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CORPORATE & FINANCIAL

WEEKLY DIGEST

July 27, 2012

SEC/CORPORATE

Bipartisan Bill Introduced in U.S. Senate to Authorize SEC to Impose Larger Penalties

On July 23, Senators Charles Grassley (R-IA) and Jack Reed (D-RI) introduced S.3416, the Stronger Enforcement of Civil Penalties Act of 2012 (the Bill), in the U.S. Senate, which seeks to increase the statutory limits that may be obtained by the Securities and Exchange Commission from individuals and entities charged with securities law violations in administrative and civil actions.

Pursuant to existing law, the SEC may only penalize individuals a maximum of $150,000 per violation and entities $725,000 per violation. The SEC has the authority to seek penalties above these caps only if the matter is adjudicated in federal court, but not when the SEC handles a case through its administrative process.

Under the Bill, the per violation cap for the most serious securities law violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement that resulted in substantial losses to victims or substantial pecuniary gain to the violator, would be increased to the greater of (i) $1 million for individuals and $10 million for entities, (ii) three times the gross pecuniary gain, or (iii) the losses incurred by the victims as a result of the violation.

The Bill also proposes to increase the per violation maximum penalties associated with less serious securities law violations to the greater of $100,000 for individuals and $500,000 for entities, or the gross pecuniary gain as a result of the violation. The maximum per violation penalties associated with violations not involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement would be increased to the greater of $10,000 for individuals and $100,000 for entities, or the gross pecuniary gain as a result of the violation.

The maximum penalty for recidivists would be three times the applicable cap where the individual or entity within the five years preceding the act or omission is criminally convicted of securities fraud or is subject to a judgment or order concerning securities fraud.

The SEC may seek these increased maximum penalties in administrative proceedings, without being required to submit the matter to civil litigation.

The Bill has been referred to the Senate Committee on Banking, Housing and Urban Affairs.

To view the Bill, click here.

CFTC

CFTC Designates Provider of Legal Entity Identifiers

In general, Commodity Futures Trading Commission Rule 45.6 provides that each counterparty to a swap must be identified by a single legal entity identifier (LEI) for purposes of the CFTC's swap recordkeeping and reporting rules. On July 23, the CFTC issued an order announcing that the Depository Trust & Clearing Corporation & SWIFT (DTCC-SWIFT) would be responsible for providing LEIs (which will be known as CFTC Compliant Interim Identifiers or CICIs) on an interim basis until the CFTC transitions to a global LEI system. The CFTC designated DTCC-SWIFT as the CICI provider for a limited term of two years.

CFTC registered entities and swap counterparties subject to the CFTC's jurisdiction must use the CICIs provided by DTCC-SWIFT for purposes of the CFTC's swap recordkeeping and reporting rules. CFTC registered entities and swap counterparties may contact DTCC-SWIFT at:

The Depository Trust & Clearing Corporation
55 Water Street
New York, NY 10041
212-855-1000

Click here to see the CFTC's order.

CFTC Proposes Clearing Determination for Credit Default and Interest Rate Swaps

On July 24, the Commodity Futures Trading Commission issued the first proposed clearing determinations pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) revisions to the Commodity Exchange Act that generally prohibit market participants from engaging in a swap transaction that is required to be cleared unless it is submitted for clearing to a derivatives clearing organization (DCO). The proposed clearing determination would require market participants, other than persons relying on the "end-user exemption" from clearing, to submit certain credit default swaps (CDS) and interest rate swaps for clearing by a DCO as soon as technologically practicable and no later than the end of the day of execution.

The proposal addresses CDS and interest rate swaps that are currently cleared by DCOs and would subject swaps in four interest rate swap classes and two CDS classes to mandatory clearing. The six classes identified in the proposal are fixed-to-floating swaps, basis swaps, forward rate agreements, overnight index swaps, North American untranched CDS indices, and European untranched CDS indices. The CFTC is expected to make a determination with respect to each swap within 90-days following publication of the proposed clearing determination in the Federal Register.

