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CORPORATE & FINANCIAL
WEEKLY DIGEST

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SEC/CORPORATE

Bylaw of Delaware Corporation Providing for Exclusive Forum in North Carolina Upheld

In *City of Providence v. First Citizens Bancshares, Inc*., C.A. No. 9795 (Del. Ch. Sep. 8, 2014), Delaware Chancellor Bouchard upheld a bylaw adopted by the board of directors of a corporation incorporated in Delaware providing that intra-corporate disputes be litigated exclusively in North Carolina. *City of Providence* relies heavily upon then-Chancellor Strine's June 2013 opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013) (*Chevron*), which found that exclusive forum bylaws are facially valid.

City of Providence goes beyond *Chevron* in some important respects. First, the Delaware Court of Chancery found that designating the corporation's headquarters state of North Carolina as the exclusive forum did not affect the bylaw's facial validity: "nothing in the text or reasoning of *Chevron* can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware."

The court also concluded that the adoption of the bylaw on the same day that the company entered into a definitive merger agreement did not affect its enforceability on an as-applied basis. Emphasizing that the forum bylaw only regulates where a suit may be filed, not whether it may be filed or the remedy available, the court stated:

> That the Board adopted it on an allegedly "cloudy" day when it entered into the merger agreement . . . rather than on a "clear" day is immaterial given the lack of any well-pled allegations . . demonstrating any impropriety in this timing.

As a result, the opinion directly contradicted the recent opinion in *Roberts v. TriQuint Semiconductor, Inc.,* No. 1402-02441 (Cir. Ct. Or. Aug 14, 2014). In that case, an Oregon state court refused to enforce an exclusive forum bylaw adopted in similar circumstances. The *Triquint* court emphasized that adopting the bylaw and merger agreement on the same day improperly deprived stockholders of the opportunity to disagree with the board and repeal the bylaw. Chancellor Bouchard's response was direct: "I do not interpret either the [Delaware General Corporation Law] or *Chevron* to mandate that a board-adopted forum selection bylaw can be applied only if it is realistically possible that stockholders may repeal it." Delaware has now joined California, Illinois, New York and Texas in enforcing exclusive forum bylaws. *City of Providence* should provide transaction planners with greater certainty, particularly on the question of the timing of adoption, although there remains a risk that a court in another state may reach a different conclusion.

BROKER-DEALER

FINRA Board to Consider Rule Proposals Regarding Private Trading Platforms

The Board of Governors (the Board) of the Financial Industry Regulatory Authority is scheduled to meet on September 19 to consider rule proposals requiring heightened oversight of computerized trading strategies and greater transparency and disclosures by private trading platforms. The FINRA Board will consider issuing guidance regarding a member firm's obligations to supervise the development, testing and use of algorithmic

trading strategies, and will consider a rule proposal requiring the registration of employees who develop or supervise the development of computerized strategies used to facilitate algorithmic trading. The proposals also would require alternative trading systems (ATSs) to provide FINRA with additional order book information (e.g., buy and sell orders) to enhance FINRA's surveillance and oversight of ATSs. Currently, ATSs (also referred to as dark pools) do not post buy and sell orders, but only report trades after they take place.

After the September 19 meeting, FINRA will notify member firms via email about the FINRA Board's actions on the proposed items and anticipated next steps, if any.

Click here to read the FINRA Board's Rulemaking Items for Discussion at the September 2014 Meeting.

CBOE and C2 in Discussions With FINRA for Regulatory Services

CBOE Holdings Inc., the parent company of the Chicago Board Options Exchange (CBOE) and the C2 Options Exchange (C2), has issued a news release announcing that CBOE and C2 are in discussions with the Financial Industry Regulatory Authority (FINRA) on a potential regulatory services agreement pursuant to which FINRA would provide regulatory services to the CBOE and C2 options markets. If terms can be agreed to, a regulatory services agreement could potentially be finalized within the next few months. The agreement may include the transition to FINRA of certain CBOE regulatory services staff and options surveillance staff. In that event, CBOE and C2 would still be responsible for the regulation of their markets and would maintain an in-house regulatory team to, at a minimum, manage CBOE and C2 regulatory oversight programs and oversee the FINRA regulatory services relationship. Regulation of the CBOE Futures Exchange is not anticipated to be part of the regulatory services agreement with FINRA.

Click here to read CBOE Holdings Inc.'s September 11, 2014 News Release.

