet Regulation FD's requirement of broad, non-exclusionary distribution of the information to the public. A company should also consider filing or furnishing a current report on Form 8-K or issuing a press release that alerts the public of any plans to disclose important information at a specified time through an identified social media outlet.

The following are a few additional practice tips to consider if your company wishes to utilize social media outlets as a means to publish company information:

- In determining which social media outlet to utilize for this purpose, consider which would be most appropriate for your company, your investors and those that follow your stock and examine the non-exhaustive factors listed in the 2008 Guidance in making this determination to ensure Regulation FD compliance.

- Consider a review and evaluation of your Regulation FD policy and other procedures to reflect your intentions to develop a practice around utilizing social media. Also consider whether your disclosure controls and procedures sufficiently cover this practice. Finally, develop a plan and protocols around how postings will be made. For instance:

    - How will the company determine which information will be posted?

    - Can you ensure compliance with other requirements such as non-GAAP reconciliations and forward-looking statement disclosures when utilizing that social media outlet?

    - What authorizations will be necessary prior to posting?

    - Who will control the dedicated social media account?

    - Can you provide for sufficient security for the social media outlet and prevent hacking?

- Clearly notify investors and the market of your intentions to utilize the social media outlet for disclosure purposes. Once you have notified the market of such intentions, follow-through with your stated intentions and keep the postings current as these are important factors for Regulation FD compliance and the SEC's prior guidance.

Fine-Tuning the 10b5-1 Plan: Is a Waiting Period Necessary?

There has been a flurry of commentary in recent months about the now familiar Rule 10b5-1 plan ("Plan"), which allows an investor to avoid insider trading liability by adopting a plan, independently administered by a third-party such as a broker, to execute purchases or sales of securities in accordance with specific instructions or a formula. If the Plan was established when the buyer or seller (the "creator" of the Plan) was not aware of material non-public information ("MNPI") regarding the security, transactions in compliance with a Plan will not present issues of unlawful insider trading even if the person *does* know MNPI at the time of the trade. This article addresses, and suggests stepping back and taking a breath before adopting, any recommendation that there must be a delay between adoption of a Plan and any trade under the Plan.

Reliance on a Plan is important, because when it adopted Rule 10b5-1 the SEC declared that compliance with the rule, such as through a Plan, was the *exclusive* means of defending a charge of insider trading where the trader was in possession of MNPI at the time of the trade. That is, the rule is not a non-exclusive safe harbor.[1] While there is reason to doubt the validity of this stringent approach, the SEC's position has not yet been tested in court.[2]

The most recent spate of commentary was prompted by a report in the *Wall Street Journal* of abnormal returns by corporate executives known or believed to have Plans in place, especially for selling company stock.[3] This is nothing new — the possibility that persons using Plans have beaten the market has been noted before.[4] At that time, the Staff of the SEC stated that it was going to look "hard" at whether Plans "are being abused in various ways to facilitate trading based on inside information."[5] Since then, the SEC has brought only one case where abuse of Rule 10b5-1 was an issue, and that involved an alleged wide-ranging fraud.[6]

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1 Selective Disclosure and Insider Trading, SEC Rel. No. 33-7881, 65 Fed. Reg. 51716, 51727 (Aug. 24, 2000).

2 *See* Allan Horwich, *The Origin, Application, Validity and Potential Misuse of Rule 10b5-1*, 62 BUS. LAW. 913, 943-49 (2007).

3 Susan Pulliam & Rob Barry, *Executives' Good Luck in Trading Own Stock*, WALL ST. J. Nov. 27, 2012, http://online.wsj.com/article/SB10000872396390444100404577641463717344178.html (subscription required). More recently, see Susan Pulliam & Rob Barry, *Directors Take Shelter in Trading Plans*, WALL ST. J. Apr. 25, 2013.

4 Alan D. Jagolinzer, *Do Insiders Trade Strategically within the SEC Rule 10b5-1 Safe Harbor?* (Dec. 6, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=541502.

5 Linda Chatman Thomson, Director, SEC Division of Enforcement, Remarks at the 2007 Corporate Counsel Institute, at 10 (Mar. 8, 2007), http://www.sec.gov/news/speech/2007/spch030807lct2.htm (citing the Jagolinzer study, *supra* note 4).

