Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

October 3, 2014 Volume IX, Issue 39

SEC/CORPORATE

ISS Publishes Results of Annual Global Voting Policy Survey

On September 29, Institutional Shareholder Services (ISS), a leading proxy advisory firm, published the results of its 2014–2015 global voting policy survey. The survey, which, according to ISS, received more than 370 responses from a combination of institutional investors, corporate issuers and other corporate governance stakeholders, is an important component in ISS' voting policy formulation process. Key findings from the 2014–2015 survey include:

- ***Pay for Performance:*** The survey results suggest investor respondents were concerned about the magnitude of chief executive officer pay. According to ISS, 60 percent of investor respondents indicated that there is a threshold at which the magnitude of CEO pay merits concern, even if the company outperformed its peer group. According to ISS, support for potential remedies, such as absolute limits on CEO pay and proportionate limits based on peer group performance, varied among investor respondents. By contrast, 50 percent of issuer respondents chose the response "No, my organization does not consider the magnitude of CEO compensation when evaluating pay practices; other aspects (such as company performance and pay structure) are considered more important."
- ***Unilateral Adoption of Bylaws:*** Investor respondents were, by a significant margin, opposed to unilateral adoption of bylaw amendments that diminish shareholder rights, according to the survey results. Of the investors that responded to the survey, 72 percent indicated that the board should never adopt bylaw or charter amendments that negatively affect investors' rights without shareholder approval (20 percent chose "it depends"). Forty-four percent of issuer respondents indicated that the board should be free to unilaterally adopt any bylaw/charter amendments, subject to applicable law (34 percent chose "it depends"). A majority of issuer respondents and more than 85 percent of investor respondents who chose "it depends" indicated that directors' track records, level of board independence, other governance concerns, the type of amendment and the vote standard for amendments by stockholders were all relevant factors for evaluating board accountability with respect to charter and bylaw amendments.
- ***Boardroom Diversity:*** A majority of all respondents, including issuers and investors, indicated that they consider overall diversity (including gender) when evaluating boards.
- ***Equity Plans:*** According to ISS, investor respondents indicated that they would weigh a combination of plan features and grant practices as, or more, heavily than plan cost alone in a scorecard approach to evaluating US equity-based compensation proposals. ISS plans to implement a "balanced scorecard" approach to evaluating plan proposals for US companies that weighs factors under three categories: cost, plan features and company grant practices.
- ***Risk Oversight/Audit:*** While a majority of investor respondents indicated that, when evaluating the board's role in risk oversight, the role of the relevant risk oversight committee, the board's risk oversight policies and procedures, board oversight action prior to incidents and board oversight after an incident were all "very" or "somewhat" important, the highest percentage (85 percent of investors) indicated that action *subsequent* to an incident was "very" important.

ISS expects to release draft voting policies in October. Typically, ISS publishes its final benchmark voting policies in November, and applies such policies to proposals voted on at meetings held on or after February 1 of the following year.

To view ISS' complete summary of its 2014–2015 survey results, click here.

BROKER-DEALER

FINRA Requests Comment on a Rule Proposal to Implement the Comprehensive Automated Risk Data System

In December 2013, the Financial Industry Regulatory Authority, Inc. released a concept proposal seeking comments on an initiative to implement the Comprehensive Automated Risk Data System (CARDS), which would be designed to collect information in a standardized format across all member firms. FINRA has now issued Regulatory Notice 14-37 in order to request comments on a proposed rule change that would implement CARDS. The rule proposal reflects comments to the concept proposal.

Under the proposed rule, CARDS would be implemented in two phases and would exclude from the required collection of information personally identifiable information (PII) for customers. The first phase would require approximately 200 carrying or clearing firms (i.e., firms that carry customer or non-customer accounts or clear transactions) to periodically submit, in an automated and standardized format, specific information that is part of their books and records relating to their securities accounts and the securities accounts for which they clear. The information required to be submitted would include account profile information (excluding PII) and data relating to securities and account transactions and holdings and securities reference data, but would exclude information related to suitability. For all other securities accounts, the carrying or clearing firms would be required to submit these data elements as part of the first phase of CARDS. The second phase would require fully disclosed introducing firms to submit specified account profile-related data elements to FINRA.

Click here for Regulatory Notice 14-37.

