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CORPORATE & FINANCIAL
WEEKLY DIGEST

January 28, 2011

SEC/CORPORATE

SEC Proposes Rules to Amend Net Worth Standard for Accredited Investor Definition

On January 25, the Securities and Exchange Commission proposed rules amending the accredited investor standards under the Securities Act of 1933 to reflect the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules would amend Rules 215 and Rule 501(a)(5) of the Securities Act to exclude the value of a person's primary residence from the $1 million net worth (or joint net worth) test for determining whether a person is an "accredited investor" under Regulation D. The proposed rules would also amend Rules 215 and Rule 501(a)(5) to clarify that net worth is calculated by excluding only the investor's net equity in its primary residence by adding the phrase "calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property." While this clarification (as well as the technical and conforming amendments referenced below) supplements Section 413(a) of the Dodd-Frank Act, the exclusion itself was effective upon enactment of the Dodd-Frank Act.

Under the proposed rules, an investor who loses his or her "accredited" status as a result of the new net worth standard would not be allowed to make a subsequent investment in a company or a fund that the investor had previously invested in through a prior Regulation D offering. At the January 25 SEC Open Meeting, Commissioner Troy Paredes, while supporting the proposed amendments to the accredited investor standards, noted that an investor could be disadvantaged by the change in status, as an investor's economic interest could be diluted if he or she cannot participate in a subsequent round of financing, or an investor could be frustrated in exercising certain contractual rights that he or she enjoys as an existing investor. Commissioner Paredes also stated that issuers could be disadvantaged by a change in an investor's accredited status, as it could be more difficult or costly for a company or fund to raise capital if certain current investors cannot invest in future offerings. Commissioner Paredes stated that he hoped commentators would address whether the SEC should "grandfather" an investor's accredited status for the focused purpose of allowing an investor who does not satisfy the new net worth standard to make follow-on investments in a company or a fund in which the investor is already invested.

The proposed rules also make certain technical and conforming amendments to Rule 501(e)(1)(i) of the Securities Act to revise the reference of "principal residence" to "primary residence" and to revise the references to former Section 4(6) of the Securities Act to Section 4(5) in Rules 144(a)(3)(viii), 155(a) and 500(a)(1) of the Securities Act, Rule 17j-1(a)(8) of the Investment Company Act of 1940 and Rule 204A-1(e)(7) of the Investment Advisers Act of 1940. Section 944 of the Dodd-Frank Act deleted the former Section 4(5) of the Securities Act and renumbered the former Section 4(6) of the Securities Act as Section 4(5).

Comments should be received on or before March 11.

Read more.

SEC Adopts Final Say-on-Pay Rules

On January 25, the Securities and Exchange Commission adopted, by a 3-2 vote, final rules under Section 14A of the Securities Exchange Act of 1934, which was enacted by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 14A requires public companies to conduct separate non-binding shareholder advisory votes to approve the named executive officer (NEO) compensation (say-on-pay) and the frequency of the say-on-pay vote (say-on-when). Section 14A also requires expanded, tabular format disclosure of NEO compensation arrangements in connection with mergers or similar transactions (golden parachutes) and a related separate advisory vote on golden parachutes in merger proxy statements. Although the final rules are not effective until 60 days after publication in the *Federal Register*, the say-on-pay and say-on-when requirements are effective for annual or special shareholder meetings occurring on or after January 21, 2011, under the Dodd-Frank Act provisions. The final rules provide transition guidance pending the effectiveness of the rules. The rules on golden parachute disclosure and the separate advisory vote are effective April 25.

