

Private Funds Weekly Roundup

Real Time Legal, Regulatory & Tax Developments Impacting Hedge Funds, Private Equity & Investments

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Topics

ACCOUNTING – FASB WILL NOT DELAY FIN 48: As we discussed a couple of weeks ago (<http://www.gtlaw.com/pub/alerts/2007/0108.pdf>), the Financial Accounting Standards Board (FASB) was set to consider delaying the implementation of FIN 48, *Accounting for Uncertainty in Income Taxes*, until next year at its January 17 Board meeting. However on January 17, FASB decided to proceed with the implementation of FIN 48 that will require companies to report uncertain state and federal tax positions on their financial statements. FIN 48, which provides guidance on the recognition and measurement of uncertain tax positions under FAS 109, became effective for all tax years beginning after December 15, 2006. Accordingly, financial reports will now require companies to report uncertain tax positions on reports filed for the first quarter of 2007 and onwards. This new rule requires a "more likely than not" standard for tax opinions to support reporting of a position that either reduces a tax liability or generates a tax refund. This "more likely than not" standard assumes a 51% chance of surviving an IRS challenge. The rule will require a company to assume that a tax position creating an economic benefit will be examined by the IRS, so that the probability of whether a position will be audited cannot be considered as a factor in accounting for uncertain tax positions. As a result, many companies will be scrambling to obtain "more likely than not" opinions from their tax advisors so that tax positions will not need to be reported on their reports. FASB confirmed that they and the SEC agree that taxpayers do not need to provide extensive documentation under the rule. Companies that have taken aggressive tax positions (and cannot get the required tax opinion) might want to consider entering into a voluntary disclosure agreement with the applicable tax authority to avoid the need to report the uncertain tax position.

FUTURES INVESTORS – NEW CFTC RULE REGULATING EQUITY WITHDRAWALS BY FUTURES COMMISSION MERCHANTS: The Commodities Futures Trading Commission (CFTC) has adopted a new rule in light of the Refco debacle to prevent futures commission merchants from making equity withdrawals if the CFTC determines that such withdrawals reduce excess adjusted net capital by 30% or more *and* will adversely impact the merchant's ability to meet customer obligations. A copy of these new regulations, which become effective March 12, is available at the CFTC Website at this link: <http://www.cftc.gov/files/foia/fedreg07/foi070110a.pdf>.

RISK ARBITRAGE/ACTIVIST INVESTORS – EXECUTIVE COMPENSATION AND PROXY PROPOSAL:

- **EXECUTIVE COMPENSATION – A NEW REGIME:** As we reported last week (<http://www.gtlaw.com/pub/alerts/2007/0118.pdf>), executive compensation will be a major issue in the coming proxy season. Please see the linked review and explanation of the new SEC disclosure requirements on executive compensation disclosure, written by our colleagues Bob Kant, Tom LaWer and Steve Lapidus: http://www.gtlaw.com/pub/alerts/2007/exec_comp.pdf.
- **CONVERGYS CORP. MAY NOT OMIT CHANGE OF JURISDICTION PROPOSAL:** On December 29, the SEC notified Convergys Corp. that it may not omit from its proxy a shareholder proposal that it change its state of incorporation from Ohio to Delaware. The proposal was submitted by the United Brotherhood of Carpenters Pension Fund. In its supporting statement, the Fund claimed that it is seeking to implement majority vote elections for directors, rather than the current plurality vote mandated by Ohio law, in the belief that the added pressure would result in improved board

performance. Convergys argued that the proposal could be omitted because it was actually two separate, distinct proposals: one to change the state of incorporation, and one to implement majority voting. The SEC disagreed with Convergys' argument and did not grant relief.

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