DERIVATIVES

NFA Issues Notice Regarding CPO and CTA Reports and Filing Requirements

On October 1, National Futures Association issued Notice to Members I-14-26 informing commodity pool operators (CPOs) of changes to Form PQR and to remind member CPOs and commodity trading advisors (CTAs) to file required reports in a timely manner. NFA has made minor technical changes to Form PQR, which are available here. These changes became effective September 30; the updated Form PQR will be available in the EasyFile system on October 6. The CTA Form PR remains unchanged.

Additionally, NFA reminded member CPOs and CTAs to file required reports on a timely basis. A member CPOs must electronically file Form PQR within 60 days of the quarters ending in March, June and September, and within 90 days of the quarter ending in December. A member CTA must file Form PR within 45 days of each quarter end. A member CPO must also file a copy of each operated pool's Annual Report within 90 days of the pool's fiscal year end. NFA reminded members that failure to timely file these reports is a violation of NFA rules and may result in disciplinary action.

NFA Notice I-14-26 is available here.

CFTC

CFTC Extends Relief for SEFs and DCMs from Straight-Through Processing Requirements for Package Transactions

On September 30, the Commodity Futures Trading Commission's Divisions of Market Oversight and Clearing and Risk (Divisions) issued No-Action Letter No. 14-121 extending no-action relief previously granted to swap execution facilities (SEFs) and designated contract markets (DCMs) from the CFTC's straight-through processing requirements for package transactions. A "package transaction" is a transaction: (i) between two or more counterparties involving two or more instruments; (ii) priced or quoted as one economic transaction with simultaneous or near-simultaneous execution of all components; (iii) that contains at least one component that is a swap subject to the SEF or DCM trade execution requirement; and (iv) where the execution of each component is contingent upon the execution of all other components. As previously reported in the ***Corporate and Financial Weekly Digest*** edition of May 2, 2014, the Divisions had issued Letter No. 14-62 granting no-action relief to SEFs and DCMs from straight-through processing requirements in CFTC Regulations 37.9(a)(2), 37.203(a) and 38.152, which generally require that a swap that is rejected from clearing for credit-related reasons (Rejected Transaction) be treated as having been void *ab initio*. The aforementioned relief was to expire on September 30, but Letter No. 14-121 extends to February 16, 2015, that portion of Letter No. 14-62 that permits a Rejected Transaction to be resubmitted for clearing on the same terms and conditions other than the time of execution if the Rejected Transaction was not accepted for clearing because of the sequencing of submission of the legs of a package transaction.

The extended relief requires resubmission be made within 120 minutes (as opposed to 60 minutes as required by the earlier relief) from the issuance of a notice of rejection. A SEF or DCM relying on the relief must satisfy a number of other conditions, including a requirement that the SEF or DCM have rules stating that if the resubmitted trade is also rejected, it is void *ab initio* without a second opportunity to submit a new trade.

CFTC Letter No. 14-121 is available here.

CFTC Extends Relief to DCOs and Their Clearing Members from Requirements for CDS Clearing-Related Swaps

On September 29, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) issued No-Action Letter No. 14-119 extending no-action relief previously granted to derivatives clearing organizations (DCOs), clearing members and reporting counterparties from certain requirements in connection with credit default swaps (CDS) entered into pursuant to a DCO's rules regarding its price submission process (CDS Settlement Price Process) for determining end-of-day settlement prices for cleared CDS (CDS Clearing-Related Swaps). DMO stated that DCO rules for CDS clearing generally require clearing members as part of the CDS Settlement Price Process to submit price quotes for any cleared CDS product in which the clearing member or its customers has open interest at the end of each day. To ensure the quotes submitted are reliable and reflect current market conditions, DMO stated that DCOs require clearing members to, on occasion, enter into "firm" or "forced" trades of CDS at the submitted price quotes. DMO stated that, absent relief, the CDS Settlement Price Process would require a DCO to register as a swap execution facility (SEF) or designated contract market (DCM) under Commodity Exchange Act (CEA) Section 5h(a)(1) and CFTC Regulation 37.3, adhere to trade execution requirements under CEA Section 2(h)(8) and CFTC Regulations 37.10 and 38.12, and meet swap data reporting requirements under CEA Section 2(a)(13)(G). DMO also stated that, absent relief, a reporting counterparty could be required to report swap data for off-facility swaps under CFTC Regulation 45.8.