Shareholders must be given a separate say-on-when vote to determine the frequency of the say-on-pay vote, i.e., whether it shall be as often as every year, every other year or once every three years. The separate say-on-when vote must occur at least once every six years. Because companies that have received Troubled Asset Relief Program (TARP) funds are required to have an annual say-on-pay vote which is effectively the same as the say-on-pay vote under these rules, TARP recipients are exempt from the requirement to include an additional say-on-pay vote and a say-on-when proposal until the first meeting after the company is no longer subject to the TARP restrictions. Smaller reporting companies (companies with public equity float of $75 million or less) have a temporary exemption from the requirement to include the say-on-pay and say-on -when vote until their meetings on or after January 21, 2013, and can continue to follow the scaled compensation disclosure requirements that do not include Compensation Discussion and Analysis (CD&A). Smaller reporting companies do not have a temporary exemption from the golden parachute rules.

Under the final rules, inclusion of the say-on-pay or say-on-when proposal does not require the filing of a preliminary proxy statement. Disclosure in CD&A is required as to whether, and if so, how companies have considered the results of the most recent say-on-pay votes. The Form 8-K under Item 5.07 filed to report meeting votes results within four business days following the annual meeting is required to be amended within 150 calendar days of the meeting (but not later than 60 days prior to the shareholder proposal submission deadline of the next annual meeting) to report the company's decision as to the frequency of the say-on-pay votes at future annual meetings.

The final rules and compliance considerations will be discussed in greater detail in an upcoming Katten *Client Advisory*.

Click here to read the SEC's press release announcing these rules.
Click here to read the text of the final rules.

BROKER DEALER

SEC Recommends Uniform Fiduciary Standard for Investment Advisers and Broker-Dealers Advising Retail Customers about Securities

On January 21, the Securities and Exchange Commission issued a Study in which the SEC staff recommended establishing a uniform fiduciary standard for investment advisers and broker-dealers providing personalized investment advice about securities to retail customers that is consistent with the standard that currently applies to investment advisers. The standard, according to the Study, should be no less stringent than the standard currently applied to investment advisers under Sections 206(1) and (2) of the Investment Advisers Act of 1940, and would require broker-dealers and investment advisers to act in the best interest of retail customers without regard to their own financial or other interest. The Study also urges the SEC to issue interpretive guidance and to engage in rulemaking to address the duties of loyalty and care that are part of this uniform fiduciary standard.

According to the Study, which was required under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the staff of the SEC was guided by an effort to establish a uniform standard providing for the integrity of personalized investment advice given to retail investors. The SEC staff's recommendations also include suggestions for implementing the new standard and for harmonizing the broker-dealer and investment adviser regulatory regimes and discuss a variety of topics, including disclosure, principal trading, investor education,

advertising and other communications, use of finders and solicitors, regulatory oversight, licensing and registration of firms and their associated persons, recordkeeping and the interpretation of key phrases, such as what "personalized investment advice about securities" means. Notably, the Study is under criticism from two SEC commissioners, who issued a press release the day after the Study's release opposing the Study's release to Congress as drafted.

Click here to read the Study.

SEC Extends and Modifies Relief for Broker-Dealers Regarding Reliance on Advisers for AML Obligations

In a no-action letter issued on January 11 (2011 Letter), the Securities and Exchange Commission's Division of Trading and Markets extended and modified no-action relief it had previously granted allowing broker-dealers to rely on SEC-registered investment advisers to perform some or all of the broker-dealers' anti-money laundering (AML) customer identification program (CIP) obligations. Under the 2011 Letter, the broker-dealer's reliance on the investment adviser must be reasonable under the circumstances, and the investment adviser must enter into a contract with the broker-dealer in which the investment adviser agrees that: (a) the adviser has implemented its own AML Program consistent with the requirements of Section 5318(h) of the Bank Secrecy Act and will update such AML Program as necessary to implement changes in applicable laws and guidance; (b) the adviser (or its agent) will perform the requirements of the broker-dealer's CIP in a manner consistent with Section 326 of the USA PATRIOT Act; (c) the adviser will promptly disclose to the broker-dealer potentially suspicious or unusual activity detected as part of the CIP being performed on the broker-dealer's behalf to enable the broker-dealer to file a Suspicious Activity Report, as appropriate in such broker-dealer's judgment; (d) the adviser will annually certify to the broker-dealer that the representations in the reliance agreement will remain accurate and that it is in compliance with such representations; and (e) the adviser will promptly provide its books and records regarding its performance of CIP to the SEC, a self-regulatory organization (SRO) with jurisdiction over the broker-dealer, or to authorized law enforcement agencies, directly or through the broker-dealer, at the request of the broker-dealer or such bodies. The SEC agreed to extend the no-action position under the existing no-action letters until May 11, after which the terms of the 2011 Letter will govern.

