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CORPORATE & FINANCIAL
WEEKLY DIGEST

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BROKER DEALER

SEC Extends Expiration Date for Interim Final Rules Providing Exemptions for Security-Based Swaps

In July 2011, the Securities and Exchange Commission approved interim final rules that exempt security-based swaps from all provisions of the Securities Act of 1933 (other than the anti-fraud provisions of Section 17(a)), as well as from the registration requirements of the Securities Exchange Act of 1934 and from the provisions of the Trust Indenture Act of 1939. The interim final rules currently expire on February 11, 2013. The SEC has stated that it does not expect to complete its evaluation of the implications for the inclusion of security-based swaps in the definition of "securities" before the current expiration date. Accordingly, the SEC is extending the expiration date of the interim final rules to February 11, 2014. The SEC is not making any other changes to the interim final rules.

The interim final rule extension may be found here.

CFTC

NFA Sets Implementation Deadline for Phase 1 of Customer Segregated Funds Reporting

The National Futures Association (NFA) recently amended Section 4 of its Financial Requirements to require futures commission merchants (FCMs) that hold customer funds to in turn require banks and trust companies holding such funds to report on a daily basis the balances of the accounts with such funds to a third party designated by the NFA. The NFA, in conjunction with CME Group, Inc., which imposes similar requirements on its FCM clearing members, has engaged AlphaMetrix360, LLC to be the third-party aggregator of the account balance information pertaining to customer funds. In a Notice to Members (Notice), the NFA stated that it will implement this reporting process in phases, beginning with the first phase, requiring banks and trust company depositories to report end-of-day cash and securities balances beginning February 15. The NFA indicated that it will continue to expand the reporting requirements to other institutions holding customer segregated funds, including derivatives clearing organizations and clearing FCMs, over the next several months.

More information on the Notice can be found here.

CFTC to Host Roundtable on Enhancing Customer Funds Protection

The Commodity Futures Trading Commission staff will host a public roundtable to discuss the CFTC's proposed rulemaking, "Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations," published for public comment on November 14, 2012. The roundtable will consist of four sessions: (i) the role of an "Examination Expert" to review Self-Regulatory Organization examination programs, (ii) the proposed disclosures of firm-specific risks and financial reporting, (iii) the proposed additional requirements for segregation and secured acknowledgment letters, and (iv) the proposed residual interest requirements for futures commission merchants.

The roundtable will be held at CFTC headquarters in Washington, D.C. on February 5, and will be open to the public. A live audio feed will also be available for anyone not able to attend in person, and a video of the discussion will be posted on the CFTC's website upon the conclusion of the roundtable.

More information on the roundtable can be found here.

NFA to Require CPOs to Identify Registered Investment Companies

The National Futures Association (NFA) has notified its members that it will require each member of the NFA that is registered as a commodity pool operator (CPO) and operates one or more commodity pools that are also registered with the Securities and Exchange Commission as investment companies under the Investment Company Act of 1940 to identify such pools through the NFA's annual CPO questionnaire. The NFA stated that this information will help the NFA identify the pools that are not required to comply with certain NFA rules and various provisions of Part 4 of the CFTC's regulations due to their registration as investment companies.

More information on the NFA's notice can be found here.

LITIGATION

Fourth Circuit Affirms Finding of No Fifth Amendment Violation in Connection with 45-Year Conviction for $100 Million Investment Scheme

The US Court of Appeals for the Fourth Circuit recently affirmed a defendant's conviction and 45-year sentence, holding that the defendant's Fifth Amendment rights had not been violated where the government simply had limited its case to prove a more narrow conspiracy than was charged in the superseding indictment. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment to a Grand Jury. . . ." The defendant appealed his conviction for crimes relating to a $100 million insurance investment scheme on the ground that the district court had violated his Fifth Amendment rights by allowing the government to alter the indictment so as to omit allegations relating to the time after the defendant sold his interest in the company at issue, which, the defendant contended, would have reflected a shorter duration of the conspiracy. The Fourth Circuit disagreed and held that because the conspiracy proven was within the scope of those alleged in the indictment, the narrowing created a non-fatal variance. Finally, the Fourth Circuit rejected the defendant's claims that his sentence was procedurally and substantively unreasonable, finding that the defendant, compared to some of his co-conspirators, had not accepted responsibility for his actions when confronted by the government, had hidden cash in anticipation of his indictment and had continued to live a lavish lifestyle with his money.