DMO previously granted time-limited relief to DCOs, clearing members and reporting counterparties from the above requirements in CFTC No-Action Letter No. 13-86, which was to expire on September 30. Letter No. 14-119 extends the relief for parties meeting certain requirements. First, DMO will not recommend enforcement action against a DCO for failing to register as a SEF or DCM or against a clearing member for entering into CDS Clearing-Related Swaps through a DCO's CDS Settlement Price Process, subject to the following conditions: (i) the relief applies only to CDS Clearing-Related Swaps arising from a DCO's Settlement Price Process as required by DCO rules; (ii) each trade must involve a clearing member that is eligible to clear CDS indices and that participates in the CDS Settlement Price Process, and must be carried out such that the DCO's net exposure remains unchanged; (iii) the CDS Clearing-Related Swap trade is initiated solely by the DCO; and (iv) the DCO relying on the relief must make information regarding the CDS Settlement Price Process available upon request.

DMO also will not recommend enforcement action against a reporting counterparty for failure to comply with Part 45 swap data reporting obligations for CDS Clearing-Related Swaps, subject to the following conditions: (i) the reporting party participates in the CDS Settlement Price Process;(ii) the relief applies only to CDS Clearing-Related Swaps arising from a DCO's Settlement Price Process as required by DCO rules; and (iii) the reporting counterparty and DCO agree that the DCO will fulfill all of the reporting counterparty's obligations under Part 45 for CDS Clearing-Related Swaps.

The no-action relief will expire on September 30, 2015.

CFTC Letter No. 14-119 is available here.

CFTC and NFA Require SD and MSP Risk Exposure Reports to Be Submitted Through WinJammer

The Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) and National Futures Association (NFA) announced that, effective September 30, swap dealers (SDs) and major swap participants (MSPs) are required to submit Risk Exposure Reports via WinJammer. The CFTC had previously implemented a web-based portal through which SDs and MSPs could submit Risk Exposure Reports as required by CFTC Regulation 23.600(c)(2)(ii). As of September 30, NFA requires SDs and MSPs to file all quarterly and interim Risk Exposure Reports with NFA and CFTC through WinJammer within five business days of providing the report to the SD's or MSP's senior management. Because reports filed through WinJammer are furnished to the CFTC automatically, DSIO no longer requires SDs and MSPs to use the CFTC web portal to file Risk Exposure Reports that have been filed through WinJammer.

NFA Notice I-14-24 is available here.

The CFTC release is available here.

LITIGATION

SEC Settles Insider Trading Case, Finding Roommate Relationship Created Duty of Trust and Confidence

The Securities and Exchange Commission recently accepted an offer of settlement submitted by Filip Szymik, in anticipation of a cease-and-desist proceeding resulting from Szymik's purported insider trading in Herbalife, Ltd. stock.

According to the SEC, Szymik used advance information about a negative review of Herbalife's stock by the hedge fund Pershing Square Management L.P., which he learned of through his roommate, an analyst at Pershing. The SEC found that Pershing's review alone was market moving and constituted inside information. Szymik related the information to his friend, Jordan Peixoto, and the two used the information to purchase a number of Herbalife put options. After Pershing's evaluation became public, Herbalife's stock fell 39 percent by close of trading, increasing the value of the put options by approximately $340,000, though Szymik ultimately obtained only $47,100 in actual profits. According to the SEC, by providing Peixoto with the advance information, and trading on the stock, Szymik violated the relationship of trust and confidence between him and his roommate, violating Section 10(b) of the Securities Exchange Act of 1934.

Without admitting or denying the SEC's findings, Szymik agreed to settle and disgorge his $47,100 profits, and to cease and desist from any further violations of Section 10(b). Szymik's settlement, which allowed him to neither admit nor deny the findings alleged, continues a string of similar non-admissions despite statements made by the Chairperson of the Securities and Exchange Commission, Mary Jo White, on September 26, 2013, that the SEC would be limiting the practice.

In the Matter of Szymik, No. 3-16183 (SEC Sept. 30, 2014).

CFTC Settles Fraudulent Trading Violations with Forex Trader

The Commodity Futures Trading Commission accepted an offer of settlement submitted by the owner of Peak Capital Group, Inc., Scott Beatty, in anticipation of an administrative proceeding resulting from Beatty's alleged violations of the Commodity Exchange Act (CEA) and other CFTC regulations.