Click here to read the SEC's 2011 Letter.

PRIVATE INVESTMENT FUNDS

Please see "SEC Proposes Rules to Amend Net Worth Standard for Accredited Investor Definition" in **SEC/Corporate** above.

CFTC

CFTC Proposes Substantial Modifications to CPO/CTA Registration and Reporting Obligations

At an open meeting on January 26, the Commodity Futures Trading Commission proposed rules that would repeal exemptions from registration and effect substantial changes to the reporting requirements applicable to commodity pool operators (CPOs) and commodity trading advisors (CTAs) under the CFTC's Part 4 rules. Among the significant changes that would be effected by the proposed rules are the following:

- Withdrawal of the existing exemptions from CPO registration set forth in CFTC Rules 4.13(a)(3) and 4.13(a)(4). As a result of these proposed changes, many hedge funds and other collective investment vehicles that either (1) limit their futures trading in order to qualify for the exemption under Rule 4.13(a)(3), or (2) require heightened investor qualification standards in order to qualify for the exemption under Rule 4.13(a)(4) would be required to register as CPOs with the CFTC and become members of the National Futures Association (NFA).

- Reinstatement of limitations that were repealed by the CFTC in 2003 on the marketing and trading activities of registered investment companies that are operated pursuant to CFTC Rule 4.5, which excludes registered investment companies and their principals from the CPO definition. Under the CFTC proposal, entities relying on Rule 4.5 could not be marketed as a method for obtaining commodity exposure and would be required to limit their commodity futures and options positions (other than positions held for hedging purposes) to no more than 5% of the liquidation value of their portfolios.

- As part of a joint rulemaking with the Securities and Exchange Commission mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, implement periodic federal reporting requirements for all registered CPOs and CTAs with respect to any private funds and other pools that they operate. Depending on whether the CPO/CTA is dually registered as an investment adviser with the SEC, reports would be filed with the CFTC and/or the SEC, and would include information about the private funds and pools operated by such CPO/CTA, such as the funds' or pools' assets under management, use of leverage, counterparty credit risk exposure and trading and investment positions. Under the SEC and CFTC proposals, this periodic reporting information would be kept confidential to the extent permitted by law. Please see "SEC and CFTC Jointly Propose Private Fund Systemic Risk Reporting Rule" in **Investment Companies and Investment Advisers** below for additional information regarding the SEC/CFTC joint proposal.

- Amend CFTC Rule 4.7 to rescind the exemption from certification requirements for financial statements of pools that are operated in accordance with CFTC Rule 4.7.

- Require persons claiming relief under CFTC Rules 4.5, 4.13 and 4.14 to reconfirm their exemption on an annual basis.

Information regarding the CFTC proposal, including a CFTC fact sheet and Q&A describing the proposal, is available here.

CFTC Publishes Tenth Series of Dodd-Frank Rules

The Commodity Futures Trading Commission has published its tenth series of proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rule proposals relate to commodity options and agricultural swaps and to the termination provisions of swap transactions entered into by swap dealers (SDs) and major swap participants (MSPs).

- **Proposed Changes to Regulations Concerning Swaps on Agricultural Commodities and Commodity Options:** Section 723(c)(3) of the Dodd-Frank Act prohibits swaps on agricultural commodities unless such swaps are entered into pursuant to a rule, regulation or order of the CFTC adopted pursuant to Section 4(c) of the Commodity Exchange Act (CEA), which grants the CFTC certain exemptive authority. Under the Dodd-Frank Act, commodity options (other than options on a futures contract) are included in the definition of "swap."

