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BROKER DEALER

CBOE Proposes to Amend Preferred Market Maker's Continuous Quoting Obligations

On January 18, the Chicago Board Options Exchange (CBOE) issued a proposed rule that would amend the continuous quoting obligations for preferred market-makers (PMMs). CBOE Rule 8.13(d) currently requires PMMs to provide continuous electronic quotes in at least 90% of the non-adjusted option series in each class in which it receives PMM orders. Under the proposed amendment, PMMs would be required to maintain continuous electronic quotes in the lesser of: (i) 99% of the non-adjusted option series that have a time to expiration of less than nine months; or (ii) 100% of the non-adjusted option series that have a time to expiration of less than nine months minus one call-put pair of each class for which it receives PMM orders. The term "call-put pair" means one call and one put that cover the same underlying instrument and have the same expiration date and exercise price. The proposed amendment also adds an interpretation to clarify that a PMM will receive a participation entitlement if it elects to disseminate quotes in series with a time to expiration of nine months or more.

For more information, click here.

PRIVATE INVESTMENT FUNDS

FATCA Regulations Are Finalized

On January 18, the Treasury Department issued final regulations under the Foreign Account Tax Compliance Act (FATCA). The final regulations incorporate the FATCA guidance that the Internal Revenue Service (IRS) has issued since proposed FATCA regulations were issued last February, as well as certain comments received regarding the proposed FATCA regulations. The final regulations also provide clarification and details with respect to:

1. the method, timing and general content that will need to be included in an agreement that a foreign financial institution (FFI) will need to enter into with the IRS to avoid FATCA withholding;
2. phased-in timelines for due diligence, reporting and withholding;
3. rules concerning intergovernmental agreements; and
4. procedures for compliance and registration by sponsors of commonly managed FFIs.

We intend to issue a client advisory discussing the FATCA final regulations.

Read more.

CFTC

CFTC to Host Roundtable on "Futurization" of Swaps

Commodity Futures Trading Commission staff will host a public roundtable to discuss the "futurization" of swaps. The roundtable will consist of four panels, which will address: (1) general industry views and concerns regarding the conversion of swaps to futures in each asset class; (2) clearing and different margin requirements for swaps and futures; (3) transaction-related matters including appropriate block rules for swaps and futures; and (4) the effect of the conversion of swaps to futures on end-users.

The roundtable will be held at CFTC headquarters in Washington, D.C. on January 31, and will be open to the public. A live audio feed will also be available for anyone not in attendance. Interested persons may submit comments to the CFTC prior to the conclusion of the roundtable.

More information is available here.

CFTC Amends Order of Registration and Approves Rulebook for LCH.Clearnet LLC

The Commodity Futures Trading Commission issued an amended order of registration to LCH.Clearnet LLC (LCH LLC), formerly the International Derivatives Clearinghouse, LLC. LCH LLC's parent company, LCH.Clearnet Group Limited, recently acquired IDC's sole parent, International Derivatives Clearing Group, LLC.

In accordance with the amended order, LCH LLC continues to be registered as a derivatives clearing organization, subject to new terms and conditions relating to recent amendments to the Commodity Exchange Act. In addition to futures and options on futures, LCH LLC is permitted to clear interest rate and currency swaps. The CFTC also approved LCH LLC's revised rulebook.

The amended order of registration is available here.

NFA Issues Notice Regarding CTA Reporting Requirements

National Futures Association (NFA) issued a notice to members relating to reporting requirements for commodity trading advisors (CTAs). Pursuant to recently adopted Commodity Futures Trading Commission Regulation 4.27, CTAs must file a Form PR annual report for the 2012 calendar year with NFA by February 14, 2013. The Form PR requires each CTA to report on an annual basis general information about the CTA, its trading programs, the pool assets directed by the CTA and the identity of the commodity pool operators that operate those pools. The Form PR must be filed electronically using NFA's EasyFile System.

NFA Notice I-13-02 is available here.

LITIGATION

2012 Trends in Securities Class Action Filings

On January 23, Cornerstone Research and Stanford Law School's Securities Class Action Clearinghouse released their "2012 Year in Review" report, which analyzes the federal securities fraud class action filings over the past year and looks at the number of actions filed, the types of filings, the geographic locations of the filings, and the industries affected. In general, the report notes that fewer class action lawsuits were filed in 2012, fewer filings were made against companies in the Financial Industry, and no new filings were related to the credit crisis.

The number of securities class actions filed in 2012 dropped by 20%. 152 securities class action suits were filed in 2012, fewer than in either 2011 (188 suits) or in an average year from 1977–2011 (193 suits). The report noted that the decrease was "largely due" to the decrease in filings challenging mergers and acquisitions. 85% of the suits brought in 2012 contained Rule 10b-5 claims, the highest percentage in the last five years. The industry most targeted by securities class actions in 2012 was the "Consumer Non-Cyclical" industry, which includes tobacco, beverage, and personal and household products companies, while filings against Financial Industry companies have been decreasing. In fact, 2012 was the first year in which there were no new filings related to the credit crisis.