6 S.E.C. v. Mozilo, No. CV 09–3994–JFW (MANx), 2010 WL 3656068, at *20 (C.D.Cal. Sept. 16, 2010) (finding that the SEC had raised genuine issues of material fact that Angelo Mozilo was aware of MNPI when he entered into Rule 10b5-1 plans to sell stock of Countrywide Financial Corporation). The case was settled a month later. SEC Press Release, Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against a Public Company's Senior Executive (Oct. 15, 2010), http://www.sec.gov/news/press/2010/2010-197.htm. The SEC had earlier charged Kenneth Lay of Enron Corp. with making trades pursuant to non-compliant Rule 10b5-1 plans. SEC Litigation Release No. 18776, SEC Charges Kenneth L. Lay, Enron's Former Chairman and Chief Executive Officer, with Fraud and Insider Trading (July 8, 2004).

Very recently, one SEC staff member, speaking for himself, observed that the fact that executives using Plans may fare better in their trading than the average shareholder is not that surprising.[7] At the same time, this staffer was reported as saying that the Division of Enforcement would "love to catch" a chief executive officer abusing a Rule 10b5-1 plan and "and use him as an example," that the SEC is "looking for big cases to send a message."[8]

Because of this renewed focus on the possible abuse of Plans, commentators have updated their suggestions for "best practices" in adopting Plans. A common theme in these prescriptions is to have a waiting period between the adoption of the Plan and the earliest a trade can be executed. The suggestions are to delay any trading for as long as three months. One advocacy group has asked the SEC to impose a waiting period of "three months or more." This proposal, coupled with more transparency regarding the Plans — which currently need not be disclosed[9] — is sought to restore public confidence with respect to purchases and sales by insiders.[10]

The rationale for this hiatus as a best practice is the following: A Plan is valid only if it is entered into when the creator was not aware of MNPI. If the Plan is structured so that a trade occurs soon after creation, it may suggest that the creator knew, or had a very strong reason to expect, that one or more trades would occur that would be advantageous in light of imminent revelations. If this happens, at the very least a bright light of suspicion may shine on the trading. For example, if a Plan is put in place in mid-April, stock sales occur in May and in early June the company announces some negative event such that the stock price falls below the price at which sales were made under the Plan, there may be suspicion that *in fact* the creator of the Plan knew that bad news was coming and used the Plan as a vehicle for making sales that might escape scrutiny. If, however, the thinking goes, there are not near-term trades — because there can't be under the Plan — any eventual transaction is not likely to be suspect.

The best practice is for the Plan of a corporate officer or director to be subject to approval of the corporation, usually the office of the General Counsel or similar function. This should be part of the company's insider trading policy. (If the company does not have a comprehensive written trading policy, there is no good excuse for not having one.) The policy may impose other restrictions on Plans, such as requiring that they be entered into only when the creator of the Plan could otherwise engage in a trade. This is usually when the company's trading window is "open," such as the period beginning soon after the quarterly earnings release. To this extent commentators are in accord. The question next addressed is whether a waiting period is needed or advisable, as many urge.

The best answer is that a waiting period is not legally necessary and its prophylactic value has to be assessed under the circumstances of each company. A delay in allowing sales or purchases under a Plan significantly impairs the ability to take advantage of the benefits of Rule 10b5-1, which are undoubtedly important for corporate executives and directors, who often — sometimes unexpectedly — become aware of MNPI. It is important to recognize that if the Plan was not created in accordance with Rule 10b5-1, no delay in trading will cure that defect. The SEC staff has stated that a Plan is not valid if it was structured so that no trades can occur until after whatever MNPI was known to the creator at the time of execution of the Plan became public.[11] In other words, the passage of time will not cure a Plan that was

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7 Yin Wilczek, *No Conclusion on 10B5-1 Plans, But SEC Monitoring Situation, Official Says*, BNA Securities Law Daily, Apr. 19, 2013 (reporting remarks of Thomas Kim, chief counsel of the SEC Division of Corporation Finance).

