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SEC/CORPORATE

ISS Launches New Equity Plan Data Verification Portal

On August 14, Institutional Shareholders Services Inc. (ISS), a leading proxy advisory firm, announced the launch of a new equity plan data verification portal for all US companies receiving proxy recommendations. The intent of this portal is to ensure that ISS's voting recommendations for its institutional investor clients reflect the most current and accurate data, and this portal may help to alleviate concerns expressed by issuers that some past voting recommendations may not have been based upon accurate information about the equity plans. This portal follows similar recent ISS verification initiatives, including its Governance QuickScore Data Verification program and S&P 500 Draft Review process. With this portal, a US company that is submitting an equity plan proposal for approval by its shareholders will now have the opportunity to review ISS's data and resolve any discrepancies before ISS makes its voting recommendation on the proposal.

This portal will be available for any proxy statement filed after September 8, 2014, by a US company containing an equity plan proposal. Usage of this portal is optional and a US company may register with ISS here. If a company elects to participate, the following time periods have been outlined by ISS, subject to ISS caveats on meeting any specific timing:

- *Filing Proxy* – A company must file its definitive proxy materials with the Securities and Exchange Commission at least 30 days in advance of its shareholder meeting date to participate.
- *Portal Opens* – Within approximately 12 business days of filing a company's definitive proxy materials, ISS will notify the company by email that its data is available for verification.
- *Company Verification* – Within just two business days, the company (and not its advisors) must verify the equity plan data and/or request modifications. ISS will make the data available for verification at 9:00 a.m. Eastern Time on day one of the verification window, and will close at 9:00 p.m. Eastern Time on the following business day.
- *ISS Response* – Within approximately five business days, ISS will provide a response to any request for modification.

As part of its announcement of this portal, ISS included Frequently Asked Questions (FAQs) providing more detail on the equity plan data verification process and a list of 27 questions in Appendix A of the FAQs to summarize what aspects of equity compensation plans ISS is reviewing. The FAQs are available here.

Given the confusion and potentially adverse consequences that may result when a published voting recommendation with respect to an issuer's equity plan proposal is based upon incomplete or inaccurate information, and the influence of proxy advisory firm recommendations generally, issuers should consider taking advantage of this portal. However, to take advantage of this portal, a US company will need to file its proxy statement at least 30 days in advance of its meeting date, be on alert for email notifications from ISS and be prepared to act—and act—promptly during the short window for modification requests. If a US company currently contemplates including an equity plan proposal on its agenda for its next shareholder meeting, it should consider registering with ISS now and reviewing the list of questions in Appendix A of the FAQs.

DERIVATIVES

ISDA Publishes Protocol for 2014 Credit Derivatives Definitions

With exactly one month left until the September 22 effective date of the International Swaps and Derivatives Association's (ISDA) new 2014 Credit Derivatives Definitions, ISDA has published a protocol to assist in applying the new definitions to existing credit derivative transactions that are governed by the 2003 version of those definitions. By adhering to the protocol, a market participant is agreeing with all other adherents that its transactions will incorporate the new definitions in place of the old. Parties are not obligated to change the terms of their existing transactions, but may prefer to do so if they want to switch to the new definitions for future swaps and want to avoid the risk of having different terms for their old and new trades.

The 2014 definitions provide enhancements, rather than radical changes, for the credit derivatives market. The most significant additions are a new credit event for government bail-ins and provisions for delivery of asset packages in settlements. There are also a number of other smaller changes designed to address practical issues that have come to light during credit events that have occurred since the 2009 big and small bangs in the credit derivatives market. Parties are still free to use the 2003 definitions, but must be careful to specify which version applies in new transactions.

A detailed FAQ about the 2014 definitions can be found here.

The terms of the protocol can be found here.

CFTC

FinCEN Issues Advisories for US Financial Institutions

The Financial Crimes Enforcement Network (FinCEN) has issued separate advisories relating to (1) anti-money laundering (AML) and counter-terrorist financing (CTF) deficiencies and (2) promoting a culture of compliance with Bank Secrecy Act (BSA) and AML obligations.

On August 5, FinCEN issued Advisory FIN-2014-A006 to notify US financial institutions of updates to Financial Action Task Force (FATF)-identified jurisdictions with AML/CFT deficiencies. FATF maintains two lists of jurisdictions with AML/CTF deficiencies: (1) jurisdictions that are subject to FATF's call for countermeasures or that are subject to enhanced due diligence and (2) jurisdictions identified by FATF to have AML/CTF deficiencies for which they have developed action plans with FATF. FinCEN provided the updated lists and encouraged financial institutions to consider the changes to these lists when reviewing obligations and risk-based approaches with respect to these jurisdictions.