  Currently, Part 32 of the CFTC regulations governs over-the-counter (OTC) commodity options, Part 33 governs exchange-traded options on futures contracts and on physical commodities, and Part 35 governs swaps, including swaps on agricultural products. Part 32 distinguishes between OTC "trade options" on non-agricultural commodities and trade options on certain enumerated agricultural commodities. Each of these different classes of instruments is currently subject to a different regulatory regime.

  The CFTC is proposing to revise Part 32, Part 33 and Part 35 to create a uniform regulatory regime for all commodity swaps and all commodity options (including agricultural and non-agricultural swaps and options). In particular, the CFTC proposes to:

  1) Revise Part 35 to make it applicable solely to agricultural swaps. As revised, Part 35 would provide that agricultural swaps are subject to the same requirements as other swaps under the CEA (as amended by the Dodd-Frank Act) and any rules, regulations or orders thereunder.
  2) Amend Part 32 to eliminate the distinction between agricultural trade options and other trade options and to affirm that all commodity options (other than options on futures contracts) are "swaps."
  3) Revise Part 33 to delete references to exchange-traded options on physical commodities, which would now be regulated as swaps.

- **"Orderly Liquidation" Termination Provisions:** Section 731 of the Dodd-Frank Act directs the CFTC to "adopt rules governing documentation standards" for SDs and MSPs. The CFTC has now proposed rules to supplement its previous proposal concerning swap documentation by requiring such documentation to include a provision confirming each counterparty's understanding of how the orderly liquidation authority under Title II of the Dodd-Frank Act (Title II) and the Federal Deposit Insurance Act (FDIA) may affect the parties' OTC swap transactions.

Title II and the FDIA vest the Federal Deposit Insurance Corporation (FDIC) with the authority to perform an orderly wind-down and liquidation of a "covered financial company"—in essence, a company that is predominantly engaged in financial activities, which activities generate at least 85% of the company's revenues, and as to which the FDIC and the Board of Governors of the Federal Reserve System have made a determination that the company is in danger of default, which default would have a "serious adverse effect" on the financial stability of the United States. The FDIC could in such a case transfer swaps (as well as certain other contracts), claims and collateral to a solvent third party financial institution. The FDIC has until 5:00 p.m. on the business day following the day on which it is appointed as receiver to complete such a transfer, during which time neither party to the swap may exercise any right to terminate the transaction or liquidate or net out its positions. The CFTC's proposal would require that the parties to a swap agree in writing to comply with the FDIC's transfer authority and consent to such a transfer and the stay on exercising their contractual rights in connection with the swap.

Comments on the proposed rules are due within 60 days from the dates of their publication in the *Federal Register*. Information regarding the tenth series of CFTC proposals, including the CFTC releases and fact sheets and Q&As for each of the proposals, is available here.

CFTC Open Meetings Regarding Proposed Dodd-Frank Rules

The Commodity Futures Trading Commission announced that it will hold open meetings on the twelfth and thirteenth series of rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act on February 11 and February 24, respectively. Details regarding the February 11 meeting are available here, and information about the February 24 meeting is available here.

CFTC Staff Roundtable Regarding Swap Data Recordkeeping and Reporting Requirements

The staff of the Commodity Futures Trading Commission announced that it will hold a public roundtable discussion on January 28 to address issues related to swap data recordkeeping and reporting requirements, including unique counterparty, product and swap identification and a master agreement library and portfolio data warehouse. The press release announcing the roundtable, including location and dial-in information and how to submit comments, is available here.

NFA Notice to Members Regarding Calculation of Retail Forex Customer Accounts

The National Futures Association (NFA) has issued a Notice to Members providing guidance regarding the calculation of retail forex customer accounts maintained by retail foreign exchange dealers (RFEDs) and futures commission merchants (FCMs).