DERIVATIVES

SEC Proposes Rule for Communications Involving Security-Based Swaps

On September 8, the Securities and Exchange Commission proposed a rule providing that publication or distribution of quotes involving security-based swaps that may be purchased only by eligible contract participants would not be deemed offers of such security-based swaps for the purposes of Section 5 of the Securities Act of 1933 (1933 Act). While security-based swaps are currently traded over-the-counter, the SEC anticipates that additional rulemaking under Title VII of the Dodd-Frank Act will require certain security-based swaps to be traded on regulated markets, such as security-based swap execution facilities or national securities exchanges. Because such markets will be accessible to persons that are not eligible contract participants, publication and distribution of price information on such markets could be considered offers of security-based swaps that would be subject to the registration requirements of the 1933 Act. The proposed rule seeks to address this concern by providing that such communications do not constitute offers of security-based swaps.

Comments on the proposed rule must be submitted to the SEC by November 10.

The text of the SEC release is available here.

CFTC

CFTC Aligns CPO Regulation With JOBS Act, Provides Other Guidance for CPOs

The Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) recently issued several letters affecting commodity pool operators (CPOs):

- JOBS Act Harmonization: On September 9, DSIO issued exemptive relief to permit CPOs that have claimed relief under CFTC Regulation 4.7(b), or an exemption from CPO registration under CFTC Regulation 4.13(a)(3), to engage in general solicitation and advertising in the marketing of their pools, consistent with the Jumpstart Our Business Startups Act (JOBS Act). This relief was necessitated by inconsistencies between these existing CFTC Regulations, which contained express prohibitions on public marketing, and

the JOBS Act's liberalization of the private placement regime under the Securities Act of 1933 (1933 Act) to permit general solicitation and advertising in certain circumstances. The CFTC relief is available to CPOs that are engaging in an offering pursuant to Rule 506(c) of Regulation D under the 1933 Act, or which use a reseller in reliance on Rule 144A under the 1933 Act. However, the relief is not self-effectuating, and must be claimed by filing a notice that includes required information with DSIO. Letter No. 14-116 is available here.

- Consolidated Reporting: In CFTC Letter No. 14-112, DSIO extended certain reporting relief, which previously had been provided to CPOs of investment companies registered under the Investment Company Act of 1940 (ICA), to include CPOs of pools that are not registered under the ICA. The relief permits such CPOs to file a single consolidated annual report and Form CPO-PQR for a parent commodity pool (Parent Pool) and its wholly owned subsidiary (Trading Subsidiary), rather than requiring duplicative reporting by both pools. Pursuant to the relief, the consolidated annual report and Form CPO-PQR for the Parent Pool must also incorporate specified financial data for the Trading Subsidiary and, if the reporting requirements for the two pools differ, the CPO must comply with the more stringent requirements. To claim relief under Letter No. 14-112, a CPO must file a notice of claim that includes required information with DSIO. Letter No. 14-112 is available here.
- Third-Party Recordkeeping: CFTC Exemptive Letter No. 14-114 expands the types of third-party recordkeepers that are permitted to retain required CPO books and records consistent with CFTC Regulations. In lieu of the approach currently codified in CFTC Regulations, which specify eligible third-party recordkeepers (including fund administrators and custodians), the relief would allow a CPO to use any third-party recordkeeper so long as that the CPO maintains timely access to such records and continues to timely and completely file statements required by CFTC Regulations. Letter No. 14-114 is available here.
- Reporting for Exempt Pools: CFTC Exemptive Letter No. 14-115 provides CPO-PQR reporting relief to CPOs that are registered as such, but which solely operate pools pursuant to CFTC Regulations 4.5 or 4.13(a)(3) (exempt pools). Although DSIO observed that CFTC Regulations would technically require such CPOs to file Form CPO-PQR, it determined that relief from this requirement would be appropriate since such CPOs otherwise have no reporting obligations under Part 4 of the CFTC's Regulations. This relief does not apply to a person that is otherwise required to be registered as a CPO. Letter No. 14-115 is available here.
- Insurance Company General Accounts: In CFTC Interpretive Letter No. 14-113, DSIO confirmed that an entity formed by the aggregation of general account assets from multiple, commonly owned, state-regulated life insurance companies is not a commodity pool within the meaning of the Commodity Exchange Act. Letter No. 14-113 is available here.

OTC Derivatives Regulators Issue Report Regarding Cross-Border Issues

On September 10, the Over-the-Counter Derivatives Regulators Group (ODRG) issued a report providing an update to the Group of 20 (G20) on its progress in resolving over-the-counter (OTC) derivatives cross-border implementation issues. The ODRG stated it will continue to develop approaches to address potential gaps and duplications in regulating branches and affiliates and the treatment of organized trading platforms and implementation of the G20 commitment that all standardized OTC derivatives contracts be traded on exchanges or electronic trading platforms. The ODRG also described its progress toward implementing previously reached understandings in areas of (1) equivalence and substituted compliance between jurisdictions, (2) clearing determinations, (3) margin requirements for non-centrally cleared derivatives, and (4) trade repository data access and reporting. Finally, the ODRG reported that it has requested that the Financial Stability Board take steps to facilitate the removal of barriers to the reporting of counterparty-identifying information to trade repositories.

