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DUE TO THE HOLIDAY, *CORPORATE AND FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON DECEMBER 27. THE NEXT ISSUE WILL BE DISTRIBUTED ON JANUARY 3.

SEC/CORPORATE

SEC Proposes Rules for "Regulation A+" Offerings

On December 18, the Securities and Exchange Commission voted to propose new rules that would expand the exemption from registration under the Securities Act of 1933 provided by Regulation A to include an exemption for up to $50 million of securities sold during a 12-month period in accordance with the proposed rules. This proposed new exemption is sometimes referred to as "Regulation A+." Reliance upon Regulation A is, and reliance upon so-called Regulation A+ would be, subject to compliance with various requirements and conditions.

Regulation A currently permits unregistered offerings of securities having a value of up to $5 million in a 12-month period, including up to $1.5 million of securities offered by selling security holders. Among other things, Regulation A requires an issuer to submit an offering statement (which includes an abbreviated form of prospectus known as an offering circular) to the SEC as a condition to reliance upon the Regulation A exemption. Offering statements for Regulation A must comply with the form and content requirements of Form 1-A and must be "qualified" by the SEC. Securities offered pursuant to Regulation A are also subject to state "blue sky" registration and qualification requirements. As a result of the limited offering amount and compliance burdens associated with offerings under Regulation A as it currently exists, Regulation A is rarely used.

Section 401 of the Jumpstart Our Business Startups (JOBS) Act (adding Section 3(b)(2) of the Securities Act) requires the SEC to adopt rules that would have the effect of updating and expanding Regulation A by exempting from Securities Act registration requirements up to $50 million of securities offered within a 12-month period, requiring issuers who offer securities that are exempt under Regulation A+ to file annual audited financial statements and imposing such other restrictions and conditions as the SEC determines are appropriate. The SEC's proposed rules would implement that mandate by creating two "tiers" of Regulation A offerings: (1) offerings under Regulation A as it currently exists (i.e., up to $5 million of securities, including no more than $1.5 million of securities offered by selling security holders, in any 12-month period) (Tier 1); and (2) offerings of up to $50 million of securities, including no more than $15 million of securities offered by selling security holders, in any 12-month period (Tier 2). Securities sold in either a Tier 1 or a Tier 2 offering would not be "restricted securities" for purposes of the Securities Act.

The proposed rules would permit eligible issuers seeking to offer securities under either Tier 1 or Tier 2 to submit draft offering statements to the SEC on a non-public basis for review prior to filing; permit use of "test the waters" solicitation materials both before and after the filing of the offering statement; and modernize the offering process, including by requiring electronic filing of offering materials and permitting issuers and intermediaries to satisfy prospectus delivery requirements under an "access equals delivery" model. Tier 2 offerings would be subject to additional requirements under the proposed rules. Specifically, in Tier 2 offerings, investors would be limited to purchasing an amount of securities that does not exceed 10 percent of the greater of the investor's annual income or net worth; financial statements included in the offering circular would have to be audited; and the issuer would be required to file annual and semi-annual reports and current event updates that are similar to those of a public company until the issuer becomes eligible to exit Regulation A reporting requirements (generally, after completing reporting for the fiscal year in which the offering statement is qualified, so long as the securities covered by the offering statement are held by fewer than 300 persons). In the case of Tier 2 offerings, state securities laws (blue sky) requirements would be preempted. Tier 1 offerings would remain subject to state blue sky registration and qualification requirements. An issuer could elect to pursue a Tier 2 offering to achieve the benefits of blue sky preemption, even if it is offering less than $5 million of securities in a 12-month period.

As is currently the case, the Regulation A exemption would only be available to an issuer organized and having a principal place of business in the United States or Canada. The proposed rules would add to Regulation A's existing issuer eligibility requirements (which disqualify SEC reporting companies, investment companies, blank check companies, issuers of certain interests in oil and gas rights or mineral rights, and issuers disqualified under "bad actor" provisions of Securities Act Rule 262) by disqualifying issuers that have not filed the ongoing reports required by the proposed rules and issuers that have been subject to an order by the SEC denying, suspending or revoking the registration of a class of securities pursuant to Section 12(j) of the Securities Exchange Act of 1934.

The proposal is subject to public comment for a period of 60 days from the date it is published in the *Federal Register*.

To view the complete text of the proposal, click here.