On August 11, FinCEN issued Advisory FIN-2014-A007 to US financial institutions on promoting a culture of compliance. The advisory highlights the importance of a strong culture of BSA/AML compliance for senior management, leadership and owners of all financial institutions subject to FinCEN regulations. FinCEN stated that a financial institution can strengthen its BSA/AML compliance culture by ensuring that (1) its leadership actively supports and understands compliance efforts, (2) compliance is not compromised by revenue interests, (3) relevant information throughout the organization is shared with compliance staff, (4) adequate resources are dedicated to compliance functions, (5) the compliance program is effective by, among other things, ensuring that it is tested by an independent and competent party and (6) its leadership and staff understand the purpose of BSA/AML efforts and how reporting is used. FinCEN stated the advisory does not change any existing expectations or obligations under BSA/AML requirements.

Commodity Futures Trading Commission Regulation 42.2 requires futures commission merchants (FCMs) and introducing brokers (IBs) to comply with, *inter alia*, applicable provisions of the BSA and implementing regulations. National Futures Association has advised member FCMs and IBs to review both FinCEN advisories.

FinCEN Advisory FIN-2014-A006 is available here.

FinCEN Advisory FIN-2014-A007 is available here.

NFA Notice I-14-19 is available here.

CFTC Provides Limited Relief to SEFs from Certain Confirmation and Recordkeeping Requirements

On August 18, the Commodity Futures Trading Commission's Division of Market Oversight issued No-Action Letter No. 14-108, which provides time-limited conditional relief to swap execution facilities (SEFs) from certain confirmation and recordkeeping requirements. CFTC Regulation 37.6(b) requires a SEF to provide to each counterparty a written confirmation of each transaction entered into on or pursuant to the rules of the SEF that contains all terms of the transaction and which must legally supersede the terms in any previously negotiated master or other agreement that has been entered into by the parties to the transaction. In connection with this requirement, the CFTC has previously taken the position that in order for a SEF to incorporate the terms of any previously negotiated agreements into such confirmations, such agreements must be submitted to the SEF prior to the execution of the relevant transaction. A SEF is also required to keep records of the documents incorporated by reference in the SEF's confirmations under Regulation 45.2(a).

Letter No. 14-108 provides relief to SEFs from two requirements regarding confirmations. First, a SEF may incorporate by reference in the confirmation of the transaction that is issued by the SEF terms from previously negotiated agreements without copies of those agreements being submitted to the SEF prior to execution. Second, a SEF is not required to receive or maintain copies of any such documents that may be incorporated by reference in the confirmation. The relief from both requirements applies only to uncleared swaps executed on or pursuant to the rules of the SEF, and is conditioned on any such agreements being made available to the CFTC upon request within a reasonable period of time. Further, in apparent contradiction of the relief granted by Letter No. 14-108, a SEF that does take advantage of such relief must nonetheless review the terms of any incorporated documents and report the confirmation data set forth therein to a swap data repository. Relief provided by Letter 14-108 will expire on September 30, 2015.

CFTC Letter 14-108 is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

Judge Rakoff Rules that Bitcoin Is Money in New York Federal Court

On August 19, Judge Jed S. Rakoff of the US District Court for the Southern District of New York issued a ruling in the case of Robert Faiella, holding that bitcoins are "money," citing the plain meaning of the term in *The Merriam-Webster Dictionary*. Faiella was charged with operating an unlicensed money transmitting business in violation of 18 U.S.C. § 1960, in connection with the sale of bitcoins for use on the Silk Road website, the "deep web" black market website which was shut down by the Federal Bureau of Investigation in October 2013.

Judge Rakoff held that a bitcoin qualifies as "money" or "funds" because it "can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions." The opinion also cited *SEC v. Shavers*, 2013 WL 4028182 (E.D. Tex. Aug. 6, 2013), in which a Texas magistrate judge held that bitcoins "were a currency or form of money."

Given the referenced dictionary definition, Judge Rakoff found that the activities Faiella is alleged to have committed in transferring or selling bitcoins for profit would constitute unlicensed money transmitting. According to the indictment, Faiella received cash deposits from customers, exchanged the cash for bitcoins and then transferred bitcoins to customers' accounts, thereby "transmitting" money pursuant to Section 1960 of the US Code. Under those facts, Judge Rakoff found that Faiella would qualify as a money transmitter, noting that the Financial Crimes Enforcement Network had issued guidance specifically stating that virtual currency exchangers constitute "money transmitters," and an exception for those involved in the sale of goods or provision of services does not apply when the only services provided are money transmission services.

The case is *U.S. v. Faiella*, 14-cr-00243, US District Court for the Southern District of New York.