The ODRG Report is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

First Bitcoin Swap Proposed

According to Reuters reports on September 12, TeraExchange, LLC, received approval from the Commodity Futures Trading Commission to begin listing an over-the-counter swap that is based on the price of a bitcoin. The CFTC approval marks the first time a US regulatory agency approved a bitcoin financial product. In March, TeraExchange announced the finalization and submission to the CFTC of its non-deliverable forward swap agreement framework for bitcoin, which allows parties to hedge against fluctuations on the Tera Bitcoin Price

Index exchange rate for bitcoin. According to Reuters, to obtain CFTC approval, TeraExchange was required to create an Index that was sufficiently resistant to manipulation. The CFTC previously approved TeraExchange for temporary registration as a swap execution facility in late 2013.

Click here to read the Reuters report.

LITIGATION

Eighth Circuit Clarifies False Claims Act Pleading Standards for Whistleblowers

The United States Court of Appeals for the Eighth Circuit recently held that whistleblowers may satisfy the False Claims Act's (FCA) heightened pleading standards without providing representative examples of false claims, such as invoices, as long as they provide other indicia of their reliability, such as personal knowledge of allegedly fraudulent practices. Planned Parenthood of the Heartland, Inc. (Planned Parenthood) is a nonprofit organization in Iowa that provides services to patients, including those eligible for Medicaid, through clinics in various locations. From 1991 to 2008, Susan Thayer served as a manager for two such clinics. Based on her personal knowledge of Planned Parenthood's billing practices, Ms. Thayer brought a *qui tam* action alleging that Planned Parenthood had violated the FCA and similar state laws by submitting false or fraudulent claims for Medicaid reimbursement. Because Ms. Thayer did not include representative examples of the purportedly false invoices, the trial court dismissed her complaint for failure to plead her claims with particularity as required by Federal Rule of Civil Procedure 9(b). The Eighth Circuit affirmed in part and reversed in part, finding that neither Rule 9(b) nor applicable caselaw requires representative examples to be submitted with every FCA complaint that alleges a systematic practice or scheme of submitting false claims. The Eighth Circuit's holding follows other circuits that have concluded a whistleblower can satisfy Rule 9(b)'s heightened pleading standard by "alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."

Thayer v. Planned Parenthood of the Heartland, Inc., Case No. 13-1654 (8th Cir. Aug. 29, 2014).

Investment Management Firm Discloses Wells Notice Over Performance Claims

F-Squared Investments, Inc. (F-Squared), a registered investment manager that provides portfolios of exchange-traded funds (ETFs), recently disclosed that it received a Wells notice from the Securities and Exchange Commission recommending enforcement action over the performance claims of certain fund indexes. According to F-Squared's most recent Form ADV, the SEC investigation covered the performance record of certain fund indexes from April 2001 through September 2008 (the Relevant Period). In various advertising materials, F-Squared represented that performance records were based on buy and sell signals used by a wealth management firm to make investment decisions during the Relevant Period. F-Squared acquired the data signals used in performance reporting for the Relevant Period in September 2008, and in October 2013 removed references to performance records from all advertising materials. In May 2014, F-Squared alerted clients that the SEC had informed it that the wealth management firm had not used buy and sell signals to manage assets, with the result that performance results for certain indexes had been substantially overstated. F-Squared, its CEO and a related entity received a Wells notice regarding the performance claims last month. F-Squared noted that it has cooperated with the investigation and will continue to do so.

F-Squared's most recent Form ADV is available here.

BANKING

Banking Agencies Request Comment on Proposed Questions and Answers Regarding Community Reinvestment

On September 8, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency requested comment on proposed revisions to the "Interagency Questions and Answers Regarding Community Reinvestment" (Q&As). The Community Reinvestment Act (CRA) requires each federal financial supervisory agency to assess the record of a financial institution in helping to meet the credit needs of its entire community, including low- and moderate-income

neighborhoods, consistent with safe and sound operations. The agencies consider that record when reviewing certain licensing applications by an institution. The interagency Q&As provide guidance for use by agency personnel, financial institutions, and the public for the interpretation of the requirements of the agencies' regulations implementing the CRA.

The proposed new and revised guidance addresses questions raised by bankers, community organizations and others regarding the agencies' CRA regulations.

The proposed new and revised Q&As:

- address alternative systems for delivering retail banking services;
- add examples of innovative or flexible lending practices;
- address community development-related issues by: (1) clarifying guidance on economic development; (2) providing examples of community development loans and activities that are considered to revitalize or stabilize an underserved nonmetropolitan middle-income geography; and (3) clarifying how community development services are evaluated; and
- offer guidance on how examiners evaluate the responsiveness and innovativeness of an institution's loans, qualified investments and community development services.