CFTC

NFA Notifies Members of FinCEN Advisory

The National Futures Association has notified member futures commission merchants (FCMs) and introducing brokers (IBs) that the Financial Crimes Enforcement Network (FinCEN) has issued an advisory containing guidance with respect to the Financial Action Task Force's (FATF) updated list of jurisdictions with strategic anti-money laundering and counter-terrorist financing (AML/CFT) deficiencies. The NFA advised member FCMs and IBs to review the advisory to ensure that their AML programs have the most current information on FATF-identified jurisdictions with AML/CFT deficiencies and revise their AML programs accordingly.

The NFA notice to members can be found here.

The FinCEN advisory can be found here.

LITIGATION

SEC Announces Enforcement Results for 2013

The Securities and Exchange Commission recently announced the results of its enforcement activities during fiscal year 2013. Most notably, the SEC disclosed that it filed 686 enforcement actions and recovered $3.4 billion in monetary sanctions (a 10 percent increase over FY 2012 and 22 percent increase over FY 2011).

The SEC's release highlighted a number of specific enforcement actions, including NASDAQ's agreement to pay a $10 million penalty in connection with the Facebook IPO, multiple insider trading actions brought in connection with the SAC Capital matter, and trial victories in the Fabrice Tourre and optionsXpress cases.

In addition, the SEC also highlighted the change to its "no admissions" policy and the success of its whistleblower program (which involved 3,238 tips and compensation payments to whistleblowers in excess of $14 million). Finally, the SEC noted that it had created a new Financial Reporting and Audit Task Force to focus on financial statement and other accounting fraud, and a Microcap Task Force to address misconduct in the microcap markets.

Going forward, the SEC stated that it expects to focus on complex financial products, gatekeepers, insider trading, market structure, investment advisers and private funds, and municipal securities.

The SEC's press release is available here and the full report is available here.

Delaware Chancery Reviews Privilege for Mixed Business and Legal Advice

The Delaware Court of Chancery recently affirmed that communications in which legal advice predominates and cannot be segregated from business advice may be withheld under the attorney-client privilege.

In a letter opinion, Vice Chancellor Parsons discussed three categories of allegedly privileged documents. The first set included communications with a corporation's in-house counsel who served as both a business and legal advisor. The second category included communications among the corporation's non-lawyer employees who purportedly intended to seek legal advice relating to the dispute at issue. The third set consisted of communications among the corporation's non-lawyer employees who were providing or seeking information to facilitate legal advice.

Rather than classify each category as privileged or not, Vice Chancellor Parsons considered the documents individually. The court explained that "where business and legal advice are inseparable in a communication – or the communication includes individuals serving in both business and legal advisory roles – the communication will be considered privileged only if the legal aspects predominate." The court also noted that communications containing both business and legal advice "must be produced with the legal-related portions redacted" if such segregation is possible. Communications that involve only business matters, however, must be produced even if a party's legal advisor is a party to the communication. *MPEG LA, L.L.C. v. Dell Global B.V. and Dell Products, L.P.*, C.A. No. 7016-VCP (Del. Ch. Dec. 9, 2013).

BANKING

Banking Agencies Issue FAQ Document Regarding CDOs Backed by TruPS Under the Volcker Rule

On December 19, three federal financial institution regulatory agencies (the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC)) issued a Frequently Asked Questions release (FAQ) to provide "clarification and guidance" to banking entities regarding investments in "Covered Funds." The FAQ discusses in particular whether collateralized debt obligations (CDOs) backed by trust preferred securities (TruPS) are Covered Funds under the final rules to implement Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rules were approved by the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Board, the FDIC and the OCC on December 10.

According to the three agencies, the FAQs "are intended to clarify that banking entities that have holdings in TruPS CDOs are not required to sell these holdings immediately under the final rules, but instead may use the conformance period to determine if they can be brought into conformance by the end of the conformance period, which is July 21, 2015." While immediate divestiture is not required, the FAQ was immediately criticized by three prominent bank trade association groups for ignoring the mark to market accounting effect and the related adverse effect on capital that the rule is expected to have on smaller insured institutions and community banks across the nation.

It is not clear what effect, if any, Congressional interest in the TruPS CDO controversy will have on the upcoming Senate vote, now expected in January, to name Janet Yellin as the new Chair of the Board.

The FAQ may be found here.