These securities class action lawsuits continue to be filed predominantly in the Second Circuit and the Ninth Circuit; however, Ninth Circuit filings fell from 55% of total filings in 2011 to 28% of total filings in 2012. 18% more actions were filed against companies listed on the NYSE or Amex, while the number of filings against companies listed on NASDAQ decreased 43%.

Cornerstone Research, "Securities Class Action Filings—2012 Year in Review," is available at here.

Eleventh Circuit Holds that Net Revenue, Not Profits, Should Determine Damages in FTC Deceptive Marketing Case

The US Court of Appeals for the Eleventh Circuit recently affirmed a judgment against three individual defendants finding that the district court correctly used net revenue to calculate damages. Defendant-appellants were involved in a mortgage loan scheme in which they solicited financially distressed homeowners and offered them assistance either through loan modifications or bankruptcy. The district court found that the defendant-appellants engaged in deceptive activities relating to the sale and marketing of the mortgage relief and home foreclosure services they offered.

On appeal, the court addressed only the issue of whether the district court abused its discretion in calculating damages by using net revenue. The Eleventh Circuit agreed with defendant-appellants that an award based on consumer losses would be improper, but found that the district court appropriately based the award on the defendant-appellants' net revenue. In doing so, the Eleventh Circuit rejected defendant-appellants' argument that profits should have been considered as a basis for the damages award. Agreeing with opinions from the First, Second and Seventh Circuits, the Eleventh Circuit held that a judgment ordering defendants to disgorge only profit (net revenue minus expenses) would inappropriately allow defendants to "deduct costs associated with committing their illegal acts."

FTC v. Washington Data Resources, Inc., No. 12-13392 (11th Cir. Jan. 16, 2013).

BANKING

Consumer Financial Protection Bureau Releases Final Qualified Mortgage Rule and Proposed Amendments to Ability to Repay Rule

On January 10, the Consumer Financial Protection Bureau (CFPB) released a final rule (ATR Rule) to implement provisions related to the ability to repay (ATR) standards and the definition of a "qualified mortgage" (QM) as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). The final rule becomes effective in January 2014.

With respect to the ATR Rule, the final rule describes certain minimum requirements for creditors in making ability-to-repay determinations. The eight underwriting factors a residential mortgage lender must consider include: (1) current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history. Although such factors must be considered, no particular underwriting models are required.

As set forth in the Dodd-Frank Act, QMs are entitled to a presumption that the creditor making the loan satisfied the ATR rules. The final rule provides a safe harbor for loans that satisfy the definition of a QM and are not "higher priced" as generally defined in a prior Federal Reserve rule. Specifically, consumers could show a violation of the ATR requirements with regard to a subprime qualified mortgage if they were able to show that, when the loan was originated, the consumer's income and debt obligations left insufficient residual income or assets to meet living expenses. For higher-priced mortgage loans, there is a rebuttable presumption with respect to the QM definition.

With respect to prime loans, if certain QM criteria are satisfied, it will be conclusively presumed that the creditor made a good faith and reasonable determination of the consumer's ability to repay.

Certain residential mortgage loans cannot be QMs. Those include mortgages with negative amoritization schedules, interest-only payments, balloon payments, or terms exceeding 30 years. In addition, "no doc" loans cannot be QMs. Finally, residential mortgage loans where the points and fees paid by a consumer exceed 3% of the total loan amount are generally prevented from being QMs. With respect to underwriting criteria, a QM must have monthly payments calculated based on the highest payment that will apply in the first five years of the loan and that the consumer has a total debt-to-income ratio (DTI) that is less than or equal to 43%. For loans where the DTI is above 43%, the CFPB believes that those need to be evaluated on an individual basis rather than in the blanket presumption that the ATR requirements have been met.

Simultaneously with the release of the ATR Rule, the CFPB also issued proposed exemptions and modifications to the rule for public comment. Specifically, the CFPB proposes to exempt from the ATR Rule extensions of credit made (i) pursuant to a program administered by a housing finance agency, (ii) by certain types of nonprofit creditors (including those designated as Community Development Financial Institutions by the Department of Treasury) and (iii) pursuant to an Emergency Economic Stabilization Act program (such as extensions of credit made pursuant to a State Hardest Hit Fund program). In addition, the proposal exempts from the ATR requirements a refinancing that is (i) eligible to be insured, guaranteed or made pursuant to a program administered by the Federal Housing Administration, US Department of Veteran Affairs or the US Department of Agriculture, or (ii) eligible to be purchased or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, if certain requirements are met. The proposal sets forth a fourth category of "qualified mortgages" and includes certain loans originated by creditors with assets of $2 billion or less that made 500 or fewer first-lien covered transactions during the previous calendar year. Finally, the proposal also sets forth for comment rules that would allow small creditors operating predominantly in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from a conclusive presumption of compliance with the ATR Rule (the "safe harbor"). Comments are due by February 25, 2013, although a final rule related to these proposals is scheduled to become effective on January 10, 2014.