8 *Id*

9 The SEC had proposed requiring disclosure of Plans in the Form 8-K. This proposal has never been adopted. Plans are disclosed in an almost incidental fashion. The Form 144 for stock sales by affiliates may imply use of a Plan, reliance on a Plan may be reflected on a Form 4, or the company or insider may otherwise voluntarily disclose the existence of a Plan, before or after transactions occur. *See generally* Horwich, *supra* note 2, 62 BUS. LAW. at 934-43.

10 Letter, Council of Institutional Investors to Chairman Walter of the SEC, Dec. 28, 2012, http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%20_10b5-1_trading_plans.pdf.

11 Exchange Act Compliance and Disclosure Interpretations Question 120.20 (Mar. 25, 2009).

not valid when adopted. A waiting period does not enhance, much less provide, a defense to a charge of unlawful trading.

The hope is thus that trades made pursuant to a Plan with a waiting period will escape the attention of persons who scrutinize insider stock trading, such as through review of Forms 4, in order to identify suspicious trades. Of course, if the reliance on a Plan and the date of adoption are not disclosed up front, the existence of an undisclosed interval will not put someone off the scent. If someone does inquire about a trade that seems to have occurred at an unusually opportune time, the company, or insider, can respond *then* that it was made pursuant to a Plan that was set up (long) before the trade, suggesting that nothing in the nature of MNPI was, or even could have been, known to the creator when the Plan was adopted. We question that the ability to give this answer, for its optical effect, is worth the sacrifice in flexibility for a Plan.

Some may argue that with the increasing tendency to include a delay as a "best practice," any Plan that does *not* have one is suspect. The wide disparity in recommendations, from ten days to three months, demonstrates that there really is no best practice.

The better approach, in our view, is to do what all companies should do in framing their insider trading policy: develop an approach that complies with the law and is appropriate in the circumstances of the particular company. When a company has good internal reporting and disclosure controls, the person with the responsibility for approval of Plans should know at any given time if the company is aware of MNPI. If that person is uncertain, he should make appropriate inquiries of the chief financial officer and those involved in major research and development, acquisition and other functions where MNPI can emerge. If, after making the inquiry and documenting it, the person is satisfied that there is no MNPI, there is no reason not to approve a new Plan when the creator also attests, as should be required, that he or she is not aware of MNPI.

This judgment should be all the easier to reach if, as most policies require and all should, Plans can be entered into (or amended, if the policy permits it) only during an open trading window under the company's trading policy. This is the time when, absent unusual circumstances, the company will have disclosed in its earnings press release any material information that has not already been made public. The shorter that window period,[12] the greater the degree of confidence that a Plan entered into during a window will be valid.

A built-in delay can have an unintended consequence that may be cumbersome to avoid. Under many Plans it is possible that not all the shares will be sold when the Plan terminates by its terms, say April 20.[13] If April 20 is during a window, upon expiration of the Plan the creator can establish a new Plan to provide for the future sale of the unsold shares. If, however, there is a mandatory delay in the effectiveness of the new Plan, say three months, those shares cannot be sold until at least July 20.

This hiatus can be avoided in either of two ways. One alternative is to amend the Plan as the termination date approaches, most likely in the window period next preceding the termination date, say January 20. Of course, if a new Plan must have a three month delay, then so must the amendment. Amending the existing Plan in this manner, however, would in effect suspend the existing Plan, which is not what is desired. This is apart from the admonition in most insider trading policies and lists of best practices to avoid amending Rule 10b5-1 plans, lest it appear that the rule is being abused.

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12 Window periods vary in length. While they generally begin a few days after the earnings release, how soon they close is a function of a variety of company-specific factors. The window might last until near the end of the current quarter, or it might last only several weeks. The length must be tailored to the circumstances of the company.

13 This assumes that the Plan has a specified termination date that can occur before all shares have been sold. If there is no termination date, it is nevertheless permissible to cancel a Plan. Exchange Act Compliance and Disclosure Interpretations Question 120.17 (Mar. 25, 2009). Seriatim cancelations followed by new Plans are disfavored. *Id.* Question 120.18.

The other alternative is to create a new Plan on January 20, covering any shares that might remain unsold under the existing Plan. It, too, would have a three month delay, but that would be acceptable, because the follow-on Plan would become effective when the existing Plan expires, allowing for uninterrupted coverage of any unsold shares in the first Plan. This new, dovetailing Plan could have a different formula and include additional shares, but some might be concerned that this approach does indirectly what cannot be done directly — amend a plan without having a delay. In any event, this technique might run afoul of, and thus require dispensation from, any company policy prohibiting overlapping or multiple Rule 10b5-1 Plans. Cumbersome? Yes. Necessary? Only if Plans must have built-in delays.