U.S. v. Allmendinger, No. 11-5162 (4th Cir. Jan. 23, 2013).

District Court Finds that Securities Exchange Act Covers Stock "Float" Manipulation

In a self-described "precedent-setting" order, the US District Court for the Eastern District of Pennsylvania recently found that the Securities Exchange Act of 1934 (Exchange Act) can apply to a scheme aimed at gaining control over a corporation's stock "float." The District Court, considering a motion to dismiss a defendant's amended counterclaims and third-party claims, was presented with the unique question of whether a violation of Section 10(b) and Rule 10b(5) can be committed by officers of a corporation, not by their misrepresentations to investors in connection with the sale of a corporation's shares (as is usually alleged), but by the officers' alleged scheme to manipulate the restricted nature of a company's shares in order to gain control over the stock's float and enrich themselves to the detriment of the corporation. The District Court found that the Exchange Act could cover such allegations, and reasoned that the US Supreme Court's broad holdings enforcing Section 10(b) and Rule 10b(5) extended to a corporate officer's scheme to manipulate the stock's float, artificially inflate its share price through fraud on the market and reap substantial gains by selling off his shares while causing the corporation and its other shareholders to suffer loss. As such, the District Court denied the motion to dismiss defendants' counterclaims, and held that, while this was a novel situation, it could not conclude on a Rule 12 motion that it would be legally impossible for defendants to satisfy a jury that the alleged scheme described in their counterclaims entitles them to relief.

Advanced Multilevel Concepts, Inc. et al. v. Edward Bukstel et al., Civil Action No. 11-3718 (E.D. Pa. Jan. 25, 2013).

BANKING

CFPB Delays Remittance Rule

The Consumer Financial Protection Bureau (Bureau) announced on January 22 that it is issuing a final rule to delay the February 7, 2013, effective date of final rules published by the Bureau on February 7, 2012, and August 20, 2012 (collectively, 2012 Final Rule). Those rules amend Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The 2012 Final Rule implements statutory requirements set forth in Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding remittance transfers.

“The Bureau is delaying the effective date of the 2012 Final Rule pending the finalization of a proposal, published on December 31, 2012 (December 2012 Proposal), that would address three narrow issues in the 2012 Final Rule. The Bureau will determine the new effective date when it finalizes the December 2012 Proposal.”

Read more.

Federal Reserve Announces Dates for Release of Stress Test and CCAR Results

The Federal Reserve Board on January 28 announced that results from the supervisory stress tests conducted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act will be released on Thursday, March 7, and the related results from the Comprehensive Capital Analysis and Review (CCAR) will be released on Thursday, March 14. Results will be released for both exercises at 4:30 p.m. Eastern Time.

The Dodd-Frank Act stress tests

> are forward-looking exercises conducted by the Federal Reserve and large financial companies supervised by the Federal Reserve to help assess whether institutions have sufficient capital to absorb losses and support operations during adverse economic conditions. The Dodd-Frank Act supervisory stress test results will include data such as capital ratios, revenue, and loss estimates under a severely adverse scenario and assuming a common set of capital actions that is used in the analysis of all of the firms.

CCAR is an annual exercise by the Federal Reserve

> to help assess whether the largest bank holding companies have sufficient capital to continue operations during the upcoming two-year period assuming economic and financial stress and have robust, forward-looking capital planning processes that account for their unique risks and are supported by the firms' risk-measurement and -management practices. As part of the CCAR, the Federal Reserve evaluates each company's plans to make capital distributions, such as dividend payments, stock repurchases, or planned acquisitions.

A list of companies being reviewed is available here.

DC Court of Appeals Decision May Impact CFPB Powers and Authority

A recent decision by a three-judge appellate panel of the US Court of Appeals for the District of Columbia Circuit (DC Circuit) may hold the key to whether, and to what extent, actions taken by Richard Cordray as the Director of the Consumer Financial Protection Bureau (CFPB) will be viewed as lawful. Though the case in question, *Noel Canning vs NLRB*, is an action challenging the purported recess appointments of certain NLRB administrators, and not Director Cordray, the case is significant in that the reasoning thereof is being used by plaintiffs in *State National Bank of Big Spring v. Geithner* to attack Director Cordray’s appointment, which was also a “recess” appointment.