Comments will be due 60 days after publication.

To view the guidance, click here.

Federal Reserve and CFPB Announce Increases in Dollar Thresholds in Regulations Z and M for Exempt Consumer Credit and Lease Transactions

On September 9, the Federal Reserve Board and the Consumer Financial Protection Bureau (CFPB) announced increases in the dollar thresholds in Regulation Z (Truth in Lending) and Regulation M (Consumer Leasing) for exempt consumer credit and lease transactions. These increases "are consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amendments to the Truth in Lending Act and the Consumer Leasing Act to adjust these thresholds annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers." The Dodd-Frank Act increased the threshold in the Truth in Lending Act (TILA) for exempt consumer credit transactions from $25,000 to $50,000, effective July 21, 2011. In addition, the Dodd-Frank Act requires that this threshold be adjusted annually for inflation by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), as published by the Bureau of Labor Statistics. Transactions at or below the thresholds are subject to the protections of the regulations.

The adjustments to the thresholds reflect the annual percentage increase in the consumer price index as of June 1, 2014 and will take effect on January 1, 2015.

Based on these adjustments, the protections of the TILA and the Consumer Leasing Act generally will apply to consumer credit transactions and consumer leases of $54,600 or less in 2015—an increase of $1,100 from 2014. However, private education loans and loans secured by real property (such as mortgages) are subject to the Truth in Lending Act regardless of the amount of the loan.

The joint press release is available here.

UK DEVELOPMENTS

AIFMD: Additional Alternative Investment Fund (AIF) Data Request by FCA

On August 22, the UK Financial Conduct Authority (FCA) contacted a number of firms that had previously submitted to the FCA an earlier version of the required AIF schedule as part of their FCA application, to request that additional supplementary information required to satisfy the requirements of the current, updated AIF schedule be provided to the FCA by September 5.

On September 9, the FCA used its EU Alternative Investment Fund Managers Directive (AIFMD) news webpage—a resource which the FCA encourages firms to monitor on an on-going basis for the latest information

on AIFMD—to report that it had not received responses from all those firms previously contacted and requested that those still to do so should ensure that they respond with the relevant information as soon as possible and in any event by close of business on September 12. In making this additional request, the FCA highlighted that a failure to provide the required information may affect the ability of firms to correctly submit their returns at the end of their reporting period via GABRIEL (GAthering Better Regulatory Information Electronically)—the FCA's online regulatory reporting system for the collection, validation and storage of regulatory data.

Any AIFMD firm that did not receive such communication is not required to do anything. Those that did receive such a request but have experienced problems in responding within the timeframes set out above are requested to contact the FCA.

EU DEVELOPMENTS

UK Court Decision Demonstrates Importance of Compliance With ISDA Market Quotation Procedures

The High Court of England and Wales (Commercial Court) recently decided in favor of Lehman Brothers Finance S.A. (in liquidation) (LBF) against Sal. Oppenheim Jr. & Cie. KGAA (Oppenheim). The matter involved a dispute over the Market Quotation calculations made by Oppenheim following the Automatic Early Termination of the 1992 ISDA Master Agreement (1992 ISDA) between the two parties, arising from LBF's credit support provider, Lehman Brothers Holdings Inc., entry into Chapter 11 proceedings on September 15, 2008. The parties had entered into four option agreements referencing the Nikkei 225 Stock Average Index (Nikkei). The Nikkei fell substantially between September 12, 2008 and September 16, 2008, the day on which Japanese exchanges re-opened following a public holiday on September 15, significantly benefiting LBF's position in the options.

Oppenheim requested three reference market makers, rather than the four required under the 1992 ISDA, to make its market quotation calculations as of September 12, 2008, three days prior to the actual occurrence of the Automatic Early Termination Date. Oppenheim had not put in writing any explanation as to why it maintained that obtaining the market quotations with a value date after September 12 would lead to a commercially unreasonable result, which may have entitled it to use an earlier valuation date.

The court awarded LBF's claim for the balance of the sum with interest of what it contended it was due under the Market Quotation provisions of the 1992 ISDA. Oppenheim had originally paid the claimant €1,849,968.99. The court ordered Oppenheim to pay €2,963,091.18, which included interest on the unpaid amount. The court held that the Market Quotation provisions required the non-defaulting party to seek quotations as soon as reasonably practicable after Automatic Early Termination occurs. Additionally, the court held that market quotations should be sought from four reference market makers as of the same time and day, so that they are contemporaneous; the quotations must not be back-dated before the Early Termination Date, even if the relevant markets have moved significantly from their positions on the Early Termination Date.

This case demonstrates the importance for market participants to expressly follow the termination provisions of the ISDA Master Agreement and to keep precise records of all calculations as well as written justification for any aspects of the calculations that do not follow the procedures to the letter.

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