According to the CFTC, Beatty solicited foreign investors and received $825,000 from at least 49 different Japanese citizens to trade leveraged, margined or financed foreign currency contracts (forex). Beatty purportedly misrepresented his earnings to customers, claiming returns as high as 43.9 percent when, in fact, Beatty had been using the submitted funds for personal use. Additionally, to facilitate his ongoing fraud, Beatty made false statements to the CFTC, stating that Peak Capital had been out of business since 2010, and that the company's website was only a template copy of the website for his construction company.

Under Sections 4b(a)(2)(A) and (C) of the CEA, it is unlawful to engage in all manner of fraud in connection with forex transactions, including solicitation and misappropriation. To prove a CEA violation under these sections, the CFTC must show that the violator knowingly made a material misrepresentation.

In contrast to the recent push by the Securities and Exchange Commission and court scrutiny of similar settlements, the CFTC allowed Beatty to neither admit nor deny its findings, perhaps recognizing the important tool regulators have in offering such settlements. Beatty agreed to settle for $1,641,000 in combined restitution and civil penalties, and additionally agreed to: (i) cease and desist from any ongoing violations and (ii) be permanently prohibited from engaging in trading under any registered entities.

In the Matter of Beatty, No. 14-34 (CFTC Sept. 30, 2014).

UK DEVELOPMENTS

FCA Updates Its AIFMD Reporting Webpage

On September 28, the Financial Conduct Authority (FCA) updated its Alternative Investment Fund Managers Directive (AIFMD) reporting webpage with information about Annex IV transparency reporting. In a separate communication, the FCA confirmed that the highly anticipated Q&A on transparency will be published on its website. While no date was specified, clients should to continue to check the FCA's link to the Q&A from time to time.

The communication for authorised and registered alternative investment fund managers (AIFMs) (including full-scope UK AIFMs, small authorised UK AIFMs and small registered UK AIFMs) can be found here, and sets forth the required information for the AIFM and the alternative investment funds (AIFs) which the AIFM manages and, where relevant, markets.

The communication for non-EEA managers (including above-threshold non-EEA AIFMs and small non-EEA AIFMs) can be found here. This provides information which is required of the AIFM and any AIFs which are marketed under the UK National Private Placement Regime.

EU DEVELOPMENTS

ESMA Consults on Draft Guidelines Clarifying the Definition of "Derivatives" Under MiFID

On September 29, the European Securities and Markets Authority (ESMA) published a consultation paper (ESMA/2014/1189) (Consultation Paper) concerning the adoption of guidelines clarifying the definitions of "derivative" and "derivative contract" under the current Markets in Financial Instruments Directive (2004/39/EC) (MiFID). The guidelines proposed by ESMA in the Consultation Paper are the result of different approaches having previously been taken by EU Member States in their implementation of MiFID, which has given rise to different interpretations between EU Member States as to what constitutes a derivative or derivative contract, with certain financial instruments being excluded by certain EU Member States. This is particularly the case regarding physically settled commodity forwards (Commodity Forwards), which are the focus of the Consultation Paper.

While previously noted as a concern, the practical implications of this lack of consistency in interpretation across EU Members States has become pertinent following the implementation of the European Markets Infrastructure Regulation (EMIR) which refers to the definitions of derivative and derivative contract contained in MiFID when considering whether and how the reporting, clearing and margin requirements in addition to other relevant obligations contained in EMIR are applied.

ESMA considers it essential that EMIR is applied consistently across EU Member States and the purpose of the Consultation Paper is to produce guidelines that ensure a consistent approach concerning Commodity Forwards is universally included in its application in all EU Members States. This will allow a common approach across the European Union from the date these guidelines are effective until MIFID is superseded by the Markets in Financial Instruments Directive II (2014/65/EU) in 2017.

Responses to the Consultation Paper must reach ESMA by January 5, 2015. All responses should be submitted online here.

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Jonathan D. Weiner	+1.212.940.6349	jonathan.weiner@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	+1.212.940.6304	kathleen.moriarty@kattenlaw.com
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	+1.312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	+1.212.940.6447	peter.shea@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
LITIGATION		
Michael M. Rosensaft	+1.212.940.6631	michael.rosensaft@kattenlaw.com
UK/EU DEVELOPMENTS		
Barry E. Breen	+44.20.7776.7635	barry.breen@kattenlaw.co.uk
David A. Brennand	+44.20.7776.7643	david.brennand@kattenlaw.co.uk
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk

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

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London: Katten Muchin Rosenman UK LLP.