LITIGATION

Parkcentral v. Porsche: Second Circuit Opens the Doors of *Morrison*, and Declines to Apply Section 10(b) to Domestic Securities-Based Swap Transactions

In *Parkcentral Global Hub Ltd,. et al. v. Porsche Automobile Holdings SE, et al.*, Dkt. No. 11-397-cv (2d Cir. Aug. 15, 2014), the US Court of Appeals for the Second Circuit affirmed the lower court's dismissal of plaintiffs' claim under Section 10(b) of the Securities Exchange Act of 1934. In a broad and defense-friendly interpretation of the US Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Second Circuit declined to disturb the presumption against extraterritorial application of US securities laws and held that "a domestic transaction or listing is necessary to state a claim under § 10(b), [but] a finding that . . . transactions were domestic would not suffice to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic."

Plaintiffs/appellants in *Parkcentral* were hedge funds that entered domestic securities-based swap agreements, which referenced shares of Volkswagen AG that trade on European stock exchanges, to bet on a decline in Volkswagen's stock price. When Porsche later disclosed its ownership of 74.1 percent of Volkswagen's stock, the news caused a surge in the price of Volkswagen's stock, which resulted in plaintiffs losing significant amounts of money in a massive short squeeze. Plaintiffs then sued Porsche and two of its executives, alleging reliance on defendants' allegedly fraudulent statements disclaiming an interest in acquiring Volkswagen. Despite the domestic nature of the plaintiffs' swap agreements, the *Parkcentral* appellate court held that "the claims in this case are so predominantly foreign as to be impermissibly extraterritorial." The court of appeals explained that the allegedly fraudulent statements at issue were made in a foreign country and concerned a foreign company whose stock was traded on foreign exchanges.

While *Parkcentral* concerned domestic securities-based swap agreements, the court of appeals did not view the domestic nature of the transaction as dispositive. Rather, the Second Circuit interpreted *Morrison* to hold that a domestic transaction or listing is a "necessary," but not necessarily sufficient condition precedent to a finding of extraterritorial application under Section 10(b). The *Parkcentral* appellate court viewed the question of extraterritoriality as a question of fact that requires "careful attention to the facts of each case." The court of appeals reasoned that its ruling was consistent with *Morrison* because a contrary ruling "would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges" simply because the claim at issue had a domestic component. The holding thus offers additional comfort to both issuers and securities-based swap agreement market participants seeking to avoid the application of US securities fraud law to extraterritorial conduct.

A copy of the decisions can be found here.

Texas Court of Appeals Decertifies Class of Brigham Shareholders

On August 15, the Texas Court of Appeals decertified a class of Brigham Exploration Co. shareholders, holding that the trial court failed to comply with a state rule requiring rigorous analysis of certification requirements. The suit stems from Brigham's approval of a $36.50 per share tender offer from Statoil ASA in 2011. Shareholders sued shortly after Brigham announced the transaction, alleging that the board members breached their fiduciary duties by failing to disclose material information to shareholders. The trial court granted class certification and adopted the shareholders' proposed trial plan, which omitted any discussion or analysis of defendants' affirmative defenses. Defendants appealed and asserted that the omission evidenced the trial court's failure to conduct a "rigorous analysis" before certification, as required by state rules. The court of appeals agreed with defendants and reversed the trial court, stating that it is improper to certify a class without knowing how claims can and will be tried, as Texas courts reject the "certify now and worry later" approach.

Brigham Exploration Co., et al. v. Boytim, et al., No. 03-13-00191-cv (Tex. Ct. App. 3d Dist. Aug. 15, 2014).

SEC Charges Colorado Woman and Her Two Companies with Offering Fraud

On August 15, the Securities and Exchange Commission filed a complaint against Heidi Ann Gamer and two companies under her control, Gamer Economic Systems, LLC and Gamer Media Partners Corp. The SEC alleged that between August 2011 and August 2012, Gamer fraudulently sold $771,900 of securities to over three dozen investors. According to the SEC, Gamer intentionally misrepresented to prospective investors that their funds would be used to develop and market interactive technology such as smart-phone applications, and later misinformed investors about non-existent contracts with a college, a football team and the Bollywood film industry. The SEC asserted that Gamer used the funds for personal expenses, rather than for operating capital, violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 thereunder. The SEC is seeking a permanent injunction, disgorgement of illicit profits and civil penalties.

Securities and Exchange Commission v. Heidi Ann Gamer, Gamer Economic Systems, LLC, and Gamer Media Partners, No. 1:14-cv-02650-ODE (N.D. Ga.).

