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CORPORATE & FINANCIAL
WEEKLY DIGEST

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BROKER DEALER

FINRA and ISG Postpone Effective Dates for Enhanced Electronic Blue Sheet Submission

Pursuant to Regulatory Notice 12-36, the Financial Industry Regulatory Authority (FINRA), together with the other interested members of the Intermarket Surveillance Group (ISG interested members), have delayed the effective dates for firms to submit new data elements for Electronic Blue Sheets (EBS). The postponed compliance dates correspond with the extensions granted by the Securities and Exchange Commission for the implementation of the SEC Large Trader Reporting Rule.

FINRA issued Regulatory Notice 11-56 (RN 11-56) on December 13, 2011, which announced enhancements to EBS. These enhancements, which were a joint effort of FINRA and the ISG interested members, were designed "to improve the regulatory agencies' ability to analyze broker-dealers' trading activities." FINRA and the ISG interested members have now extended the compliance dates for the Blue Sheet reporting requirements to November 30, 2012 and May 1, 2013, so that broker-dealers have additional time to develop, test and implement the enhancements.

By November 30, 2012, broker-dealers must be in Blue Sheet reporting compliance with the seven new fields described in RN 11-56, which may apply to all National Market System securities and for all transactions effected (directly or indirectly) by or through (a) any proprietary account of a U.S. registered broker-dealer or (b) any account used by a customer that trades through a "sponsored access" arrangement.

By May 1, 2013, broker-dealers must be in Blue Sheet reporting compliance for the "Order Execution Time, Entering Firm Identifier and Executing Firm Identifier" fields in all securities and all types of transactions effected (directly or indirectly) by or through all types of accounts that are Blue Sheet reportable.

Click here to read the full text of Regulatory Notice 12-36.

CFTC

ICE Announces Plans to Transition Swaps to Futures Contracts

On July 30, the IntercontinentalExchange (ICE) announced that, subject to approval from the Commodity Futures Trading Commission and the U.K. Financial Services Authority, all cleared over-the-counter (OTC) products listed on ICE's OTC energy market will be transitioned to futures products in January 2013. After the transition, these products will be subject to regulation as futures and will not be subject to the swap regulatory regime created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

ICE plans to transition all of its cleared U.S. natural gas, electric power, and natural gas liquids swaps and options, as well as its cleared U.S. emissions forwards and options, to futures and options on futures that will be listed for trading by ICE Futures U.S. Cleared crude and refined oil, freight, and iron ore swaps and options will be

transitioned to futures and options on futures that will be traded on ICE Futures Europe. Both ICE Futures U.S. and ICE Futures Europe plan to allow market participants to execute trades using an electronic order book, block trades, exchanges of futures for related positions, and cross trades. Uncleared (bilateral) swaps will continue to be listed on ICE's OTC platform, which will register as a swap execution facility.

ICE does not expect the transition to change its execution, clearing, minimum commission or view-only fees or, subject to regulatory approval, its margining methodology and rates.

The participant notice is available here.

CFTC Roundtable to Discuss Customer Protection Requirements for FCMs

The staff of the Commodity Futures Trading Commission will hold a public roundtable on Thursday, August 9 at 9:30 a.m. Eastern Time to discuss customer protection requirements for futures commission merchants (FCMs). The roundtable is scheduled to discuss: (i) self-regulatory organization (SRO) examination requirements for FCMs; (ii) CFTC oversight of SRO examination programs; (iii) the role of independent certified public accountants in the examination process; and (iv) customer protection requirements for FCMs, including various proposals related to customer-segregated funds.

The CFTC press release containing further information regarding the roundtable is available here.

LITIGATION

Third Circuit Affirms Grant of Summary Judgment for Defendants in Securities Fraud Case

The U.S. Court of Appeals for the Third Circuit affirmed the district court's ruling that plaintiffs had failed to establish two key elements of their securities fraud claim against a corporate defendant and its two shareholders. Plaintiffs, who also were shareholders of the defendant corporation, alleged that defendants had violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder when they issued only "condensed financial statements," which omitted transactions between defendants and another corporation that the shareholder defendants owned. The district court found that plaintiffs had failed to create a genuine dispute as to loss causation and reliance—two key elements to a securities fraud claim. The Third Circuit agreed, finding first that the plaintiffs did not prove loss causation because they did not prove that the defendants' fraudulent transfers diminished the value of plaintiffs' stock, and second, that plaintiffs were unaware of defendants' alleged misstatements and omissions, and therefore could not establish reliance. In discussing reliance, the Third Circuit noted that defendants had met their burden of proving plaintiffs' non-reliance by showing that the latter never had read the "condensed financial statements" at issue.

