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BROKER DEALER

FINRA Delays Implementation Date of Know-Your-Customer and Suitability Rules

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposal to delay the implementation date for know-your-customer (FINRA Rule 2090) and suitability rules (FINRA Rule 2111) until July 9, 2012. The previous implementation date was October 7, 2011. Following SEC approval of these rules, many firms requested that the implementation date be delayed to allow firms additional time to determine the types of systems and procedural changes they need to make, implement those changes, and educate associated persons and supervisors regarding compliance with the rules.

Click here to read SEC Release No. 34-64260.
Click here for information on previous guidance from FINRA regarding the new rules, as reported in the January 14 edition of *Corporate and Financial Weekly Digest*.

CFTC

CFTC Inspector General Issues Report Examining Cost-Benefit Analyses of Dodd-Frank Rulemaking

The Office of the Inspector General (OIG) for the Commodity Futures Trading Commission has issued a report summarizing its investigation into the CFTC's cost-benefit analyses for four rulemakings promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The OIG investigation, which was conducted at the request of Reps. Frank Lucas (R-OK) and K. Michael Conway (R-TX), reviewed how the CFTC formulated its cost-benefit analyses for its rulemakings regarding (1) definitions of "swap dealer," "major swap participant" and other key terms from Title VII of the Dodd-Frank Act; (2) confirmation, portfolio reconciliation and compression requirements for swap dealers and major swap participants; (3) core principles for designated contract markets; and (4) duties of swap dealers and major swap participants.

In its report, OIG concludes that, to a varying extent for the various rulemakings examined, the CFTC's Office of General Counsel (OGC) appeared to have a more dominant role in formulating the cost-benefit analysis than did the CFTC's Office of the Chief Economist (OCE), at times overriding the latter's input into the process. OIG further stated that the OGC's methodology for formulating cost-benefit analyses utilized a historic and "somewhat stripped down" analytical approach, and recommended that a "more robust" approach, with greater OCE input, be implemented.

A copy of the OIG report is available here.

CFTC Open Meeting Regarding Fourteenth Series of Proposed Dodd-Frank Rules

The Commodity Futures Trading Commission announced that it will hold an open meeting on the fourteenth series of rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act on April 27. At the meeting, the CFTC will consider, among other things, proposed rulemakings regarding capital requirements for swap dealers and major swap participants, bankruptcy protections for cleared swaps and associated collateral, product definitions under Title VII of the Dodd-Frank Act and other conforming amendments to CFTC regulations.

Information about the meeting is available here.

LITIGATION

Non-Party Granted Right to Seek to Unseal Court Documents

Jepsco, Ltd., a shareholder of Rich Realty Inc. (RRI) requested that all papers filed under seal in an action brought by B.F. Rich Co., Inc. against RRI in the Delaware Chancery Court be opened for review pursuant to Court of Chancery Rule 5(g)(6). Jepsco, which was not a party to the action against RRI, asserted a concern that the sealed documents would reveal that RRI sold assets without providing notice to shareholders, or distributing the proceeds of the transaction. RRI objected to Jepsco's request on the basis that Jepsco was not a party to the action and that the text of Rule 5(g)(6) limited this right to parties.

The Court of Chancery did not determine whether Jepsco had standing under Rule 5(g)(6). Instead, it found a clear basis for Jepsco to intervene in the action under Court of Chancery Rule 24, which delineates the circumstances under which a nonparty may intervene in a pending case either as of right or as permitted by the Court. Under Rule 24, a party has standing either where the party can claim an interest in the subject of the litigation or where the applicant's claim and the main action have a common question of fact or law.

The Chancery Court found that Jepsco's motion met both of the standards. Thus, it granted intervention in the underlying litigation for the limited purpose of obtaining access to documents filed under seal. (*B.F. Rich Co., Inc. v. Richard E. Gray, Sr. and Rich Realty, Inc.*, C.A. No. 1896-VCP (Del. Ch. Apr. 8, 2011))

Kansas District Court Rejects "Reverse Alter Ego" Liability Theory

Plaintiffs entered into a Funding Agreement with defendant Gary Hall that directed the parties to create lending entities to facilitate real estate investments. The Funding Agreement provided that the parties would divide profits received by the lending entities. Defendant Bentley Investments of Nevada LLC was a lending entity Mr. Hall created pursuant to the Funding Agreement. Plaintiffs asserted that defendants failed to advance the profits contractually allocated to them, and thereby breached the Funding Agreement.

Defendant Bentley moved to dismiss plaintiffs' complaint on the basis that it failed to plead a breach of contract claim, because Bentley was not a party to the Funding Agreement. Plaintiffs contended that Bentley should be held liable under a "reverse alter ego theory" because it was responsible for Mr. Hall's breaches.

The U.S. District Court for the District of Kansas granted defendants' motion to dismiss, rejecting plaintiffs' argument that Bentley was liable on a reverse alter ego liability theory. Citing Tenth Circuit precedent, the district court noted that absent a clear statement under state law that reverse alter ego liability is appropriate, federal courts should not hold a corporation liable for the acts of an individual. Because Kansas has not clearly adopted reverse alter ego liability, plaintiffs could not predicate a claim on this theory to hold defendant Bentley liable. (*Bettis v. Hall*, No. 10-2457-JAR, 2011 WL 1430327 (D. Kan. Apr. 14, 2011))

EXECUTIVE COMPENSATION AND ERISA

DOL May Modernize Electronic Disclosure Rules

The U.S. Department of Labor (DOL) recently indicated that it may update the rules governing electronic disclosure of benefit plan information (e.g., summary plan descriptions, benefit statements, administrative forms, annual notices, etc.). DOL rules generally require disclosure procedures that are reasonably intended to ensure actual receipt of the relevant documents by plan participants and beneficiaries. In 2002, the DOL adopted a safe

harbor rule that allowed for electronic disclosure—usually through a website or email. If the safe harbor rule is followed, the plan sponsor/administrator will be deemed to have satisfied the disclosure requirements.

While less costly than paper distribution, the safe harbor requirements for electronic disclosure can seem unreasonably technical and onerous in application. For example, posting of information on a company's intranet site is not sufficient. Sending the documents to participants as an attachment to an email—perhaps even with a return receipt—may be required. In addition, if an employee is not expected to have regular computer access as part of his or her regular work duties, then the employee must give written or electronic consent to receiving electronic disclosure. If the employee does not consent electronic disclosure, then he or she must be provided with paper disclosures. While these safe harbor rules may not seem overly burdensome on their face, when applied to the diverse population of large employers, it can be difficult to ensure compliance for every employee. The rules also must be followed for non-employee participants (e.g., former employees, beneficiaries, etc.), making full compliance even more complicated.

In light of these difficulties, and in light of the improved technology that has been developed since the safe harbor rules were adopted in 2002, the DOL has requested interested persons to provide information to the DOL. Such information is requested in the form of specific questions that should be answered by responders. The questions generally address issues related to access and usage of the Internet (e.g., what percentage of participants and beneficiaries have access to the Internet at work or at home?), updating the current rules (e.g., should the current rules be updated and, if so, how?), and technical items (e.g., under what circumstances should someone have the right to opt out of electronic disclosures?). The information gathered will help the DOL evaluate whether and how the electronic disclosure rules can be updated to better suit their intended purpose. Those wishing to respond to the DOL's request for information should do so by June 6.

The DOL's request for information can be found here.

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