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CORPORATE & FINANCIAL
WEEKLY DIGEST

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CFTC

CFTC's Energy and Environmental Markets Advisory Committee To Hold Meeting

The Commodity Futures Trading Commission's Energy and Environmental Markets Advisory Committee will hold a meeting on February 26. The meeting, which will focus on the expected impact of the CFTC's proposed position limit rules on energy and environmental markets, will be open to the public.

More information, including webcast and dial-in information, is available here.

CFTC Announces Members of Market Risk Advisory Committee

The Commodity Futures Trading Commission has announced the members of its Market Risk Advisory Committee (MRAC). The MRAC's membership list is available here.

As provided in its charter, the MRAC's purpose is to conduct public meetings and submit reports on systemic issues that threaten the stability of the derivatives markets and other financial markets, and to otherwise assist the CFTC in identifying and understanding the impact and implications of an evolving market structure and movement of risk. The MRAC's charter is available here.

More information is available here.

NFA Notifies SDs and MSPs of Annual Questionnaire Requirements

Beginning April 1, National Futures Association (NFA) will require its member swap dealers (SDs) and major swap participants (MSPs) to complete the SD-MSP Annual Questionnaire as part of its annual membership renewal process. The SD-MSP Questionnaire can be accessed by logging into NFA's Annual Questionnaire system.

As part of this year's SD-MSP Questionnaire, each SD and MSP also must include the contact information for five key employees with knowledge of the firm's business continuity and disaster recovery plan. Each SD and MSP also must include its chief risk officer as one of the key employees. This information must be submitted through the WinJammer system.

NFA's Notice I-15-10 is available here.

LITIGATION

CFOs Ordered to Return Bonus and Profits Due to False Financial Statements

The Securities and Exchange Commission recently ordered two former CFOs of Saba Software, Inc. to reimburse the company for stock-sale profits and bonuses accrued during the 12-month periods following its materially false

and misleading financial statements. Saba, a Silicon Valley-based software company, misstated revenues in SEC filings from October 2007 to January 2012. The misstatements stemmed from professional service employees' false time-keeping practices, including recording hours in advance to accelerate revenue recognition, and failing to report non-billable time to conceal budget overruns. As a result of the inaccurate time records, Saba failed to recognize revenue in accordance with generally accepted accounting principles and was required to restate its financial statements for the years 2008–2011, as well as the first two quarters of 2012. Although the company's CFOs were not accused of misconduct, Section 304 of the Sarbanes Oxley Act of 2002 requires the CFO of any issuer required to prepare an accounting restatement due to material noncompliance with securities laws as a result of misconduct to reimburse the issuer for (1) any bonus or incentive-based or equity-based compensation received during the 12 months following the filings; and (2) any profits realized from the sale of securities of the issuer during those 12 months. Without admitting or denying the SEC's findings, the current and former CFOs of the company consented to the SEC's order. The prior CFO, who served from December 2008 to October 2011, was required to reimburse $337,375, while his successor was ordered to pay $141,992.

Securities and Exchange Commission v. William Slater, CPA and Peter E. Williams, III, File No. 3-16381.

SEC Argues in Second Circuit *Amicus* Brief That Dodd-Frank Protects Inside Whistleblowers

On February 6, the Securities Exchange Commission filed an *amicus* brief advising the United States Court of Appeals for the Second Circuit that the whistleblower protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act cover individuals who report wrongdoing internally before reporting to the SEC. The *amicus* brief was filed in support of appellant Daniel Berman, a former employee at marketing firm Neo@Oglivy LLC, who was fired after reporting accounting violations to his supervisors. Because Berman did not notify the SEC of wrongdoing until six months after his termination, the lower court found that he was not protected by the Dodd-Frank Act's anti-retaliation provisions. The Dodd-Frank Act added Section 21F to the Securities Exchange Act of 1934, which directs the SEC to pay monetary awards to whistleblowers whose reports result in successful enforcement actions and prohibits employers from retaliating against whistleblowers. In its brief, the SEC asserted that in issuing the final rules implementing Section 21F, it sought to ensure that the whistleblower program did not undermine individuals who report violations internally before contacting the SEC. The SEC argued that the rules provide additional economic incentives to those who report wrongdoing internally. Specifically, it noted that Rule 21F-2(b)(1), which designates categories of persons who are considered "whistleblowers" for the purposes of the anti-retaliation provisions, includes individuals who report violations to persons or governmental authorities *other than* the SEC. The SEC asserted that a contrary interpretation would weaken its authority to pursue enforcement actions against retaliatory employers. The SEC urged the court to grant deference to its interpretation as the agency charged with administration of the Dodd-Frank Act.