BANKING

OCC Issues Merchant Processing Booklet

On August 20, the Office of the Comptroller of the Currency (OCC) issued the "Merchant Processing" booklet of the *Comptroller's Handbook*. This booklet, which replaces the booklet of the same name issued in December 2001, has been revised to include the supervision of federal savings associations. The "Merchant Processing" booklet provides updated guidance to examiners and bankers on assessing and managing the risks associated with merchant processing activities.

Specifically, the booklet includes updated guidance on:

- selection of third-party organizations and due diligence;
- technology service providers;
- on-site inspections, audits and attestation engagements, including the "Statement on Standards for Attestation Engagement" (SSAE 16) and the "International Standard on Assurance Engagements" (ISAE 3402);
- data security standards in the payment card industry for merchants and processors;
- member alert to control high-risk merchants (MATCH) list;
- Bank Secrecy Act/Anti-Money Laundering compliance programs and appropriate policies, procedures and processes to monitor and identify unusual activity; and
- appropriate capital for merchant processing activities.

Read more.

UK DEVELOPMENTS

FCA Publishes Supervisory Approach to Financial Promotions in Social Media

On August 6, the UK Financial Conduct Authority (FCA) published its guidance consultation on social media and customer communications (Guidance). The Guidance is intended to clarify and confirm the FCA's approach to the supervision of customer communications and, more specifically, financial promotions published using social media platforms. It also proposes guidance to assist those firms that use social media to communicate financial promotions to their clients as to how they might do so while still complying with the relevant rules of the FCA.

In the Guidance, the FCA acknowledges the increasing use of various forms of social media by firms (including blogs and microblogs, such as Twitter) to issue financial promotions and other communications to clients—something that the FCA recognizes in the Guidance as forming an integral part of many firms' marketing strategies, and therefore a method of communicating it does not wish to prevent. The FCA accepts the significant potential benefits from the use of all digital media (including social media) by firms when communicating with clients so long as this is done in a responsible and customer-focused manner.

The FCA highlights in the Guidance possible difficulties with communicating financial promotions via social media platforms, particularly those that are character-limited, and reminds firms that (no matter what the media) all financial promotions to clients must be clear, fair and not misleading and comply with all relevant FCA rules. In the Guidance, the FCA also emphasizes the need for consideration to be given as to the appropriateness of character-limited media as a means of promoting complex features of financial services or products. It also provides general guidance using a number of examples as to what would be generally considered appropriate by the FCA in terms of the format and content of such financial promotions published via social media.

The Guidance has been published so that market participants might comment on the FCA's current position. The Guidance is available here. The Guidance is open for consultation until November 6. The FCA will incorporate any feedback it receives where it considers it appropriate to do so into its final guidance on the subject prior to publication.

EU DEVELOPMENTS

ESMA Publishes Updated List of Non-EEA Central Counterparties Applying for Recognition Under EMIR

On August 11, the European Securities and Markets Authority (ESMA) published an updated list of central counterparties (CCPs) outside the European Economic Area (EEA) that have applied for recognition under Article 25 of the European Market Infrastructure Directive (EMIR). Absent such recognition, non-EEA CCPs are not permitted to provide clearing services to clearing members or trading venues established in the European Union. In addition, the EU Capital Requirements Regulation provides that only recognized non-EEA CCPs are "qualifying CCPs" for purposes of calculating certain exposures. Therefore, an EU credit institution risks significantly adverse capital treatment to the extent that it, or any of its affiliates for which it calculates capital on a consolidated group basis, is a clearing member at a non-EEA CCP that has not been recognized under Article 25 of EMIR.

In order for a non-EEA CCP to obtain recognition, a number of preconditions must be met, including that the European Commission (EC) has determined that the legal and supervisory regime in such non-EEA CCP's jurisdiction is equivalent to the applicable requirements under EMIR. The EC has requested guidance from ESMA in making these determinations, and to date ESMA has issued guidance in respect of the following jurisdictions: Australia, Canada, Hong Kong, Japan, India, Singapore, South Korea, Switzerland and the United States. Notably, ESMA's updated list of non-EEA CCPs applying for recognition include CCPs from jurisdictions where ESMA has not yet issued any guidance, including Brazil, Dubai, Israel, Malaysia, Mexico, New Zealand and South Africa. ESMA has not indicated when, or if, it intends to prepare guidance in respect of these latter seven jurisdictions.

Despite the guidance that ESMA has provided to date, the EC has not yet made any formal equivalence determination in respect of any non-EEA jurisdiction. On June 27, Michel Barnier, the EU Financial Services Commissioner, indicated his intention to recommend recognition for CCPs from Australia, Hong Kong, India, Japan and Singapore, but not for CCPs from the United States.

ESMA's updated list of non-EEA CCPs that have applied for recognition under EMIR can be found here. ESMA's technical guidance that has been published to date can be found here. The June 27 statement from Commissioner Barnier can be found here.

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