In our view, at this time there is no reason to run with the herd when it comes to built-in delays. Assess what makes sense for the particular situation you face.

Also of Interest

Refresher on the ISS QuickScore Governance Rating

As companies obtain and review proxy analyses issued by Institutional Shareholder Services ("ISS") concerning their annual meeting proxy statements this year, many will note a new addition to the report — the ISS QuickScore Governance Rating. In anticipation of inquiries from directors and management reviewing the reports, the following is a quick refresher on the key attributes of this new system.

- This is ISS's third generation governance rating system (preceded by the Corporate Governance Quotient (CGQ) and the Governance Risk Indicators (GRId)).

- ISS intends for the QuickScore to be more quantitatively driven than its predecessors, with a greater focus on correlations between governance factors and financial metrics. QuickScore utilizes a scoring system that ranks companies from 1 through 10 (the lower the score, the more favorable the rating) on an aggregate basis and within four categories or "pillars" — Board Structure, Shareholder Rights, Compensation, and Audit.

- The Governance QuickScore uses a quantitative approach applying weights to between 40 and 80 governance attributes and 16 performance and risk factors. Each of these factors are discussed in more depth in the ISS Technical Document summarizing QuickScore, which can be found **here**. However, ISS has not disclosed the relative weight given to each governance attribute or other factor and it is not clear how ISS will determine whether a company "meets," "exceeds," or "falls short" of expectations for any particular governance feature.

- Within each category, attributes that have significant negative impact on the overall category score are highlighted by a red flag and those having a significant positive impact are highlighted by a green star.

- ISS has initially rolled out the QuickScore for the 3,000 largest U.S. companies and the 250 largest Canadian companies. Ultimately, ISS intends the QuickScore system to encompass approximately 4,100 companies in 25 markets.

- ISS makes available a Data Verification tool that allows companies to review the specific questions addressed for each pillar and the ISS responses/conclusions for those questions upon which the QuickScore was based. As part of this verification tool, companies are able to respond and make their case for a change in ISS's stated conclusion for an issue, although the company will be asked to provide back-up support for their claim from a publicly available document.

Nasdaq Proposes Internal Audit Requirement

The Nasdaq Stock Market recently proposed a rule change to require listed companies to establish and maintain an internal audit function. A link to the proposed rule can be found **here**. Companies would be permitted to outsource the internal audit function to a third party service provider other than their independent auditor. The NYSE has required listed companies to have an internal audit function since 2004 and many Nasdaq listed companies already have such a function as a matter of best practice.

If the rule change is approved by the SEC, companies listed on Nasdaq on or prior to June 30, 2013, would be required to have an internal audit function no later than December 31, 2013. Companies listing on Nasdaq after June 30, 2013, would be required to have an internal audit function prior to listing.

NYSE Issues Reminder on Material Information Disclosures

On the heels of the SEC's recent report on use of social media to disclose company information (discussed above), the NYSE recently published a reminder to listed companies about its process for handling the disclosure of material information. The notice from the NYSE noted that given the recent SEC guidance, companies may be considering the merits of utilizing social media outlets for disclosure purposes. It thus took the opportunity to summarize its disclosure rules for listed companies, including the following:

- Under Section 202.06 of the NYSE Listed Company Manual, companies can comply with the NYSE's timely disclosure rule by issuing a press release or by means of any Regulation FD compliant method (or combination of methods). When news will be released during market hours (leading up to the opening and between 9:30 am - 5:00 pm EST), companies are reminded that the NYSE requires that ten minutes advance notice be provided to the NYSE's Corporate Actions & Market Watch team prior to the dissemination of any news that is deemed to be of a material nature or that might impact trading in the company's securities, or at the time the company becomes aware of a material event having occurred.

- Companies must provide the NYSE with the means by which the company intends to disseminate the news and the NYSE must have the ability to view the news to ensure it has been fully disseminated. This advance call provides the NYSE with an opportunity to consider whether a temporary trading halt in the company's securities should be put in place. A halt in trading allows investors to evaluate the official company news in its entirety and adjust their trading positions as they see fit.