The DC Circuit held, among other things, that the appointment of the NLRB administrators by the President violated the Recess Appointments Clause of the US Constitution because it was not made during a recess that occurred between sessions of Congress. Without discussing herein the court’s holding, it is worth mentioning that the DC Circuit’s decision is at odds with that of another appellate court, the US Court of Appeals for the Eleventh Circuit. Commentators have surmised that the conflict between the courts will propel the case, perhaps on an accelerated timetable, to the US Supreme Court for resolution.

Even if the Cordray appointment is ultimately held to have been unlawful (which is by no means certain), due to the particular language of the Dodd-Frank Wall Street Reform and Consumer Protection Act pursuant to which the CFPB was created, it appears that certain powers to promulgate rules, regulate, and examine financial institutions may still exist, though those powers may be in the hands of the Secretary of the Treasury (Secretary). Under the Dodd-Frank Act, until the director is appointed with the advice and consent of the Senate, the Secretary has the administrative authority, intended to be transferred to the CFPB, over laws, regulations and financial institutions that were previously administered by other federal agencies such as the Federal Reserve and the Office of the Comptroller of the Currency. On the other hand, it is clear under the Dodd-Frank Act that so-called new regulatory powers given to the CFPB, such as the ability to supervise non-depository institutions, may not be so exercised by the Secretary. To further complicate matters, there are various hybrid laws, such as the Electronic Funds Transfer Act, which have been on the books for years but which also contain brand new provisions (i.e. the remittance provisions) that may be considered beyond the scope of the Secretary's power.

Finally, there is some conjecture that even if Director Cordray's appointment is held to be invalid, a reviewing court may nonetheless hold that all actions taken by the CFPB will be considered valid because the director was acting under a cloak of apparent authority.

Read more.

EXECUTIVE COMPENSATION AND ERISA

HHS Releases Language for Use in Updating Business Associate Agreements

On January 25, the Department of Health and Human Services (HHS) published its highly anticipated Health Insurance Portability and Accountability Act (HIPAA) Omnibus Final Rule (Final Rule). The Final Rule covers many topics, including the extension of some of HIPAA's privacy and security compliance obligations to "business associates" or organizations that do business with HIPAA-covered entities.

HHS provided suggested language that could be used to comply with the Final Rule for use in contracts between business associates and covered entities (business associate agreements). The deadline for reflecting the provisions of the Final Rule in business associate agreements is September 23, 2013 (though currently existing business associate agreements have until September 22, 2014 to be updated).

The Final Rule notes that the updated language provided by HHS is sample language only and does not have to be used in the exact form provided by HHS. HHS's sample language also includes alternative provisions that may be used in business associate agreements, so it is important for business associates and covered entities to review their agreements to ensure that the proper alternatives are chosen.

A link to the sample business associate agreement provisions may be found here.

The Final Rule can be found here.

IRS Releases Proposed and Final Regulations regarding Health Insurance Premium Tax Credits

On January 30, the Internal Revenue Service released proposed and final regulations regarding the health insurance premium tax credit and the requirement that an employer maintain minimum essential coverage under the Affordable Care Act (ACA). The IRS is preparing to release a series of questions and answers to help individuals and entities comply with the new ACA rules.

The final regulations, which are effective for taxable years ending after December 31, 2013, provide guidance related to employees electing to enroll in eligible employer-sponsored coverage and those employees who wish to enroll in qualified health plans established through government-sponsored insurance exchanges. The final regulations also provide guidance on how to claim the premium tax credit associated with enrolling in an exchange.

The proposed regulations provide guidance related to assessing liability for shared responsibility payments if an employer does not maintain minimum essential coverage under the ACA. The proposed regulations address who is liable for providing coverage for covered employees and dependents enrolling in government-sponsored programs, employer-sponsored programs and retiree programs. The IRS has scheduled a public hearing on the proposed rules for May 29.

The Final Rule can be found here.

The Proposed Rule can be found here.

UK DEVELOPMENTS

Appeal Tribunal Confirms £8 Million Market Manipulation Fine

On January 28, the Upper Tribunal (Tax and Chancery Chamber) upheld the decision of the Regulatory Decisions Committee (RDC) of the UK Financial Services Authority (FSA) to impose a fine of £8 million (approximately $12.6 million) on Swift Trade Inc. (Swift Trade), a Canadian company that is not FSA authorized or regulated, for market abuse in the form of "layering." The RDC decision was reported in the September 16, 2011, edition of *Corporate and Financial Weekly Digest*.