More information is available here.

Please see "Agencies Issue Final Rule on Appraisals for Higher-Priced Mortgage Loans" in **Banking** below.

FDIC Launches Community Affairs Webinar Series

On January 24, the Federal Deposit Insurance Corporation (FDIC) announced that staff from the FDIC's Division of Depositor and Consumer Protection (DCP) Community Affairs Branch will host a webinar series for bankers in 2013. The series will highlight strategies for institutions to consider that may complement other efforts to promote community development and expand access to the banking system. The first webinar will be held on February 6, from 1:30 p.m. to 2:30 p.m. (ET). The free webinars will be held every other month. Registration is required.

Read more.

Agencies Issue Final Rule on Appraisals for Higher-Priced Mortgage Loans

On January 18, six federal financial regulatory agencies (the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the National Credit Union Administration and the Office of the Comptroller of the Currency) issued a final rule that establishes new appraisal requirements for "higher-priced mortgage loans." The rule implements amendments to the Truth in Lending Act (TILA) made by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). Under the Dodd-Frank Act, mortgage loans are higher-priced if they are secured by consumers' homes and have interest rates above certain thresholds.

Specifically, new TILA section 129H prohibits a creditor from extending credit in the form of a higher-risk mortgage loan to any consumer without first:

- Obtaining a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property.

- Obtaining an additional appraisal from a different certified or licensed appraiser if the higher-risk mortgage finances the purchase or acquisition of a property from a seller at a higher price than the seller paid, within 180 days of the seller's purchase or acquisition. The additional appraisal must include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

A creditor of a "higher-risk mortgage" must also:

- Provide the applicant, at the time of the initial mortgage application, with a statement that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the applicant's expense.

- Provide the applicant with one copy of each appraisal conducted in accordance with TILA section 129H without charge, at least three (3) days prior to the transaction closing date.

New TILA section 129H(f) defines a "higher-risk mortgage" with reference to the annual percentage rate (APR) for the transaction. A higher-risk mortgage is a "residential mortgage loan" secured by a principal dwelling with an APR that exceeds the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set—

- By 1.5 or more percentage points, for a first lien residential mortgage loan with an original principal obligation amount that does not exceed the amount for the maximum limitation on the original principal obligation of a mortgage in effect for a residence of the applicable size, as of the date of the interest rate set, pursuant to the sixth sentence of section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454);

- By 2.5 or more percentage points, for a first lien residential mortgage loan having an original principal obligation amount that exceeds the amount for the maximum limitation on the original principal obligation of a mortgage in effect for a residence of the applicable size, as of the date of the interest rate set, pursuant to the sixth sentence of section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454); or

- By 3.5 or more percentage points, for a subordinate lien residential mortgage loan.

The definition of "higher-risk mortgage" expressly excludes "qualified mortgages" as defined in TILA section 129C, and "reverse mortgage loans that are qualified mortgages" as defined in TILA section 129C. 15 U.S.C. 1639c.

For higher-priced mortgage loans, the rule requires a creditor to use a licensed or certified appraiser who prepares a written appraisal report based on a physical inspection of the interior of the property. The rule also requires creditors to disclose to an applicant information about the purpose of the appraisal and provide a consumer with a free copy of any appraisal report. If the seller acquired the property for a lower price during the prior six months and the price difference exceeds certain thresholds, a creditor will have to obtain a second appraisal at no cost to the consumer. This requirement for higher-priced home-purchase mortgage loans is intended to address fraudulent property flipping by seeking to ensure that the value of the property legitimately increased.

The rule exempts several types of loans, such as qualified mortgages, temporary bridge loans and construction loans, loans for new manufactured homes, and loans for mobile homes, trailers and boats that are dwellings. The rule also has exemptions from the second appraisal requirement to facilitate loans in rural areas and other transactions. The rule is scheduled to become effective on January 18, 2014.

In response to public comments, the agencies intend to publish a supplemental proposal to request additional comment on possible exemptions for "streamlined" refinance programs and small dollar loans, as well as to seek clarification on whether the rule should apply to loans secured by existing manufactured homes and certain other property types.

Read more.

Please see "Consumer Financial Protection Bureau Releases Final Qualified Mortgage Rule and Proposed Amendments to Ability to Repay Rule" in **Banking** above.

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