Pursuant to Commodity Futures Trading Commission Regulation 5.5, RFEDs, FCMs and introducing brokers (IBs) that participate in over-the-counter retail forex transactions must, upon opening an account for a customer, provide the customer with (a) certain written disclosures, and (b) with respect to the four most recent calendar quarters during which the RFED or FCM maintained retail forex accounts, the total number of non-discretionary "open" retail forex customer accounts maintained by the RFED or FCM, the percentage of such accounts that were profitable during the quarter and the percentage of such accounts that were not profitable during the quarter.

The NFA Notice clarifies that the term "open" account includes only those accounts that entered into trades during a particular quarter and/or maintained an open position at any time during the quarter, regardless of whether a cash balance was maintained, interest was paid and/or any fees were incurred during the quarter.

The NFA Notice can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC and CFTC Jointly Propose Private Fund Systemic Risk Reporting Rule

The Commodity Futures Trading Commission and Securities Exchange Commission jointly proposed rules that would implement Sections 404 and 406 of the Dodd-Frank Wall Street Reform and Consumer Protection Act by creating a new Form PF, which is designed to gather information regarding the private fund industry that would be

useful to the Financial Stability Oversight Council in monitoring systemic risk. Form PF would be required to be filed periodically by any investment adviser registered or required to be registered with the SEC that advises one or more private funds. The proposed CFTC rule would require commodity pool operators (CPOs) and commodity trading advisors (CTAs) registered with the CFTC to file Form PF with the SEC in lieu of proposed CFTC filing requirements, but only if those CPOs and CTAs are also registered with the SEC as investment advisers and advise one or more private funds. Information reported on Form PF would generally remain confidential.

Under the proposed rules, smaller private fund advisers (less than $1 billion in assets under management) would file Form PF once a year and would report only basic information regarding the private funds they advise, including details regarding assets under management, borrowings and leverage, derivatives, credit providers, investor concentration and fund performance. Smaller private fund advisers that manage hedge funds would also report information about fund strategy, counterparty credit risk and use of trading and clearing mechanisms.

Large private fund advisers ($1 billion or more in assets under management) would be required to file Form PF on a quarterly basis and would provide the same information required for smaller advisers as well as additional information that differs depending on the type of private funds that the adviser manages. Large private fund advisers to hedge funds would report on an aggregated basis details regarding exposure by asset class, geographical concentration and turnover. In addition, for each managed hedge fund having a net asset value of at least $500 million, these advisers would report details relating to that fund's investments (such as long and short exposure by asset class), leverage and collateral practices, counterparty exposure, risk profile, portfolio liquidity and redemption restrictions. Large private fund advisers to private equity funds would be required to report additional details relating to fund finances and investments, including the extent of borrowings, guarantees and leverage of their funds' portfolio companies and the use of bridge financing. Large private fund advisers to liquidity funds, such as money market funds, would also be required to file information relating to the liquidity funds that they advise.

To read the SEC's press release, click here.
To read the proposing release, which includes proposed Form PF, click here.

LITIGATION

Mere Failure to Disclose Unfavorable Regulation Is Insufficient to Establish Scienter

The U.S. Court of Appeals for the First Circuit affirmed dismissal of securities fraud claims against a technology company, holding that the plaintiffs failed to establish that the failure to disclose unfavorable regulatory changes in Japan was a result of defendants' wrongful intent.

Waters Corp. manufactures and sells water treatment equipment worldwide, deriving 10% of its revenue from sales in Japan. The Japanese government eased water regulations in March 2007, reducing the demand for Waters' equipment, but company officials did not mention this development during a conference call with investors in October, stating instead that the "softness in Japan" was related to general economic conditions. When Waters missed its 2007 fourth quarter earnings forecast, company officials disclosed the Japanese government's actions and Waters' stock price dropped 20%. Investors sued the company and its directors for securities fraud under the Private Securities Litigation Reform Act (PSLRA), but their claims were dismissed by the district court.

