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CFTC

CFTC Expands List of Acceptable Legal Entity Identifiers

The Commodity Futures Trading Commission issued an amended order that expands the list of acceptable legal entity identifiers (LEIs) for purposes of swap data reporting and recordkeeping obligations under Parts 45 and 46 of the CFTC Regulations. The original order, which was issued on July 23, 2012, required registered entities and swap counterparties to satisfy their LEI obligations by using CFTC Interim Compliant Identifiers (CICIs) provided by DTCC-SWIFT until a global LEI system is established.

Pursuant to the amended order, once the CFTC's Chief Information Officer (CIO) publishes on the CFTC's website a notice that the European Securities and Markets Authority will recognize LEIs issued by DTCC-SWIFT for data reporting purposes, registered entities and swap counterparties will be able to use LEIs provided by either DTCC-SWIFT (referred to as CICIs) or German issuer WM Datenservice (referred to as General Entity Identifiers), to satisfy their swap data reporting and recordkeeping obligations. Similarly, the CFTC will allow registered entities and swap counterparties to used identifiers provided by other issuers once the CIO publishes on the CFTC's website that (i) CFTC staff have verified that such issuer meets certain LEI standards and (ii) each jurisdiction that accepts such issuer's identifiers also accepts DTCC-SWIFT's identifiers.

Once a global system is adopted, registered entities and swap counterparties may use LEIs provided by DTCC-SWIFT, WM Datenservice or any other issuer that has been listed by the CIO on the CFTC's website as globally acceptable. Each registered entity and swap counterparty must ensure that it satisfies all swap data reporting and recordkeeping obligations using a single LEI.

The CFTC's amended order is available here.

CFTC Delays Effective Date for Clearing Exemption for Swaps Between Affiliates

The Commodity Futures Trading Commission recently adopted regulations relating to the clearing exemption for swaps between certain affiliated entities. Pursuant to the final regulations, the clearing exemption is available to affiliates that satisfy certain conditions and reporting requirements. More information regarding the final regulations is available in *Corporate and Financial Weekly Digest* of April 5, 2013.

The effective date of the final regulations is listed in the *Federal Register* as June 10, 2013, but due to Congressional Review Act requirements, the effective date has been automatically extended to June 18, 2013. As a result, the CFTC's Division of Clearing and Risk issued an advisory exempting swaps between "eligible affiliate counterparties" (as such term is used in the final regulations) from the clearing requirement under Section 2(h)(1)(A) of the Commodity Exchange Act and Part 50 of CFTC Regulations until June 18, 2013.

The CFTC staff advisory is available here.

LITIGATION

“Sophisticated Plaintiff” Found to Be Adequate Class Representative

The US District Court for the Western District of Texas certified a class of common stock purchasers in an action against Pain Therapeutics, Inc. (PTI) and its directors. The plaintiffs’ complaint alleges that PTI misled investors concerning its efforts to obtain Federal Drug Administration approval for the painkiller REMOXY.

Among the requirements for certifying a class is that the “claims or defenses of the representative parties are typical of the claims or defenses of the class,” and “the representatives will fairly and adequately protect the interests of the class.” PTI argued that the proposed plaintiff class could not meet these elements because the general partner of the lead plaintiff was a sophisticated investor. In rejecting the argument and certifying the class, the court found that Congress, in the Private Securities Litigation Reform Act, expressed a desire for sophisticated plaintiffs in class action securities case. The court found that the plaintiff’s “sophistication makes it more suitable to serve as a lead plaintiff, not less.”

KB Partners I, L.P. v. Barbier, No. A-11-CA-1034-SS, 2013 WL 2443217 (W.D. Tex. 2013).

Securities Class Representative Cannot Object to Bankruptcy Release on Behalf of Class

The US District Court for the Southern District of New York affirmed an order rejecting an objection to the confirmation of a Chapter 11 Plan of Reorganization for Dynegy, Inc. and Dynegy Holdings, LLC (together, Dynegy) for a lack of standing.

In March 2012, a putative securities class action was filed against Dynegy and its officers. A lead plaintiff was appointed in that action in July. Contemporaneously, Dynegy filed for Chapter 11 bankruptcy, staying the securities litigation against itself, but not the individual defendants. The US Bankruptcy Court for the Southern District of New York approved a disclosure statement which included releases of claims against the individual defendants in the securities action. The lead plaintiff in the securities action, Stephen Lucas, opted out of the release. Lucas also objected to the release on behalf of the putative class in the securities action. The bankruptcy court overruled his objection.

The District Court affirmed, holding that Lucas did not have standing to object to the release. Lucas could not object on his own behalf; having already opted out, the issue was moot as to him. Additionally, Lucas lacked standing to object in the bankruptcy action on behalf of the putative securities class because he never attempted to certify that class before the bankruptcy court. Lucas could not use his status to “have his cake and eat it too – to opt out of the [r]elease personally but also to challenge its validity in the separate bankruptcy proceeding.”