FDIC Issues Latest Supervisory Insights Journal (Winter Edition)

On December 19, the Federal Deposit Insurance Corporation (FDIC) published the latest edition of its *Supervisory Insights* journal. The three major topics covered are listed below:

- "Industry Trends Highlight Importance of Effective Interest-Rate Risk Management" looks at how changes in the banking industry's asset mix and funding profile have led to increased interest-rate risk (IRR) exposure. The article highlights supervisory expectations for IRR management and suggests strategies banks can use to assess and mitigate this exposure.
- "Lending Trends: Results from the FDIC's Credit and Consumer Products/Services Survey" shares recent survey results relating to loan growth, credit underwriting, factors influencing banks' ability and willingness to lend, and use of loan workouts.
- "The New Basel III Definition of Capital: Understanding the Deductions for Investments in Unconsolidated Financial Institutions" discusses how the new regulatory capital rules require a deduction from capital, under certain circumstances, for a portion of a bank's investments in the capital of unconsolidated financial institutions. This article provides examples of how to calculate the deduction.

The *Supervisory Insights* journal may be accessed here.

Agencies Issue Proposed Guidance on Tax Allocation Agreements Between Insured institutions and Their Holding Companies

On December 19, banking agencies including the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (collectively, the agencies) gave notice that they are seeking comment relating to supplemental guidance on income tax allocation agreements involving holding companies and insured depository institutions (IDIs). According to the agencies, "[a]n aim of the proposed guidance is to reduce confusion" regarding ownership of any tax refunds. The federal banking regulators are proposing the guidance "in response to disputes between holding companies in bankruptcy and failed depository institutions regarding ownership of tax refunds. Courts have come to differing conclusions regarding the ownership of tax refunds between holding companies and depository institutions based on their interpretation of language in tax allocation agreements," according to the agencies. It would appear that another aim of the agencies is to prevent future disputes in court by requiring that certain language deemed beneficial by courts to the insured institutions and to the FDIC be inserted in existing and future tax allocation agreements.

In 1998, federal banking regulators issued an interagency policy statement on income tax allocation. The proposed guidance

> would supplement the 1998 policy statement by instructing insured depository institutions and their holding companies to review their tax allocation agreements to ensure the agreements expressly acknowledge that the holding company receives any tax refunds as an agent for the insured institution. In addition, all banking organizations would be asked to insert specific language in their tax allocation agreements to further clarify tax refund ownership.

The agencies stated as follows:

> *In reviewing their tax allocation agreements, Consolidated Groups should ensure the agreements (1) clearly acknowledge that an agency relationship exists between the holding company and its subsidiary IDIs with respect to tax refunds, and (2) do not contain other language to suggest a contrary intent. In addition, all Consolidated Groups should amend their tax allocation agreements to include the following paragraph or substantially similar language:*
>
> *The [holding company] is an agent for the [IDI and its subsidiaries] (the "Institution") with respect to all matters related to consolidated tax returns and refund claims, and nothing in this agreement shall be construed to alter or modify this agency relationship. If the [holding company] receives a tax refund from a taxing authority, these funds are obtained as agent for the Institution. Any tax refund attributable to income earned, taxes paid, and losses incurred by the Institution is the property of and owned by the Institution, and shall be held in trust by the [holding company] for the benefit of the Institution. The [holding company] shall forward promptly the amounts held in trust to the Institution. Nothing in this agreement is intended to be or should be construed to provide the [holding company] with an ownership interest in a tax refund that is attributable to income earned, taxes paid, and losses incurred by the Institution. The [holding company] hereby agrees that this tax sharing agreement does not give it an ownership interest in a tax refund generated by the tax attributes of the Institution.*

The proposed addendum would also “clarify” how sections 23A and 23B of the Federal Reserve Act, which establish certain restrictions on and requirements for transactions between depository institutions and their affiliates, apply to tax allocation agreements. According to the proposed guidance:

> *Tax allocation agreements should require the holding company to forward promptly any payment due the IDI under the tax allocation agreement and specify the timing of such payment. Agreements that allow a holding company to hold and not promptly transmit tax refunds received from the taxing authority and owed to an IDI are inconsistent with the requirements of section 23B and subject to supervisory action. However, an Agency’s determination of whether such provision, or the tax allocation agreement in total, is consistent with section 23B will be based on the facts and circumstances of the particular tax allocation agreement and any associated refund.*

The proposed guidance may be found here.

Federal Financial Regulators Extend Comment Period for Proposed Policy Statement on Assessing Diversity Policies and Practices of Regulated Entities

On December 19, six federal financial regulatory agencies announced that they are extending the comment period for their proposed policy statement for assessing diversity policies and practices of the institutions they regulate to allow the public more time to analyze the issues and prepare their comments. The proposed policy statement, issued pursuant to Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is intended to promote transparency and awareness of diversity policies and practices within federally regulated financial institutions. The agencies that issued the proposal are the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Securities and Exchange Commission.

Commenters now have until February 7, 2014, to provide feedback on the proposed policy statement. Originally, comments were due December 24, 2013.

Read more.

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