Gallup v. Clarion Sintered Metals, Inc. et al., Nos. 11-4003, 11-4004 (3d Cir. July 26, 2012).

Second Circuit Finds that Petition to Compel Arbitration Cannot Be Voluntarily Dismissed

The U.S. Court of Appeals for the Second Circuit affirmed the Southern District of New York's vacatur of a petitioner's voluntary notice of dismissal of a petition to compel arbitration. Petitioner and respondent had entered into an arbitration agreement and petitioner had filed a petition to compel arbitration. After some litigation, petitioner filed a notice of voluntary dismissal under the Federal Rules of Civil Procedure. The Second Circuit found that the Federal Rule of Civil Procedure allowing for voluntary dismissal (Rule 41) did not apply to petitions to compel arbitration and that the petitioner lacked the right to voluntarily and unilaterally dismiss the petition for arbitration. Additionally, the Second Circuit found that allowing parties to voluntarily dismiss petitions to compel arbitration would inappropriately expand the voluntary dismissal right, as the Rule allows one party to curtail the other's right of voluntary dismissal by filing an answer or a motion for summary judgment, but under the Federal Arbitration Act, a respondent's option is limited: he can file a motion for summary judgment, but not an answer, in response to a motion to compel arbitration.

ISC Holding AG v. Nobel Biocare Finance AG, Nos. 10-4867-cv(L), 11-239-cv(CON) (2d Cir. July 25, 2012).

BANKING

Federal Reserve Finalizes Financial Market Utility Rules

On July 30, the Board of Governors of the Federal Reserve System (Board) announced the approval of a final rule establishing risk-management standards for certain financial market utilities (FMUs) designated as systemically important by the Financial Stability Oversight Council. The final rule also establishes requirements for advance notice of proposed material changes to the rules, procedures, or operations of certain designated FMUs. FMUs, such as payment systems, central securities depositories, and central counterparties, provide the infrastructure to clear and settle payments and other financial transactions. The final rule (Regulation HH) is substantively similar to the proposed rulemaking, with two exceptions. The final rule includes a new provision that would allow the Board to waive the application of certain Regulation HH standards to a particular type of designated FMU, "where the risks presented by or the design of that designated FMU would make application of certain standards inappropriate." In addition, the Board has revised the illustrative list of changes that do not require an advance notice, in part to include changes to a designated FMU's fees, prices, or other charges.

The final rule implements two provisions of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). It establishes risk-management standards governing the operations related to the payment, clearing, and settlement activities of designated FMUs, except those registered as clearing agencies with the Securities and Exchange Commission or as derivatives clearing organizations with the Commodity Futures Trading Commission. (Under Section 805(a)(2) of the Dodd-Frank Act, the CFTC and the SEC are also required to take relevant international standards and existing prudential requirements into consideration in prescribing regulations containing risk-management standards governing designated clearing entities.) The risk-management standards are based on the recognized international standards developed by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions that were in existence at the time of the proposed rulemaking, which were incorporated previously into the Board's Policy on Payment System Risk.

The final rule also establishes requirements for advance notice of proposed material changes to the rules, procedures, or operations of a designated FMU for which the Board is the supervisory agency under Title VIII of the Dodd-Frank Act. The advance notice requirements set the threshold above which a proposed change would be considered material and thus require an advance notice to the Board, and also include provisions on the length of the review period.

The final rule will be effective on September 14, 2012.

Click here for more information.

EXECUTIVE COMPENSATION AND ERISA

DOL Revises its Position on Brokerage Windows (Again)

The Department of Labor (DOL) continues to revise its stance on the disclosures plan sponsors must make to participants about brokerage windows. DOL regulations require sponsors of participant directed retirement plans to issue statements about the fees paid and the investment returns for investment options under participant-directed plans (such as the typical 401(k) plan). For most plans, the first disclosure is due August 30, 2012.

According to the DOL regulations issued in 2010, sponsors need to disclose fee and investment information only on “designated investment alternatives” (DIAs). A DIA is a core investment offered by the plan, but the regulations specify that a brokerage window is not a DIA. (A "brokerage window" is an option that allows a plan participant to open a brokerage account for some or all of his or her account, and access investments other than DIAs.) So, instead of having to report information on all of the investments available through the brokerage window, the plan sponsor was required to describe the brokerage windows and any plan level fees associated with it.

In May of this year, the DOL issued Field Assistance Bulletin (FAB) 2012-2, which seemed to reverse the regulation's rule that a brokerage window was not a DIA. Under this FAB, if the greater of 5 participants or 1% of

the plan's participants invest (on a date that is not more than 90 days before the date the annual disclosure is due) in the same investment option through the brokerage window, the plan sponsor must treat that investment option as a DIA and provide the same disclosures as the disclosures on the Plan's core funds.