Brief of the Securities and Exchange Commission, Amicus Curiae in Support of the Appellant, Berman v. Neo@ogilvy LLC et al., Second Cir. No. 14-4626 (Feb. 2015).

UK DEVELOPMENTS

Financial Conduct Authority Clarifies Its Use of Attestations for UK Authorized Firms

Further to the *Corporate and Financial Weekly Digest* article published on August 29, 2014, in which we described a letter (Letter) that the UK Financial Conduct Authority (FCA) had sent to the FCA Practitioner Panel the week before, the FCA has now published a web page which further clarifies its use of attestations.

As we noted previously, the FCA introduced attestations as a formal "supervisory tool" to seek a personal commitment from an approved person at the relevant FCA authorized firm that specific action has been taken or will be taken. The FCA's aim for attestations is to ensure that there is clear accountability and senior management focus on specific issues where the FCA would like to see change within firms (often without any on-going regulatory involvement).

On its new web page, the FCA:

- states what its aims are for the use of attestations and the most usual scenarios in which they will be used, reiterating information that it provided in the Letter; and

- publishes data on the number of attestations it requested during 2014. The webpage separately discloses the number of attestations by sector and conduct classification for 2014.

The number of attestations requested by the FCA during 2014 was 59, with the wholesale (i.e., non-retail) and investment management sector being the sector most subject to attestation requests. The FCA will be publishing quarterly information regarding its requests for attestations, so it should be possible to see trends emerging in due course. (However, as a result of data protection/privacy issues, the specific recipients of attestation requests cannot be ascertained from the FCA's new web page or the published data.)

The FCA's web page on attestations is available here.

EU DEVELOPMENTS

ESMA Publishes Additional Consultation Paper on MiFID II/MiFIR Implementation

On February 18, the European Securities and Markets Authority (ESMA) published a new consultation paper (CP) on the implementation of the transparency provisions of the revised EU Market in Financial Instruments Directive (MiFID II) and the EU Market in Financial Instruments Regulation (MiFIR). ESMA had previously published another set of MiFID II/MiFIR consultation papers on December 19, 2014. However, the transparency-related sections of these papers did not address certain non-equity instruments. The CP is designed to fill this gap by providing ESMA's transparency proposals for foreign exchange derivatives, credit derivatives, contracts for differences and "other" derivatives.

The CP provides two sets of analyses for each of the foregoing asset classes. First, the CP sets out ESMA's analysis on the definition of liquid market for the relevant asset class, which is essential for market participants to determine whether, for example, a trade execution obligation applies to the financial instruments in that asset class. Second, the CP presents ESMA's calculations on the "large-in-scale" as well as "size specific to the instrument" thresholds, which are used to determine whether a particular trade qualifies for a waiver from otherwise-applicable pre- and post-trade transparency requirements. In conducting its analyses, ESMA relied on data collected from trade repositories (TR) even though, as ESMA notes, certain "quality issues" remain in relation to the data reported to TRs. Nevertheless, ESMA announced that it was satisfied that such data was "sufficient to provide a general overview" of the trading activity for the relevant asset classes.

The CP also completes the transparency-related draft regulatory technical standards (RTS) from the consultation papers of December 2014, which included rules and tables for certain bonds, structured finance products, emissions allowances and derivatives not included in the current publication. The consultation period for the CP ends on March 20.

A copy of the CP can be found here.

ESMA's press release accompanying the report can be found here.

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* Click here to access the *Corporate and Financial Weekly Digest* archive.

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