The First Circuit affirmed the dismissal, holding that that the failure to disclose the Japanese government's actions did not give rise to a strong inference of scienter as required by the PSLRA. The court ruled that even though company officers knew about the new regulations in March 2007, the plaintiffs failed to establish that the defendants knew the change would have a material impact on the company. Because company officials could have reasonably believed the regulatory changes would not significantly impact worldwide sales during 2007, the failure to disclose the changes did not establish that they acted with the requisite scienter for securities fraud. (*City Of Dearborn Heights v. Waters Corp.*, 2011 WL 167837 (1st Cir. Jan. 20, 2011)).

Class Certification of Fraud Claim Denied

A federal district court recently held that a group of aggrieved consumers will not be able to pursue their fraud claims as a class against the company that purportedly deceived them because the company's growing awareness that the customers would not receive their merchandise raised questions of fact requiring individualized adjudication.

Bassett Furniture Industries manufactures furniture that it sells through factory-owned and independent dealers. One independent dealer encountered financial difficulties, and Bassett directed the dealer to conduct a prolonged "liquidation sale," using most of the proceeds to reduce its debt to Bassett rather than to pay to obtain additional furniture from Bassett to deliver to its customers. When the dealer went out of business, a group of 188 customers who did not receive the furniture they ordered sued Bassett for fraud, arguing that the liquidation sale was a Ponzi scheme that Bassett knew would eventually collapse.

The U.S. District Court for the Eastern District of Wisconsin denied class certification for the fraud claims. The court observed—and the plaintiffs conceded—that Bassett's awareness that the liquidation sale would fail changed over time, as Bassett had more confidence that the dealer could bankroll current sales with future purchases at the inception of the sale than it did at the end. Accordingly, the strength of each plaintiff's fraud claim depended on the date that the plaintiff placed the order, raising individualized questions of fact and precluding collective adjudication. Similarly, the court refused to certify a class with respect to breach of contract against Bassett because those claims required an individualized inquiry into the reasonableness of each plaintiff's reliance on the dealer's apparent authority to act on behalf of Bassett. (*Schmidt v. Bassett Furniture Industries*, 2011 WL 67255 (E.D. Wisc. Jan. 10, 2011)).

UK DEVELOPMENTS

FSA Fines City Index for Transaction Reporting Failures

On January 20, the UK Financial Services Authority (FSA) published a final notice announcing that it had fined City Index Limited £490,000 (approximately $780,000) for failing to provide accurate transaction reports.

Between November 2007 and September 2009, City Index submitted inaccurate reports for about 2 million transactions (nearly 60% of its reportable transactions for that period). It failed to send any reports for around 55,000 reportable transactions and submitted incorrectly completed reports for a further 1.97 million transactions.

In addition, City Index was found to have breached FSA principles. It failed to put in place a mechanism for ensuring the accuracy and validity of its transaction reports, and failed to identify fundamental errors in its transaction reporting process upon the implementation of a new trading platform. These breaches occurred despite the FSA sending repeated reminders to firms of their obligations to provide accurate data and of the importance of compliance with the FSA rules on transaction reporting.

As it had agreed to settle at early stage, City Index qualified for a 30% discount from the original fine of £700,000 (approximately $1.1 million). Further, the penalty took into account the fact that City Index had taken steps to address the concerns raised including the retention of independent consultants to conduct a formal review of its transaction reporting and starting a project to remedy the transaction reporting issues.

To read the final notice, click here.

Jail Sentence Imposed for Insider Dealing

On January 21, Neil Rollins, a former senior manager of PM Onboard Limited, a waste industry firm, was sentenced to a prison term of 27 months for insider dealing and money laundering. Rollins was also ordered to pay £197,000 (approximately $310,000) in confiscation.

This case is the fifth successful prosecution brought by the UK Financial Services Authority (FSA) as part of its ongoing drive to promote efficient, orderly and fair markets and to tackle market abuse. The sentence follows Rollins's trial which ended in late November 2010 with guilty findings on five counts of insider dealing and four counts of money laundering after he traded on the basis of information he obtained as a result of his senior position and laundered the proceeds.