- The NYSE expects that a company representative will be available to discuss the details of the news and answer any potential questions the NYSE may have. While not intended to be an exhaustive list, examples of news the NYSE would consider to be potentially material include: earnings, mergers/acquisitions, securities offerings and pricings related to these offerings (see below for more information), major product launches or new patent approvals, dividend announcements, etc.

- In instances of unusual market activity or rumor-driven activity, a company is expected to contact the NYSE and promptly release to the public any news or information which might reasonably be affecting the market in its securities. Where there is no knowledge of material news, a company may be contacted by the NYSE and asked to issue a press release promptly so that the activity/rumor can be addressed for the overall market.

- While foreign private issuers are not required to comply with Regulation FD, they must still comply with the NYSE's timely disclosure rule. Given that foreign-based issuers are operating in different time zones, it is especially important that the NYSE be provided with contact details for company representative(s) that can be reached during the NYSE's market hours and who have the authority to speak on a company's behalf. This contact information is critical in case a situation were to arise where the NYSE became concerned about

the trading in the company's securities and a company representative was not immediately available; the NYSE may be forced to halt trading in the company's securities until information can be received by the NYSE to support the resumption of trading.

Spotlight on Schiff Hardin

Schiff Hardin LLP Adds Leading Corporate and Securities Attorneys with Significant China Practice

Schiff Hardin recently welcomed three distinguished new partners to the firm's Corporate and Securities Group from Cozen O'Connor in Washington, D.C. and Philadelphia: Ralph V. De Martino (Washington), F. Alec Orudjev (Washington) and Cavas S. Pavri (Philadelphia). While at Cozen O'Connor, Mr. De Martino served as Chair of the Global Securities Practice Group. All three partners are based in Schiff Hardin's Washington, D.C. office, but Mr. Pavri will practice primarily in Philadelphia.

Messrs. De Martino, Orudjev and Pavri have particular experience providing Chinese clients with sophisticated counsel on transactional, regulatory and litigation matters. They have represented Chinese clients from a wide range of industries, including agriculture, pharmaceuticals, biotechnology, electronics, manufacturing, energy, transportation and digital media.

The additions of Messrs. De Martino, Orudjev and Pavri reflect Schiff Hardin's continuing national expansion across offices and practice groups. Since January 1, 2013, roughly 25 lateral attorneys have joined Schiff Hardin's Ann Arbor, Atlanta, Chicago, New York, San Francisco and Washington, D.C. offices in the Corporate and Securities Group, Energy Group, Environmental Group, Intellectual Property Group, Labor and Employment Group, Litigation Group and Tax Group.

Schiff Hardin LLP Adds Leading State and Local Taxation Attorneys in Ann Arbor

Schiff Hardin also recently announced the addition of a distinguished team of state and local taxation attorneys to the firm's Ann Arbor, Michigan office. Joanne B. Faycurry (partner), Samuel J. McKim III (of counsel), Sarah G. Deson-Fried (counsel) and Jackie J. Cook (associate) all join Schiff Hardin from Miller Canfield P.L.C. in Detroit. They represent multi-state corporate clients — including Discount Tire, Ford Motor Company, General Motors and Masco Corporation — in national, state and local tax matters.

Schiff Hardin's new team of attorneys is experienced in tax planning, counseling and litigation in all state and local tax areas. This includes: legislative drafting; issuing opinions as to tax issues; negotiating controversies, including mediation and arbitration; litigating tax matters in the Michigan Tax Tribunal, Michigan Court of Claims and Circuit Courts; and handling appeals to the Michigan Court of Appeals, Michigan Supreme Court and U.S. Supreme Court.

Their focus encompasses franchise taxes, excise taxes (e.g., sales, use and withholding taxes, motor fuel taxes, and state unemployment and payroll taxes), Michigan's recently enacted Corporate Income Tax, Michigan’s repealed Single Business Tax and the repealed Michigan Business Tax, real and personal property ad valorem taxes, investment incentives and enticements, and other miscellaneous state and local taxes (e.g., municipal income taxes, special assessments, utility taxes, hotel and accommodation taxes and liquor license fees).

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