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CORPORATE & FINANCIAL
WEEKLY DIGEST

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BROKER DEALER

FINRA and ISG Extend Effective Date for Certain Electronic Blue Sheet Data Elements

The Securities and Exchange Commission recently extended the compliance date for the broker-dealer recordkeeping, reporting and monitoring requirements of the Large Trader Reporting Rule from May 1, 2013 to November 1, 2013. To align with this new compliance date, the Financial Industry Regulatory Authority and other US members of the Intermarket Surveillance Group (ISG Members) have extended the effective date to submit certain new data elements for Electronic Blue Sheets (EBS) that were previously identified in Regulatory Notice 12-47. Specifically, broker dealers must be in EBS reporting compliance for the Order Execution Time, Large Trader Identification Numbers 1 through 3 and Large Trader Identification Qualifier fields by November 1, 2013. With respect to EBS requests from FINRA and other ISG Members, the data elements identified in Regulatory Notice 12-47 are unchanged and must be populated by November 1, 2013. In addition, minor modifications have been made to the EBS record layout from the version published in Regulatory Notice 12-47.

Click here for the FINRA notice.

CFTC

NFA Amends FCM Capital Requirements for Forex Transactions with ECPs

The National Futures Association (NFA) has amended the financial requirements applicable to member futures commission merchants (FCMs) acting as counterparties in foreign exchange (forex) transactions. Pursuant to NFA's Financial Requirements Section 1(a), all member FCMs are required to maintain adjusted net capital equal to or in excess of certain amounts enumerated in Section 1(a). The amendment adds a provision to Section 1(a) to require an FCM acting as a counterparty in a forex transaction with an eligible contract participant to maintain adjusted net capital in excess of $20,000,000.

The amendment will be effective June 20, 2013.

NFA Notice to Members I-13-10 is available here. NFA Financial Requirements Section 1(a) is available here.

LITIGATION

Delaware Supreme Court Upholds Collateral Estoppel in Multiforum Litigation

The Delaware Supreme Court recently held that the dismissal of a shareholder derivative suit by a California federal court had a preclusive effect on a substantially similar suit pending in the Delaware Chancery Court against the same defendants. The decision strengthens the defense of collateral estoppel in multijurisdiction derivative litigations.

In September 2010, Allergan, Inc. entered into a settlement with the Department of Justice concerning the improper marketing of BOTOX. Shortly thereafter, shareholders filed derivative actions in the Delaware Chancery Court and a California federal court. The California court dismissed the action with prejudice for failure to plead demand futility under Rule 23.1. The defendants subsequently moved to dismiss the Delaware action on the basis of collateral estoppel. The Chancery Court denied defendants' motion to dismiss. The Chancery Court invoked the internal affairs doctrine and applied Delaware law, finding that the plaintiffs in the two jurisdictions were not in privity. As an alternative basis for dismissal, the Chancery Court found that the California shareholders were not adequate representatives of the corporation.

The Supreme Court reversed because the Chancery Court's decision "conflated collateral estoppel with demand futility." It held that once a court of competent jurisdiction has issued a final judgment, a "successive case is governed by the principles of collateral estoppel, under the full faith and credit doctrine, and not by demand futility law, under the internal affairs doctrine." The Court opined that "the undisputed interest that Delaware has in governing the internal affairs of its corporations must yield to the stronger national interests that all state and federal courts have in respecting each other judgments." Applying California law and federal common law, the Court held that the federal judgment satisfied all elements of collateral estoppel.

The Court further rejected the Chancery Court's finding that the California plaintiffs were inadequate representatives because they filed suit before pursuing a books and records investigation. The Court rejected the "'fast filer' irrebuttable presumption of inadequacy," finding that there was "no record support for the trial court's premise that stockholders who file quickly . . . are *a priori* acting on behalf of their law firms instead of the corporation." Although the Court shared the Chancery Court's concern about fast filers, it cautioned that "remedies for the problems [that fast filers] create should be directed at the lawyers, not the stockholder plaintiffs or their complaints."

Pyott v. Louisiana Municipal Police Employees' Retirement System, No. 380, 2012 (Del. April 4, 2013).

DOJ Narrows "Carve Out" Practice Regarding Corporate Plea Agreements

Assistant Attorney General Bill Baer in charge of the Department of Justice's Antitrust Division recently announced changes to the division's "carve-out practice" regarding corporate plea agreements. The changes aim to protect the privacy of those suspected but not yet charged with wrongdoing, and to spare uncooperative employees from being identified in a public document involving criminal conduct.

In the past, the Antitrust Division's corporate plea agreements sometimes included non-prosecution deals for employees who cooperated and whose conduct did not warrant prosecution. However, the division excluded, or "carved out," employees who were potentially guilty of wrongdoing. It also excluded a much broader group of individuals, including employees who refused to cooperate, employees against whom that division was still developing evidence, and employees who could not be located. The names of all carved-out employees were included in the corporate plea agreements, which were publicly filed in the district courts where the charges were brought.

The new policy implements two changes. First, the division will "no longer carve out employees for reasons unrelated to culpability." In addition, the division will no longer include the names of carved-out employees in plea agreements. Instead, those names will be listed in an appendix, and the Department of Justice will ask the court for leave to file the appendix under seal. Baer noted that "absent significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers."

Assistant Attorney General Baer's statement is available here.

