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CORPORATE & FINANCIAL
WEEKLY DIGEST

January 20, 2012

BROKER DEALER

Rule Change to Extend the Temporary Limitation of the Application of FINRA Rules to Security Based Swaps

On January 13, the Securities and Exchange Commission approved for immediate effectiveness the Financial Industry Regulatory Authority's proposal to extend FINRA Rule 0180 to January 17, 2013. FINRA Rule 0180 temporarily limits, with certain exceptions, the application of FINRA rules with respect to security-based swaps.

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) expands the definition of "security" to, among others, expressly encompass security-based swaps. The expansion of the Dodd-Frank Act's definition of "security" raises certain complex issues of interpretation, including issues as to the application of those provisions to registered broker-dealers. The SEC previously stated that, absent additional time to analyze the foregoing issues, and to consider whether to provide interpretive or operational guidance, the changes required by the Dodd-Frank Act may lead to unnecessary market uncertainty. Accordingly, the SEC has provided certain temporary exemptions to address the expansion of the Dodd-Frank Act's definition of "security" to expressly encompass security-based swaps.

Because the Dodd-Frank Act's expanded definition of "security" has similar implications for numerous provisions under FINRA rules, in July 2011, FINRA filed FINRA Rule 0180 for immediate effectiveness, which, with certain exceptions, is intended to temporarily limit the application of FINRA rules with respect to security-based swaps. FINRA Rule 0180 was set expire on January 17, 2012. The SEC approved FINRA's proposal to extend FINRA Rule 0180 to January 17, 2013, pending the final implementation of new rules and guidance that would provide greater regulatory clarity in relation to security-based swap activities, so as to provide relief from certain FINRA requirements and thereby help avoid undue market disruptions resulting from the change to the definition of "security" under the Dodd-Frank Act.

Click here to read Release No. 34-66156.

LITIGATION

District Court Finds That Complaint Adequately Alleged Existence and Breach of an Oral Partnership Agreement

Plaintiff Scott McNamara, M.D. brought an action against defendants Catherine Picken, M.D. and Washington ENT Group, PLLC (WENT) for an accounting, conversion, breach of contract, interference with business relations, and defamation.

McNamara alleged that he and Picken first discussed the possibility of sharing office space and then later agreed to merge their medical practices. According to the complaint, McNamara and Picken executed a sublease for office space and printed out announcements regarding the merger. WENT began billing insurers for services rendered by McNamara and McNamara was added to the WENT bank account. The parties, according to the complaint, orally agreed to share profits and losses equally. Despite discussing signing a partnership agreement, the parties never completed a draft or executed any written agreement.

The business relationship eventually fell apart because, the complaint alleges, Picken came to believe McNamara had stolen money from WENT and engaged in “unprofessional acts.” The complaint alleges that Picken tortuously interfered with McNamara’s business relations by repeating these conclusions to a WENT employee and to personnel at a hospital where both doctors worked.

The defendants moved for judgment on the pleadings pursuant to Federal Rules of Civil Procedure Rule 12(c) on all counts. The defendants argued that Counts I (accounting), II (accounting and conversion), and IV (breach of contract) failed as a matter of law because the plaintiff had not adequately alleged the existence of a partnership agreement. Because the parties had discussed executing a written agreement which never materialized, the defendants argued the parties could not have had the requisite intent to create an enforceable oral contract. The court disagreed that this factor was dispositive, and concluded that the complaint alleged sufficient facts plausibly showing that the parties had intended to be bound by the alleged oral agreement such that the defendants’ Rule 12(c) motion should be denied. The court did, however, decided to dismiss the tortuous interference claim on the ground that the plaintiff failed to allege damages.

McNamara v. Picken, 2012 WL 76176 (D.D.C. Jan. 11, 2012).

Sixth Circuit Confirms That Burden-Shifting Test Applies to FMLA Interference Claim

Plaintiff Gwendolyn Donald, a former restaurant assistant manager, filed a suit against an Arby’s franchise owner claiming that the franchise terminated her employment in violation of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and Michigan’s Persons With Disabilities Civil Rights Act (PWDCR). The district court granted summary judgment for defendant Sybra, Inc. (Sybra).

Donald experienced a number of serious health problems that required her to take leave for treatment. During one such period, her employer concluded that she had stolen money from a cash register. When Donald returned from leave, her employer confronted her with the theft accusation and then terminated her employment.

Donald argued that the employer’s actions gave rise to both FMLA interference and retaliation claims. The district court assumed for the sake of argument that Donald made out a prima facie case for improper interference with her FMLA rights. The district court, however, went on to find that Donald could not prove that Sybra’s stated reason for her termination – the alleged theft – was pretextual.

In affirming the district court’s decision, the U.S. Court of Appeals for the Sixth Circuit clarified that courts should apply the *McDonnell Douglas* burden-shifting test to FMLA interference claims as well as to FMLA retaliation claims: once a plaintiff shows that an employer interfered with the exercise of FMLA rights, the burden shifts to the employer to show that the adverse action was unrelated to the employee engaging in protected FMLA activity; the employee then may show that the employer’s stated reason is “pretextual.”

The Sixth Circuit also found that Donald’s ADA and PWDCRA claims failed because she did not produce sufficient evidence demonstrating that anyone perceived her as being unable to engage in a major life activity.