This means that a plan sponsor would have to pick a date during the period beginning June 1, 2012 and August 30, 2012 and take a snapshot of the investments in the brokerage window. If 1% or more of the plan participants invest in the same investment through the brokerage window, the plan sponsor must gather fee and performance information from these investments and report it to participants.

The DOL reversed its position again on July 30 by issuing FAB 2012-2R, which revises the earlier guidance. The new FAB provides that sponsors are not required to describe the fees associated with investments offered solely through a brokerage window.

The DOL did not specify why it has modified its position on brokerage windows. Presumably, the statement in the original FAB was in response to certain advice provided by some commentators after the DOL issued its 2010 participant fee disclosure regulations. These commentators noted that plan sponsors could circumvent the fee disclosure rules by offering only brokerage windows. Presumably, the revised FAB was due to the backlash of the financial services and employee plan community, including the challenge of the DOL's authority to use a FAB to revise its regulations so materially without a comment period.

A copy of the revised Field Assistance Bulletin can be found here.

UK DEVELOPMENTS

FSA Imposes Fine of £294,000 for AML Breaches

On August 2, the U.K. Financial Services Authority (FSA) announced that it had fined Turkish Bank (UK) Ltd (TBUK) £294,000 (approximately $456,000) for breaches of the Money Laundering Regulations 2007 (MLR). The FSA found that the breaches—which related to TBUK's correspondent banking arrangements—were widespread and lasted over two and a half years. The FSA stated that the anti-money laundering (AML) breaches had led to "an unacceptable risk that TBUK could have been used to launder money."

TBUK's breaches of the MLR included failing to:

- establish and maintain appropriate and risk-sensitive AML policies and procedures for its correspondent banking relationships;
- carry out adequate due diligence on, and ongoing monitoring of, the respondent banks it dealt with and failing to reconsider these relationships when this was not possible; and
- maintain adequate records relating to the above.

While the FSA concluded that the failings were not deliberate or reckless, they were considered to be "more serious" because the FSA had previously warned TBUK of deficiencies in its approach to AML controls over correspondent banking.

TBUK agreed to settle with the FSA at an early stage of the investigation. As a result of the early settlement and the firm's co-operation, the fine of £420,000 (approximately $650,000) was reduced by 30%.

For more information, click here.

FSA Publishes FAQs on Transition to the FCA

On July 31, the FSA Financial Services Authority (FSA) published a set of FAQs on the transition from the FSA to the successor regulator, the Financial Conduct Authority (FCA). The FSA intends to publish an "Approach Document" in October providing more detail on how the FCA will work. The FSA will be succeeded by the FCA and the Prudential Regulation Authority on a date yet to be fixed in early 2013.

For more information, click here.

Terms of Wheatley Review of LIBOR Announced

On July 30, HM Treasury announced the terms of the review which will be conducted by Martin Wheatley, the CEO-designate of the Financial Conduct Authority, examining the framework for the setting of LIBOR.

The Wheatley review will formulate policy recommendations with a view to reforming the current framework for setting and governing LIBOR, including consideration of:

- Whether participation in the setting of LIBOR should become a regulated activity under UK financial services legislation and regulations;
- How LIBOR is constructed, including the feasibility of using actual trade data to set the benchmark;
- The appropriate governance structure for LIBOR;
- The potential for alternative rate-setting processes;
- The financial stability consequences of a move to a new regime and how a transition could be appropriately managed;
- Determining the adequacy and scope of sanctions to appropriately tackle LIBOR abuse;
- The scope of UK regulatory and criminal authorities' powers with respect to financial misconduct, particularly market abuse and abuse relating to the setting of LIBOR and equivalent rate-setting processes; and
- The FSA's approved persons regime and investigations into market misconduct.

A formal discussion paper covering the above points will be published on August 10 and the review will aim to publish its conclusions by the end of September.

For more information, click here.

Treasury Consultation on Financial Sector Resolution Proposals

On August 1, HM Treasury published a consultation paper *Financial Sector Resolution: Broadening the Regime* setting out proposals and questions for consultation on enhancing the mechanisms available for dealing with the failure of systemically important non-bank financial sector entities.

The consultation covers four broad groups where the government considers institutional failure to potentially pose systemically important issues: investment firms and financial holding companies; central counterparties (CCPs); other financial market infrastructures such as payment systems; and insurers.

The consultation paper contains draft legislative clauses for certain key aspects of the envisaged resolution. The consultation closes on September 24.

For more information, click here.

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