In re Dynegy Inc., No. 12 Civ. 8908(JGK), 2013 WL 2413482 (S.D.N.Y. 2013).

BANKING

FDIC and Canada’s Deposit Insurance Corporation Sign Memorandum of Understanding

On June 12, the Federal Deposit Insurance Corporation (FDIC) announced the signing of a memorandum of understanding (MOU) with the Canada Deposit Insurance Corporation (CDIC) that “formalizes and strengthens cross-border cooperation in the event of the failure of a large, complex financial institution operating in both countries.” Several large Canadian banks have significant presences in the United States. The MOU was signed Tuesday evening in Ottawa by CDIC President and CEO Michéle Bourque and FDIC Chairman Martin J. Gruenberg.

The agreement “builds on the existing relationship between the FDIC and CDIC by enhancing and strengthening their consultation and cooperation and exchange of information related to crisis management and contingency planning, both during normal business times and during periods of financial stress.”

For more information, see the Memorandum of Understanding Concerning the Resolution of Insured Depository Institutions and Certain Other Financial Companies with Cross-Border Operations in the United States and Canada.

OCC Adjusts Policy Statement to Facilitate Capital Raising by Minority Institutions

On June 11, Comptroller of the Currency Thomas J. Curry told an interagency conference on minority depository institutions (MDI) and community development financial institutions that the Office of the Comptroller of the Currency (OCC) has revised its policy statement on minority institutions to make it easier for those banks and thrifts to raise capital. Minority depository institutions, or MDIs, "are sometimes unable to accept equity investment capital from some investors because their status as a minority institution would be jeopardized if the share of minority ownership fell below 50 percent."

The OCC's new policy statement adds discretionary language that allows the agency to continue to treat an existing minority institution as an MDI even if it no longer meets the 51 percent ownership criteria provided that it meets two requirements. First, it must primarily serve the credit and economic needs of the community in which it is chartered and, second, that community must be predominantly minority. A mutual savings institution may be considered an MDI if a majority of its board is minority and if the communities it serves are predominantly minority. In addition, a mutual institution can be considered a minority institution if women comprise a majority of the board and hold a significant percentage of senior management positions.

Mr. Curry signed the OCC's new Policy Statement on Minority Institutions on June 7. The amended policy statement raises interesting questions for non-minority institutions that meet the above two qualifications. Among other things, the minority institutions may be designated as community development banks. That designation may facilitate investment in such a bank by other depository institutions. For more information, see the Policy Statement on Minority National Banks and Federal Savings Associations.

CFPB Director Cordray Addresses Overdraft Fees

In prepared remarks given on June 11, Consumer Financial Protection Bureau (CFPB) Director Richard Cordray summarized the CFPB's preliminary report on the overdraft practices of banks and other financial institutions. Signaling an upcoming rulemaking after additional research is undertaken, Director Cordray stated,

> This report describes a broad variety of different overdraft practices and different consumer experiences. It also raises concerns about the ability of consumers to anticipate and avoid overdraft costs. As I indicated at a field hearing on this subject last year, we recognize that federal agencies have addressed these issues in different ways at different times, and our review is intended to help develop more consistent federal oversight of these issues across financial institutions.

Director Cordray explained,

> [t]he report has three major takeaways. First, the data show that opting in to overdraft coverage of ATM and debit card transactions makes consumers more vulnerable to increased costs and involuntary account closures…. A second takeaway is that financial institutions have very different policies, procedures, and practices that can be highly complex and difficult for consumers to understand, yet greatly affect whether and how often they will incur overdraft fees…. The third takeaway is how widely the outcomes for consumers vary across financial institutions. The average amount of annual overdraft charges in our study was $225. But consumers at some institutions paid an average of $147, while consumers at others paid $298, more than twice as much. Similarly, involuntary account closures because of overdraft ranged widely. Of the accounts that were open at some point in 2011, six percent were involuntarily closed by the end of the year. But the rate of involuntary closures appeared to vary by more than 14-to-1 among the financial institutions covered in our study. These wide variances raise further questions.

Director Cordray stated, "nothing in this report implies that banks and credit unions should be precluded from offering overdraft coverage. Moreover, our study shows progress in some areas in recent years in protecting consumers from harm." However, Director Cordray also indicated that the CFPB will likely proceed to fashion a rule in this area after additional study:

> Our findings raise concerns about the number of consumers who are incurring heavy overdraft fees or account closures, and the wide variations across institutions indicate that certain practices and procedures merit further analysis. We need to determine whether they are causing the kind of consumer harm that the federal consumer protections laws are designed to prevent….We are a data-driven agency, and we will continue to examine this subject carefully before taking action through a transparent policy process.

Director Cordray's remarks are available here.

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