The proposal does not apply to entities that are eligible for the end-user exception to the clearing requirement, such as non-financial entities hedging commercial risks. In addition, the clearing requirement does not apply to swaps entered into prior to the enactment of the Dodd-Frank Act or prior to the application of the mandatory clearing requirement.

The proposed rule is available here.

CFTC Approves Swap Transaction Compliance and Implementation Schedule Rule

On July 24, the Commodity Futures Trading Commission approved an implementation schedule to phase in compliance with the mandatory swap clearing requirements created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). Under the Dodd-Frank Act, the path to mandatory clearing begins with the publication of a proposed clearing determination for a particular class of swaps, followed by a 30-day public comment period, and a final clearing requirement determination which, absent a stay of up to 90 days, must be made within 90 days of the publication of the proposed determination. The new CFTC rule provides that, when the CFTC deems it appropriate, market participants will have additional time to comply with any such clearing requirement determination.

As proposed, the final rule divides market participants into three categories and establishes a compliance schedule for each category. Category 1 includes swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, and active funds. Pursuant to the CFTC's schedule, Category 1 entities will have 90 days from the date that a final clearing requirement determination is published in the Federal Register to comply. Category 2 includes commodity pools, "private funds" (certain funds that are exempt from registration under the Investment Company Act of 1940) other than "active funds" (private funds that are not third-party subaccounts that execute 200 or more swaps per month), and a person predominately engaged in banking or financial activities (provided that the entity is not a third-party sub-account). Category 2 entities will have 180 days following the publication of a final clearing requirement determination in the Federal Register to comply. Category 3 entities, which include those involving third-party subaccounts, ERISA plans and other entities not exempt from the mandatory clearing requirement, will have 270 days following publication of a final clearing requirement determination in the Federal Register to comply.

The CFTC has reserved to itself the discretion to determine whether to apply the compliance schedule in connection with a particular clearing requirement determination.

The final rule is available here.

CFTC Withdraws and Re-Issues Proposed Ownership and Control Reports Rule

On July 26, the Commodity Futures Trading Commission withdrew a prior proposal and issued a new proposed rule relating to the collection of ownership and control information. The proposed rule amends certain aspects of the current position reporting rules and expands the rules to include accounts that trigger volume-based reporting thresholds on a designated contract market (DCM) or swap execution facility (SEF).

The proposed rule divides revised Form 102, the reporting form for special accounts, into three sections. Section 102A would be used to identify special accounts that hold reportable commodity futures or options positions. Section 102B would collect ownership and control information for accounts that meet a specified trading volume. Section 102S would be used to submit Form 102S filings for swap counterparties and customer consolidated accounts with reportable positions. By including Section 102S, revised Form 102 allows large trader reporting for both futures and swaps through a single submission.

New Form 71 ("Identification of Omnibus Accounts and Sub-Accounts") would be sent, at the CFTC's discretion, to volume threshold accounts that are identified as customer omnibus accounts. Recipients of Form 71 would be required to provide information regarding any account to which the customer omnibus account allocated trades that triggered the volume threshold. The proposed rule also includes revisions to CFTC Form 40, which is completed by market participants who are identified as large traders. Finally, the proposed rule would permit the electronic submission of Forms 102, 40 and 71.

Comments should be submitted on or before September 24. The proposed rule is available here.

CFTC Requests Public Comment on LCH.Clearnet SA Derivatives Clearing Organization Application

On July 26, the Commodity Futures Trading Commission requested public comment on an application by LCH.Clearnet SA for registration as a derivatives clearing organization. Comments may be submitted electronically through the CFTC's Comments Online process. The application documents and all comments received are available on the CFTC's website. Comments should be submitted on or before August 27.

More information is available here.

CFTC Issues Temporary No-Action Relief from Aggregation Requirements of Position Limits Rule

On July 24, the Commodity Futures Trading Commission issued temporary no-action relief to harmonize the implementation of the CFTC's Position Limits for Futures and Swaps (the Position Limits Rule) with the proposed changes to the aggregation provisions of the Position Limits Rule.