The Upper Tribunal found that between January 1, 2007 and January 4, 2008, Swift Trade systematically engaged in deliberate market abuse in the form of layering of numerous individual shares on the London Stock Exchange (LSE). The manipulative trading caused a succession of small price movements in the LSE shares and Swift Trade made substantial profits. The abuse was widespread and repeated on many occasions and involved tens of thousands of trading orders by many individual traders, sometimes acting in concert with each other across many locations worldwide. The trading led to a false or misleading impression of supply and demand and artificial market prices in the LSE shares, which was to the detriment of other market participants.

The Upper Tribunal concluded that "the conduct of which Swift Trade was guilty amounted to a cynical course of intensive manipulation of the LSE … carried out over a period of a little over a year, that attempts were made to conceal it, and that, far from demonstrating remorse, those controlling Swift Trade have done everything possible to escape the consequences of their actions. Of its kind, it is as serious a case as might be imagined, and there is nothing which could possibly be said by way of mitigation."

Read more.

MF Global Judgment Clarifies Law on Client Money Entitlement

A High Court judgment by Mr. Justice Richards handed down on January 29 has confirmed that a client's open positions on trades, made with a firm regulated by the UK Financial Services Authority (FSA) that subsequently enters into an administration or liquidation, should be valued by reference to the market value of the trades at the time of the firm's failure rather than at the date the positions are closed out.

The administrators of MF Global UK Limited (MFG UK) sought directions from the court as to whether a client's entitlement in respect of its positions is to be valued as of the date of the firm's failure or by reference to the value of the positions as of the date that they were closed out. The court rejected arguments advanced on behalf of clients who stood to gain as their positions were closed out at prices which were higher than the market value of the positions on the date that MFG UK went into administration.

The judgment was based on a consideration of Chapters 7 and 7A of the FSA's Client Assets Sourcebook and, in particular, the meaning of 'client equity balance' which is defined in the FSA's Handbook Glossary as "the amount which a firm would be liable ... to pay to a client in respect of the margined transactions if each of his open positions was liquidated at the closing or settlement prices published by the relevant exchange or other appropriate pricing source and his account closed."

Mr. Justice Richards stated "there is no perfect system for establishing the figures at which open positions would close-out on the [date of the commencement of an administration] ... the FSA has taken the policy decision to adopt the same basis as applies to the daily reconciliations for understandable reasons of consistency, simplicity and speed."

Read more.

EU DEVELOPMENTS

ESMA Publishes Further Update of Short Selling Regulation Questions and Answers

On January 30, the European Securities and Markets Authority (ESMA) published a second updated version of its questions and answers EU Regulation on Short Selling and Certain Aspects of Credit Default Swaps (EU236/2012) (the Short Selling Regulation) (the Q&A). The purpose of the Q&A (first issued on September 13, 2012, and updated on October 10, 2012, as reported in the October 12, 2012, edition of *Corporate and Financial Weekly Digest*) is to promote common supervisory approaches and practices among national securities markets regulators on the requirements of the Short Selling Regulation.

A new section addresses several issues relating to the restriction on uncovered sovereign credit default swaps.

Key changes in the updated Q&A address:

- The scope of the Short Selling Regulation, particularly the treatment of exchange-traded funds, American Depository Receipts and Global Depository Receipts;
- Various points regarding the net short position calculations, particularly with respect to fund management group entities; and
- Duration adjustment for calculating net short positions in sovereign debt.

Read more.

Spanish Short Sales Ban Ends, Greek Ban Continues

On January 31, the Spanish securities regulator, the Comisión Nacional del Mercado de Valores (CNMV), announced that the prohibition on short sales of Spanish shares under the EU Short Selling Regulation (EU236/2012) would end with effect from February 1. This prohibition, imposed on November 1, 2012 for a period of three months (as reported in the November 2, 2012, edition of *Corporate and Financial Weekly Digest*), continued a ban originally introduced by the CNMV on July 23, 2012.

The European Securities and Markets Authority announced on January 29 that the three-month prohibition on short sales of Greek shares, which was also imposed on November 1, 2012 (continuing an earlier ban introduced under Greek law), would continue in effect for a further three months until April 30, 2013.

The ESMA opinion regarding Spain is available here.

The ESMA opinion regarding Greece is available here.

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