Donald v. Sybra, Inc., No. 10-2153 (6th Cir. Jan. 17, 2012).

BANKING

FDIC Board Approves Final Rule Requiring Resolution Plans for Insured Depository Institutions Over $50 Billion

On January 17, the Federal Deposit Insurance Corporation approved a final rule requiring an insured depository institution with $50 billion or more in total assets to submit periodic contingency plans to the FDIC for resolution in the event of the institution's failure. These resolution plans "will inform the FDIC's ability, as receiver, to resolve the institution in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than a Friday), maximizes the net-present-value return from the sale or disposition of its assets, and minimizes the amount of any loss to be realized by the institution's creditors."

Time will tell whether such plans will materially assist the FDIC in successfully resolving large-scale failures. The plans, which if done well will be costly to develop both in terms of time and money, will only be useful to the extent that the institutions submitting them put time and effort into crafting them, to the extent they are maintained in an up-to-date fashion, and to the extent they are profitably utilized by knowledgeable supervisory personnel in advance of an impending failure.

For more information, click here.

FDIC Board Proposes Capital-Adequacy Stress Testing for Banks It Supervises With More Than $10 Billion in Assets

On January 17 the Federal Deposit Insurance Corporation approved a notice of proposed rulemaking (NPR) that would require certain depository institutions with more than $10 billion in consolidated assets to conduct annual capital-adequacy stress tests. The NPR, to implement section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), would apply to FDIC-insured state nonmember banks and FDIC-insured state-chartered savings associations with total consolidated assets of more than $10 billion. The FDIC regulated 23 state non-member banks with total assets of more than $10 billion as of September 30, 2011. The proposed rule expands upon proposed guidance issued on June 15, 2011 on covered banks' stress testing as a part of overall institution risk management. That guidance included stress testing non-capital related aspects of financial condition. The Dodd-Frank Act requires each primary federal financial regulator, including the FDIC, to issue consistent and comparable stress-testing regulations for financial companies with total consolidated assets of more than $10 billion. In terms of its requirements, the NPR "is substantively similar to a proposal the Federal Reserve published in December 2011."

The NPR defines "stress test" as a process to assess the potential impact of economic and financial conditions on the consolidated earnings, losses and capital of the bank over a set planning horizon, taking into account the current condition of the bank and its risks, exposures, strategies, and activities. The NPR describes the content of the reports institutions are required to publish, and the timeline for conducting the stress tests and producing the required reports. Under the proposed rule, each covered bank would be required to conduct annual stress tests using the bank's financial data as of September 30 of that year to assess the potential impact of different scenarios on the consolidated earnings and capital of that bank and certain related items over a nine-quarter forward-looking planning horizon, taking into account all relevant exposures and activities.

The stress tests "would provide forward-looking information that would assist the FDIC in assessing the capital adequacy of the banks covered by the rule. The banks that would be required to conduct the stress tests also are expected to benefit from improved internal assessments of capital adequacy and overall capital planning," according to the FDIC.

The FDIC's proposal will be published in the Federal Register with a 60-day public comment period.

The guidance continues a trend, solidified by the Dodd-Frank Act, of having insured institutions do intense legwork to assist regulators in their supervisory capacity. Regulators believe that the work done will be of assistance to the institutions themselves.

To review the notice, click here.

American Bankers Association Asks Congress to Re-Propose Volcker Rule

On January 17, Frank Keating, President of the American Bankers Association, asked Congress to ask the agencies charged with drafting the Volcker Rule, which would curtail proprietary trading and private equity and hedge fund investments by banks, to start over. The letter states that "[t]he proposed rules as written are unworkable and fail to carry out the intent of Congress to clearly define prohibited activity in proprietary trading and investments in hedge funds and private equity funds. ABA therefore requests that Congress (1) communicate its Volcker Rule objectives to the agencies in writing and at the hearing, and (2) call for a re-proposed set of rules for public comment that readily align with such objectives." The letter was delivered one day before agency heads testified before Congress on their efforts to implement the Volcker Rule.

The letter may be found here.

EXECUTIVE COMPENSATION AND ERISA

HHS Issues Final Regulations Addressing Electronic Funds Transfers by Health Plans

On January 10, the Department of Health and Human Services (HHS) issued interim final regulations regarding the standards applicable to electronic funds transfers (EFTs) made by health plans to health care providers. The regulations were prompted by Section 1104(b)(2)(A) of the Patient Protection and Affordance Care Act, which amended the earlier Health Insurance Portability and Accountability Act (HIPAA) by adding EFTs to the list of transactions for which HHS must adopt a standard under HIPAA. The goal of the new regulation is to make EFTs a more efficient method for the receipt of health claim payments. Comments regarding the regulations are due before March 12. Compliance will be required effective January 1, 2014.

The new regulations adopt two standards for health plans which transmit health claim payments to providers using EFTs. Specifically, the standards include (a) a format for when a health plan initiates or authorizes an EFT with its bank; and (b) specific information that must be contained in the EFT. Each EFT must include two specific parts. First, it must contain the EFT payment/processing information, and second, adjustments to the claim charges in an attached "remittance advice" notice, so that any adjustments to the payment are clear and explained. In the event that the remittance notice and the payment arrive at different times (which causes confusion and waste in matching up such payments and notices), the EFT regulations require the use of a tracking number so that the notice and payment can be easily and properly correlated.

The Interim Final Rule may be accessed here.

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