The Position Limits Rule establishes a position limits regime for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. The Position Limits Rule generally requires a person to aggregate its positions with the positions of any other entity in which the person has an ownership interest of 10 percent or more. In May 2012, the CFTC issued a notice of proposed rulemaking (Aggregation Notice) seeking public comment on proposed changes to the aggregation provisions.

Market participants must comply with the Position Limits Rule 60 days after the further definition of "swap" is published by the Federal Register, which is expected shortly. Because the CFTC may not have taken final action on the Aggregation Notice by that date, the no-action position provides that, upon the compliance date for the Position Limits Rule, market participants may comply with the aggregation requirements by either:

1. complying with the Position Limits Rule as if it were amended to include the provisions proposed in the Aggregation Notice; or

2. compliance with the Position Limits Rule, except that the person does not aggregate any positions in Referenced Contracts (as defined in the Position Limits Rule) held by another entity that the Position Limits Rule would require be aggregated with the person's positions, if:

    i. the person believes, based on advice of counsel, that information sharing with that entity would result in a reasonable risk of violating federal, state, or foreign law, rule, or regulation;

    ii. the person has a 50% or lesser ownership or equity interest in that entity and has taken reasonable steps to ensure independence between the person and that owned entity, which may include but need not be limited to compliance with the current standards for independence set forth in 17 C.F.R. Section 150.3(a)(4)(i) or in Section 151.7(f)(1); or

    iii. the person acquires a 50% or lesser ownership or equity interest in that entity in the normal course of business as a broker-dealer registered with the Securities and Exchange Commission or similarly registered with a foreign regulatory authority.

The temporary relief will remain in effect until (i) 60 days after the CFTC publishes a rule finalizing changes to the CFTC's aggregation policy, (ii) 60 days after the CFTC issues an order declining to take further action on the Aggregation Notice, or (iii) December 31, 2012, whichever occurs first.

Any entity that intends to rely on the temporary relief must provide prior notice to the Division of Market Oversight in an e-mail to: dmonoaction@cftc.gov. The notice to the Division of Market Oversight must: (i) state that the entity is relying on such relief, and (ii) state the names of any entities holding positions that it is not aggregating.

Click here for CFTC No-Action Letter. Click here for Aggregation Notice.

LITIGATION

SEC Enters Into Deferred Prosecution Agreement with Investment Fund

This week the Securities and Exchange Commission entered into Deferred Prosecution Agreement (DPA) with the Amish Helping Fund (the Fund), an Ohio non-profit corporation. This is only the second DPA that the SEC has reached since it announced its Cooperation Initiative over two years ago.

The Fund, is a religious-based organization with the purpose of raising funds to loan to Amish families to enable them to purchase real estate. From 1995 to June 2010, the Fund offered and sold investment contracts to about 3,500 investors in the Amish community. The SEC alleged that the Fund violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 by failing to update the Fund's offering memorandum since it was first prepared in 1995. Specifically, the memorandum failed to reflect changes in the history of operations of the Fund, the cash reserves of the Fund, the use of investor money, and the ability of investors to redeem their money. To date, no investor has suffered any realized losses in connection with the Fund's misleading offering statement.

The DPA between the SEC and the Fund delays prosecution of any related action against the Fund for two years. During that deferred period, the Fund has the opportunity to correct any violations of securities laws and regulations. If the Fund fully complies with the terms of the DPA, the SEC has agreed not to file further enforcement actions arising from the Fund's current alleged violations. As a condition of the DPA, the Fund was required to accept responsibility for the violations alleged by the SEC. The Fund also agreed to a broad range of remedial conditions that are outlined in the DPA, including fully cooperating with the SEC's current investigation by providing non-privileged documents and other requested information, amending and updating its offering memorandum and offering investors a right of recission. In addition, the Fund will be subject to periodic audits from an independent accountant and must register all of the Fund's past and new securities offerings with the Ohio Division of Securities.