Margaret Cole, Managing Director of Enforcement and Financial Crime at the FSA, said: "By pursuing a criminal prosecution in this case, the FSA has shown that it will take tough action against those who abuse positions of trust by dealing on the basis of inside information. Rollins' crime was aggravated by the fact that he sought to hide

his conduct from the FSA by laundering the proceeds. The guilty verdicts and sentence in this case send a message, loud and clear, that insider dealing and money laundering are serious crimes."

Read more.

FSA Issues Discussion Paper on Product Intervention

On January 25, the UK Financial Services Authority (FSA) published DP11/1, a discussion paper on Product Intervention. DP11/1 considers how the FSA and its successor (the planned Consumer Protection and Markets Authority (CPMA)) should pursue consumer protection and sets out initial proposals for comment.

As part of its new consumer protection strategy introduced in 2010, the FSA has adopted a more interventionist approach with the aim of anticipating consumer detriment where possible and thereby preventing it. This approach aims to scrutinize the whole of the product life cycle from start to finish rather than just focusing on issues arising at the point-of-sale.

As part of this strategy, the key proposals set out in DP11/1 suggest:

- **More prescriptive rules**—The FSA is minded to introduce greater prescription in the current regulatory framework to help improve customer outcomes and strengthen its ability to hold firms to account for product governance failings. This may include changing some of the FSA's regulatory guide on the responsibilities of providers and structures into rules.

- **Product intervention—**When the FSA identifies products with features that it considers have the potential to cause detriment to consumers, it suggests that it should have the power to require, for example, product pre-approval, mandatory product features, price intervention, increasing prudential requirements on providers, consumer and industry warnings, preventing non-advised sales, imposing additional competence requirements for advisers or even giving the FSA the power to ban the product at issue.

In the foreword to the discussion paper, FSA Chairman Lord Turner, said: "The crucial issue is how far along this spectrum of earlier and more intense interventions we should progress. This debate comes at a critical time as the scope and powers of the CPMA are being discussed by the government, parliament and stakeholders. It is fundamental to shaping the regulatory philosophy of the new organization."

The deadline for responses to DP11/1 is April 21. The responses will be taken into account in the consultation papers that the FSA intends to publish during the first half of 2011 on its approach to the transition to regulation by the CPMA.

To read the discussion paper, click here.

FSA Fines JJB Sports PLC for Disclosure Failings

On January 25, the UK Financial Services Authority (FSA) issued a Final Notice to JJB Sports plc that detailed a fine of £455,000 (approximately $725,000). The FSA found that JJB had failed to disclose information to the market about the true cost of two acquisitions. These failings had led to a false market in JJB shares for over nine months.

On December 18, 2007, JJB announced its purchase of Company A for £5 million (approximately $8 million). JJB failed to disclose that in addition to that purchase price it had also paid approximately £10 million (approximately $16 million) for in-store stock.

In a second announcement, on May 22, 2008, JJB disclosed a £1 purchase consideration paid for Company B. JJB failed to disclose that it had also agreed to pay off Company B's overdraft of £6.47 million (approximately $10 million).

At the relevant time, the cash positions of listed companies were the subject of increasing investor focus, and JJB's failure to give proper disclosure about the purchase price of the two companies gave a false impression of the costs of the two acquisitions and their impact on JJB.

The FSA found that the true costs of the two acquisitions were not disclosed until the publication of JJB's 2008 Interim Results on September 26, 2008. On that day, JJB's share price fell by 49.5%.

In fixing the amount of JJB's penalty, the FSA took into account JJB's cooperation, and the fact that since the date of the non-disclosure both the executive board and the non-executive directors had been replaced.

As JJB agreed to settle at an early stage, it had qualified for a reduction of the original fine of £650,000 (approximately $1 million) by 30%. The fine imposed on JJB is the second largest ever imposed by the FSA on a company for breach of the Disclosure and Transparency and Listing Rules.

To read the FSA's final notice to JJB, click here.

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