BANKING

Bill Introduced to Require Study on Basel III

On April 18, Sen. Joe Manchin (D-WV) and Sen. Dean Heller (R-NV) introduced American Bankers Association-supported legislation (S. 731) addressing the issuance of final rules based on the third banking supervision accords issued by the Basel Committee on Banking Supervision (Basel III). The legislation would require the banking regulators to conduct a comprehensive study of the Basel III capital proposals' impact before issuing any final rules. The study would need to include “a quantitative analysis of the proposals’ effects on the financial services, including community, mid-size, and regional institutions, as well as a determination of the rules’ long-term impact.” Late in 2012, the bank regulatory agencies announced that they would delay implementation of earlier proposed capital proposals, including the proposal to implement Basel III reforms. The capital proposals have been criticized from many quarters, some taking the position that the rules are too strict, that they will be ineffective, that they are unduly harsh for smaller institutions, and that they are not strict enough, particularly with respect to leverage ratios. The proposed capital regulations and related proposals have also created potential difficulties for large foreign banking organizations.

Sen. Richard Shelby (R-AL) also introduced a bill (S. 737) on April 17 that would require a “quantitative impact study of the cumulative effect” of Basel III before regulators could issue final rules.

The proposed legislation is available here.

ABA Endorses Bill to Mandate Examination Fairness

American Bankers Association President and CEO Frank Keating expressed bankers’ strong support for the House and Senate exam fairness bills—H.R. 1553 and S. 727–that were reintroduced on April 15. In a letter to the Senate, Mr. Keating stated as follows:

> Our members are concerned that bank regulators are making decisions during the examination process that have effectively and unnecessarily reduced the amount of capital available for lending – particularly to small businesses. These decisions hinder banks’ ability to help local businesses grow and create jobs. S. 727 would address this critical issue by establishing clear examination standards and creating an independent Examination Ombudsman to ensure the consistency of all examinations. It also would ensure that financial institutions receive timely examination reports that include full documentation of the information the regulators used to make their determinations, and would create an expedited process for banks to appeal examination decisions without fear of reprisals.

Mr. Keating’s letter is available here.

Agencies Provide Additional Instructions for Submission of Resolution Plans and Extend Deadline

On April 15 the Federal Reserve Board (Board) and the Federal Deposit Insurance Corporation (FDIC) announced the release of additional guidance, clarification and direction for the first group of institutions filing their resolution plans pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. These 11 institutions filed their initial resolution plans with the Federal Reserve Board and the FDIC in 2012. Plans were required generally from US bank holding companies with $250 billion or more in total nonbank assets and foreign-based bank holding companies with $250 billion or more in total US nonbank assets. Following review of the initial resolution plans, the agencies have developed instructions for the firms to detail what information should be included in their 2013 resolution plan submissions. In particular, “the revised instructions include requests for more detailed information on, and analysis of, obstacles to resolvability under the Bankruptcy Code including global issues, financial market utility interconnections, and funding and liquidity, as well as to provide analysis to support the strategies and assumptions contained in the firms’ resolution plans.”

The Board and the FDIC have also granted an extension to the filing date to give the firms additional time to develop resolution plan submissions that address the agencies’ instructions. Accordingly, the 2013 resolution plan filing deadline will move from July 1, 2013 to October 1, 2013. The extension does not affect resolution plan submission dates for other banking organizations.

More information is available here and here.

Federal Reserve Proposes Assessments for BHCs with $50 Billion or Greater in Assets

On April 18 the Federal Reserve Board (Board) proposed an annual assessment of bank holding companies and savings and loan holding companies with $50 billion or greater in total consolidated assets and for nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve.

> The Dodd-Frank Act directs the Federal Reserve to collect assessments, fees, or other charges equal to the expenses the Board estimates are necessary and appropriate to carry out its supervisory and regulatory responsibilities for these large financial companies. The proposed rule outlines how the Federal Reserve Board would determine which companies are assessed, estimate the total expenses that are necessary or appropriate to carry out its supervisory and regulatory responsibilities for such companies, determine the amount of each company's assessment, and bill for and collect the assessments.

Under the proposal, each calendar year would be an assessment period. The Federal Reserve would notify each company of the amount of its assessment no later than July 15 of the year following the assessment period. Payments would be due by September 30.

Further, 2012 would be the first assessment period but payments would not be collected until the rule is finalized. Using the methodologies in the proposal, the Board estimates that for 2012 there would be approximately 70 companies assessed and the Board would collect a total of approximately $440 million. All assessments collected by the Federal Reserve would be transferred to the US Treasury.

Comments on the proposed rule must be submitted by June 15.

Read more.

Steve Antonakes, Acting Deputy Director of the CFPB, Addresses Bankers

On April 17, Steve Antonakes, Acting Deputy Director of the Consumer Financial Protection Bureau (CFPB), addressed the American Bankers Association meeting in Washington, D.C. Mr. Antonakes's remarks should be required reading for any banker who wants to understand the mission of the CFPB, and how its mission is different than that of traditional bank regulators. It is worth noting that the CFPB itself will examine the more than 200 Federal Deposit Insurance Corporation (FDIC)-insured institutions with assets in excess of $10 billion, and will write the consumer protection rules for all FDIC-insured institutions as well as non-FDIC-insured participants in the financial system.

Mr. Antonakes's speech is available here.

For more information, contact:

FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey, Jr.	212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	212.940.6304	kathleen.moriarty@jkattenlaw.com
Raymond Mouhadeb	212.940.6762	raymond.mouhadeb@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	212.940.6447	peter.shea@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	212.940.8584	robert.weiss@kattenlaw.com
Gregory E. Xethalis	212.940.8587	gregory.xethalis@kattenlaw.com
Allison Yacker	212.940.6328	allison.yacker@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com
LITIGATION		
William M. Regan	212.940.6541	william.regan@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com

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Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN CENTURY CITY CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND ORANGE COUNTY SHANGHAI WASHINGTON, DC

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