The SEC's Cooperation Initiative is intended to allow companies who come forward with evidence of securities violations to avoid civil litigation. Insight into the Initiative, however, has been difficult due to the fact that the SEC has only previously published one other DPA. Despite the apparent limited use of the Cooperation Initiative, the SEC continues to tout the potential benefits. In connection with announcing the settlement with the Amish Fund, the director of the SEC's Division of Enforcement, Robert Khuzami, emphasized: "Cooperation provides real and substantial benefits for companies that respond appropriately to the discovery of wrongdoing in their ranks....Here, the SEC acknowledged and rewarded [the Fund's] cooperation because, among other things, it acted swiftly and completely in correcting the misleading statements provided to investors, agreeing to annual audits of the fund holding the securities, and implementing significant remedial measures to prevent future violations of the securities laws."

SEC Announces Deferred Prosecution Agreement with Amish Fund, (July 17, 2012).

Delaware Chancery Court Holds That Former Employees Are Not Indispensible Parties to Litigation

The Court of Chancery for the State of Delaware recently rejected an effort to dismiss an unfair competition / employee raiding lawsuit against a Delaware corporation on the theory that the departing employees, who were not named as defendants, were indispensible parties to the action.

The plaintiff NuVasive, a medical corporation, sued Lanx, another medical corporation, after Lanx hired a number of former NuVasive employees. NuVasive did not sue the former employees in Delaware because they were not subject to personal jurisdiction in Delaware – suits were pending against them in several other jurisdictions. NuVasive asserted several claims against Lanx, alleging, in part, that Lanx had induced the employees to breach their employment agreements and aided and abetted thefts of trade secrets and a breach of the employees' fiduciary duties to NuVasive. Lanx moved to dismiss the claims, arguing that the employees were indispensible parties to the litigation pursuant to Court of Chancery Rule 12(b)(7), and that the litigation could not proceed without the employees. The Chancery Court disagreed.

To be deemed an indispensible party to a litigation under Delaware procedural law, the party must be necessary in the sense that the missing party will be subject to substantial harm if the litigation is resolved without their inclusion. With respect to the non-contract based claims against Lanx, the Court held that even though it would have to consider the departing employees' conduct, they were not necessary parties because they would not suffer any direct harm from the Court's determination of those issues. It was significant that the plaintiff agreed that it would not seek to prevent the employees from litigating those issues in the cases pending against them in other jurisdictions.

However, the Court did find that the former NuVasive employees could potentially suffer substantial harm if the Court were to resolve the contract-based claims without their involvement in the litigation. Those claims required the Court to interpret the former employees' agreement with NuVasive to determine whether, among other things, their current employment violated the post-employment restrictions in those agreements. Since NuVasive was seeking a permanent injunction to prevent violations of the terms of those agreements, such relief could directly effect the former employees ability to continue to work for Lanx. Accordingly, with respect to the contract-based claims, the Court determined the employees were necessary parties.

Nonetheless, the Court did not take the further step of deeming the departing employees indispensible parties and dismissing NuVasive's suit. The Court reasoned that although a judgment against Lanx might be prejudicial to the employees, the Court could shape any relief to minimize the prejudice to the former employees, such as denying the request for injunctive relief and awarding only monetary damages. Thus, the Court allowed the plaintiff to press forward with its claims and noted that the plaintiff was choosing to do so cognizant of the limited scope of remedies available in the forum.

NuVasive, Inc. v. Lanx, Inc., No. 7266-VCG (Del. Ch. July 11, 2012).

BANKING

FDIC Develops Regulatory Calendar

The Federal Deposit Insurance Corporation (FDIC) announced on July 26 that it is developing a regulatory calendar to help community banks stay up-to-date on changes in federal banking laws, regulations, and supervisory guidance. The calendar will summarize regulatory developments and highlight key dates to facilitate industry comment and compliance. A draft of the calendar is available on the FDIC Web site.

Among other things, the calendar:

- includes notices of proposed, interim, and final rulemakings as well as supervisory guidance to financial institutions issued by the FDIC and Federal Financial Institutions Examination Council (FFIEC), joint issuances with other regulators that do not fall under the auspices of the FFIEC, and independent issuances by other regulators relevant to the FDIC's supervisory examination programs;
- provides key dates banks should be aware of, such as the comment period for proposed rules and the effective date for finalized guidance; and
- provides dates and topics of upcoming outreach events for bankers, such as conference calls to discuss issues of importance.

