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CORPORATE & FINANCIAL
WEEKLY DIGEST

May 17, 2013

CFTC

CFTC Adopts Final Rules for Execution Facilities and Other Matters

During an open meeting on May 16, the Commodity Futures Trading Commission adopted a final rule establishing core principles and other requirements for swap execution facilities, which will become effective 60 days after publication in the Federal Register. We will issue a Client Advisory describing the core principles and other requirements for swap execution facilities following the publication of the final rule. The CFTC also adopted final rules related to procedures for establishing minimum block sizes, the process for making a swap available to trade and interpretive guidance on disruptive trading practices.

Information regarding the open meeting may be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

FINRA Issues Interpretive Guidance on Use of Back Tested Index Data by ETPs

On April 22, the Financial Industry Regulatory Authority, Inc. issued to ALPS Distributors, Inc. interpretive guidance with respect to FINRA Rule 2210(d) and the use of hypothetical back tested index performance information, which FINRA refers to as pre-inception index performance (PIP) data. While the FINRA staff emphasized that PIP data cannot be used in communications with retail investors under FINRA Rule 2210(d), distribution to institutional investors of marketing materials including PIP data would not be objectionable to FINRA under specified conditions and so long as the PIP data met certain criteria. The interpretive guidance applies only to rules-based indices used by passively managed exchange traded products, and the conditions of use and criteria for data are set forth in the letter.

Click here for more information.

LITIGATION

Mississippi District Court Defers to New York Court in Bond Action

The United States District Court for the Northern District of Mississippi denied the motion of defendant ACA Financial Guaranty Corporation (ACA) to dismiss a class action complaint, finding that the issues were previously adjudicated adversely to ACA in the New York Supreme Court where a companion case, Oppenheimer v. ACA Financial Guaranty Corporation, is currently pending.

The putative class action arose from ACA's agreement to insure municipal bonds issued by a South Carolina road construction project, "Connector 2000." Connector 2000 sought bankruptcy protection and as part of that bankruptcy, the court cancelled certain bonds. In both the New York Supreme Court and in the Northern District of Mississippi, ACA argued that the cancellation of the bonds eliminated its insurance obligation.

In Oppenheimer, Judge Ramos found that the project's bankruptcy filing did not relieve ACA of its insurance obligation. The District Court denied ACA's motion to dismiss—which was largely based on its argument that the case in New York was wrongly decided—and noted that if Judge Ramos's determination is overruled by the Appellate Division, ACA could use that decision at summary judgment.

Davis v. ACA Fin. Guaranty Corp.*, Cause No. 3:11-CV-093-MPM-SAA (N.D. Miss. May 9, 2013, 2013)*

Involuntary Bankruptcy Petitions Dismissed Where Alter Ego Status Was Disputed

The United States Bankruptcy Court for the Southern District of New York granted motions to dismiss involuntary Chapter 7 petitions filed against TPG Troy LLC and T3 Troy LLC (the Troy Entities). Petitioners filed numerous actions against the Troy Entities in the United States and Europe to recover money they alleged was owed in connection with the default of payment-in-kind and subordinated notes.

Petitioners alleged that the Troy Entities were the alter egos of the note issuers, which, they argued, was sufficient to establish that there was not a bona fide dispute as to liability or amount, as required for an involuntary bankruptcy petition. In response, the Troy Entities argued that they had no contractual relationship with the issuers, and that Petitioners failed to allege facts sufficient to meet the "heavy burden" of establishing an alter ego relationship.

Based on the pleadings and decisions of the other cases in which the Petitioners have alleged alter ego liability against the Troy Entities as well as the facts presented in this case, the Bankruptcy Court determined that there was a "bona fide" dispute as to whether the Troy Entities were alter egos of the issuers and, accordingly, dismissed the involuntary bankruptcy petitions.

In re TPG Troy, LLC*, Nos. 12-14965(MG), 12-14966(MF) (S.D.N.Y. May 9, 2013)*

BANKING

Federal Reserve Requires 18 Largest US Bank Holding Companies to Submit Stress Test Results

On May 13, the Board of Governors (Board) of the Federal Reserve System announced that stress test results from the largest 18 US bank holding companies must be submitted to the Federal Reserve no later than July 5. Under the Board's rule implementing stress test requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act for bank holding companies (BHCs) with total consolidated assets of $50 billion or more and nonbank financial companies supervised by the Board, a BHC that participated in the 2009 Supervisory Capital Assessment Program is required to conduct a mid-cycle company-run stress test in 2013. The mid-cycle stress test must be conducted using data as of March 31, 2013, and be based on scenarios developed by the BHC. The BHC must report the stress test results to the Board no later than July 5, 2013. In addition, the BHC must publicly disclose a summary of the results in the period between September 15 and September 30, 2013. Companies should conduct their stress tests in accordance with the expectations and principles set forth in the "Supervisory Guidance on Stress Testing for Banking Organizations with More Than $10 Billion in Total Consolidated Assets," 77 Fed. Reg. 29458 (May 17, 2012). BHCs must use the FR Y-14A Summary schedule to report the results of their company-run stress tests and the FR Y-14A Scenario schedule to report the scenarios used in the mid-cycle stress tests. BHCs must provide information supporting their projections. In addition to the quantitative projections collected on the FR Y-14A, each BHC is also required to submit qualitative information supporting its projections.

Click here for further information.

Federal Reserve Division Director Michael S. Gibson Testifies on Cross-Border Resolution Plans

On May 15, Michael S. Gibson, Director, Division of Banking Supervision and Regulation of the Federal Reserve, testified before the Subcommittee on National Security and International Trade and Finance of the U.S. Senate Committee on Banking, Housing, and Urban Affairs. In his concluding remarks, Director Gibson stated, "The financial regulatory architecture is stronger today than it was in the years leading up to the crisis, but

considerable work remains to complete implementation of the Dodd-Frank Act and the post-crisis global financial reform program."

Click here to view Director Gibson's speech.

FDIC Division Director James R. Wigand Testifies on Cross-Border Resolution Plans

On May 15, James R. Wigand, Director, Office of Complex Financial Institutions of the Federal Deposit Insurance Corporation (FDIC) testified before the U.S. Senate Subcommittee on National Security and International Trade and Finance. In his concluding remarks, Director Wigand stated, "In conclusion, the FDIC, working with our foreign colleagues, has made substantial progress in one of the most challenging areas of the financial reforms adopted in the Dodd-Frank Act. The cross-border issues presented by the failure of a [global systemically important financial company] with international operations are complex and difficult. … While much work remains to be done, the FDIC is much better positioned today to address the failure of one of these institutions."

Click here to view Director Wigand's speech.

OCC Issues Clarification of the Treatment of Certain Sovereign and Securitization Positions

On May 10, the Office of the Comptroller of the Currency (OCC) issued Bulletin OCC 2013-13, which is intended to clarify the treatment of sovereign and securitization provisions under the Market Risk Capital Rule. Specifically, for the purpose of determining standardized specific risk capital requirements for certain sovereign debt positions, "sovereign entities that are members of the Organization for Economic Cooperation and Development (OECD) but do not receive a Country Risk Classification (CRC) should be treated as having the functional equivalent of a CRC of zero." Further, with respect to securitization positions,

> the OCC is clarifying that exposures underlying the securitization position should not necessarily be considered to be in default solely because the borrower has deferred payments of principal or interest. In limited cases, such a deferral is not a result of a change in the borrower's creditworthiness. Instead, payment deferrals might be a result of provisions in the contract at the time funds were disbursed. In such circumstances, the loan need not be classified as being in default.

Click here to read the Bulletin.

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