A draft of the calendar may be viewed at http://www.fdic.gov/regulations/resources/cbi/calendar.html.

FDIC Announces Nashville, TN and Dallas, TX Asset Purchaser/Investor Outreach Workshops

On July 23, the Federal Deposit Insurance Corporation (FDIC) announced a series of outreach workshops to provide information on how to become an FDIC Investor and/or Asset Purchaser. The FDIC has assets from failed banks available for acquisition by depository institutions, investors and asset purchasers. Some of these assets have been designated for inclusion in structured sales. To ensure a diversity of participation in the structured sales program, the FDIC stated that it "welcomes and strongly encourages minority- and women-owned investors and asset managers to participate and/or partner in bidding on the equity interests sold to investors under the program."

The half day workshops will cover how structured transactions are created and operated, the pre-qualification process, details about the Small Investor Program and Investor Match Program, how to participate in cash loan sales and real estate sales, and a discussion about the transactional documents necessary to bid. The workshop dates are as follows:

Tuesday, August 7, 2012
TBD
Nashville, Tennessee
8:00 AM – 1:00 PM

To reserve a space in Nashville, please register here by Friday, August 3, 2012.

Thursday, August 9, 2012
TBD
Dallas, Texas
8:00 AM – 1:00 PM

To reserve a space in Dallas, please register here by Monday, August 6, 2012.

For more information, click here.

Federal Reserve Issues Guidance on a Lender's Decision to Discontinue Foreclosure Proceedings

On July 11, the Board of Governors of the Federal Reserve System (Board) issued guidance to emphasize the importance of appropriate risk management practices and controls in connection with a decision not to complete foreclosure proceedings after they have been initiated (a situation referred to in the guidance as an abandoned foreclosure). This guidance applies to state member banks, bank holding companies and savings and loan holding companies (collectively, banking organizations) with residential mortgage servicing operations.

According to the Board, "[i]nformation obtained on mortgage industry practices has revealed that lenders and servicers sometimes discontinue a foreclosure process without notification to borrowers or local authorities, which can raise a number of issues. Banking organizations with residential mortgage servicing operations should ensure that the following key concepts are addressed in their policies and practices governing abandoned foreclosures:

- Notification to Borrowers. Supervised banking organizations should notify the borrower(s) when a decision is made not to pursue a foreclosure action, and should inform the applicable borrower(s) of their (1) rights to occupy their property until a sale or other title transfer action occurs, (2) financial obligations regarding the outstanding loan balance and the payment of applicable taxes and insurance premiums, and (3) property maintenance responsibilities.

- Communications. Supervised banking organizations should use all means possible to provide the notification described above to affected borrowers, particularly those who prematurely vacated their homes based on the servicers' initial communications regarding foreclosure actions. In particular, when attempting to provide the notification, supervised organizations should employ the same extensive methods they use to contact borrowers in connection with payment collection activities.

- Notification to Local Authorities. Supervised banking organizations should ensure that their procedures include reasonable efforts to notify appropriate state or local government authorities of the organization's decision to not pursue a foreclosure, including complying with applicable state or local government notification requirements. These local entities may include tax authorities, courts, or code enforcement departments.

- Obtaining and Monitoring Collateral Values. Supervised banking organizations should have a process for obtaining the best practicable information on the collateral value of a residential property that may be subject to foreclosure, updating this information on a regular basis and using current information in their assessment as to whether to initiate, continue, or abandon a foreclosure proceeding."

The Board indicated in the guidance that both safety and soundness and consumer compliance examiners will be monitoring abandoned foreclosure procedures.

For more information, click here and here.

UK DEVELOPMENTS

FSA Consults on Further Client Money Proposals

On July 25, the UK Financial Services Authority (FSA) published a Consultation Paper Client Assets, Firm Classification, Oversight, Reporting and the Mandate Rules (CP12/15) in relation to two areas of client assets (CASS) policy - CASS oversight and reporting; and the mandate rules. The proposals set out in the Consultation Paper aim to:

- clarify existing CASS firm classification, operational oversight and reporting requirements;

- amend the language and presentation of some questions contained within the Client Money and Assets Return (which regulated firms holding client money are required to file) and its associated guidance notes based on industry feedback; and

- clarify the scope of the mandate rules in chapter 8 of the CASS sourcebook.

The Consultation period lasts until September 30. The FSA intends to issue a policy statement in November, with revised rules coming into force on January 1, 2013.

For more information, click here.

EU DEVELOPMENTS

Italian and Spanish Regulators Introduce Short Selling Bans

On July 23, the Spanish regulator (CNMV) and the Italian regulator announced short selling bans with immediate effect. The Spanish ban applies to any transaction the effect of which is to initiate or increase a net short position in any stock admitted to trading on a Spanish regulated market for which the CNMV is the competent authority. The ban includes transactions in derivatives on such stocks and on indices of which such stocks are constituents. The Spanish ban will initially remain in force for three months, expiring on October 23.

The Italian ban, initially in force only until 6 p.m. Italian time, Friday, July 27, prohibits short selling, including covered short selling, of the securities of 29 named Italian financial institutions. It does not extend to derivatives or index transactions.

For more information on Italy, click here.
For more information on Spain, click here.

ESMA Publishes Guidelines on ETFs and Other UCITS Issues and a Consultation Paper on Repurchase Agreements

On July 25, the European Securities Markets Authority (ESMA) released ESMA/2012/475, a Report and Consultation Paper comprising guidelines on Exchange Traded Funds (ETFs) and other issues relating to UCITS funds (Undertakings for Collective Investment in Transferable Securities) and a Consultation Paper on repurchase and reverse repurchase agreements (repos).

In the Guidelines (Annex III of the document), ESMA imposes additional conditions and/or modifies existing rules on:

- index-tracking UCITS and index-tracking leveraged UCITS
- UCITS ETFs and actively-managed UCITS ETFs
- redemption conditions for secondary market investors of all UCITS ETFs
- the use of efficient portfolio management techniques, total return swaps and similar derivatives
- the management of collateral for OTC derivatives and efficient portfolio management techniques
- the use of financial indices by UCITS.

Of particular note is guideline 29 which requires that all revenues (net of operational costs) arising from the use of efficient portfolio management techniques (such as securities lending) must be returned to the UCITS. This will prohibit the current common practice under which such revenues are split between the UCITS investment manager and the UCITS fund.

In the Consultation Paper on repos (Annex IV of the document), ESMA seeks views on the appropriate treatment of repo and reverse repo arrangements, in particular the proportion of its assets that a UCITS can place under arrangements under which the UCITS cannot "recall" securities – i.e. terminate the repo at short notice with respect to some or all of the included securities. The Consultation period closes on September 25.

For more information, click here.

European Commission Consults on Future Framework for Investment Funds

On July 25, in a development, which builds on and is complementary to ESMA's July 25 to ESMA's Guidelines on ETFs and other UCITS issues discussed above, the European Commission issued a Consultation on issues arising in investment funds. The Commission Consultation focuses on:

- Eligible assets and the use of derivatives by UCITS funds;
- Money market funds and their future regulation;
- The fund industry's involvement in securities lending and repo arrangements; and
- The fund industry's exposure to OTC derivatives that will be subject to central clearing obligation; and
- The fund industry's approach to investor redemptions.

The Consultation, also examines UCITS fund managers' use of efficient portfolio management techniques including securities lending. The Consultation period runs until October 18.

For more information, click here.

European Commission Proposes Legislation Prohibiting Benchmark Manipulation

On July 25, the European Commission adopted amendments to proposals for a Regulation (Market Abuse Regulation or MAR) and a Directive (Market Abuse Directive or MAD) on insider dealing and market manipulation. The new amendments explicitly prohibit the manipulation of benchmarks, including London InterBank Offered Rate and Euro Interbank Offered Rate, and make such manipulation a criminal offence.

For more information, click here.

For more information, contact:

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