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SEC/CORPORATE

SEC to Consider Conflict Minerals, Resource Extraction and Regulation D Rules on August 22

On July 2, the Securities and Exchange Commission, pursuant to a "Sunshine Act" notice, stated that at an open meeting on August 22 it will consider:

I. whether to adopt rules regarding disclosure and reporting obligations with respect to the use of conflict minerals;

II. whether to adopt rules regarding disclosure and reporting obligations with respect to payments to governments made by resource extraction issuers; and

III. rules to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506 of Securities Act of 1933 Regulation D and Rule 144A.

The conflict minerals and resource extraction rules, which have previously been proposed, were mandated by Sections 1502 and 1504, respectively, of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The revisions to Rule 506 were mandated under the Jumpstart Our Business Startups (JOBS) Act. In each case, adoption of these rules is past due under the Congressionally mandated schedule for adoption. Because the Staff of the SEC's Division of Corporation Finance has not yet proposed rules implementing Section 201a of the JOBS Act relating to the elimination of the prohibition against general solicitation and general advertising, commentators have speculated as to whether at the August 22 open meeting general solicitation and general advertising rules will be proposed or will (in light of the JOBS Act mandated July 4 effective date, since past) be adopted as interim final temporary rules allowing for them to become effective on publication in the Federal Register but with a comment period extending beyond August 22.

For more information, click here.

FASB Drops Proposal to Modify Loss Contingency Disclosure Requirements

On July 9, the Financial Accounting Standards Board (FASB) decided to remove its project to modify disclosures of certain loss contingencies from the FASB's technical agenda. The project, originally undertaken in 2007, sought to address concerns that disclosures about certain loss contingencies (particularly with respect to litigation) under existing guidance did not provide sufficient information in a timely manner to assist financial statement users in assessing the likelihood, timing and amounts of cash flows associated with loss contingencies. The proposed Accounting Standards Update would have replaced the disclosure requirements of Accounting Standards Codification 450 for certain loss contingencies with new, expanded disclosure requirements.

According to the FASB, the proposed modifications, as set forth in the FASB's 2008 and 2010 Exposure Drafts, met "overwhelming opposition" from stakeholders who provided feedback. Generally speaking, stakeholders expressed concern that additional disclosures would be prejudicial to the reporting entity and would not address the underlying issue, namely a lack of compliance with existing loss contingency disclosure requirements. At the

July 9 meeting, a majority of the FASB board members similarly concluded that the existing disclosure requirements under ASC 450 are sufficient.

To view the handout from the July 9 FASB meeting, click here.

BROKER DEALER

SEC Adopts Rule to Require Consolidated Audit Trail for Markets

On July 11, the Securities and Exchange Commission held an open meeting and adopted Rule 613, which requires U.S. exchanges and the Financial Industry Regulatory Authority (FINRA) to submit a national market system (NMS) plan for creating, implementing and operating a single, market-wide consolidated audit trail system. The consolidated audit trail system will collect and accurately identify every order, cancellation and trade execution for all exchange-listed equities and options across all U.S. markets. The consolidated audit trail will increase the data available to regulators investigating illegal activities such as insider trading and market manipulation, and it will significantly improve the ability to reconstruct broad-based market events in an accurate and timely manner.

Among other things, the rule mandates that the NMS plan require the following:

- Orders and trades must be reported to the central repository by 8 a.m. Eastern Time following the trade day.
- Each broker-dealer and exchange must be assigned a unique, cross-market identifier to be reported to the central repository along with every reportable event.
- Each customer (as well as any customer adviser who has trading discretion over a customer's account) must be assigned a unique, cross-market customer identifier to be reported to the central repository for every order originated.
- The exchanges, FINRA and their members must synchronize their business clocks to be in millisecond or finer increments.
- Accounts must be identified when reporting to the consolidated audit trail, but not the ultimate beneficial owners as was originally proposed.

Two of the five SEC Commissioners did not vote in favor of the rule because they believe that the mandates of the rule do not go far enough. The dissenters were Commissioner Elisse B. Walter and Commissioner Luis A. Aguilar.

The new rule becomes effective 60 days after its publication in the Federal Register. The exchanges and FINRA are required to submit the NMS plan to the SEC within 270 days of the rule's publication in the Federal Register. Once the SEC approves the NMS plan, the exchanges and FINRA are required to report the required data to the central repository within one year, and members are required to report within two years. Certain small broker-dealers will have up to three years to report the data.

To view the SEC Press Release and Fact Sheet, click here.

CFTC

CFTC and SEC Adopt Further Definitions of Swap and Related Key Terms

The Commodity Futures Trading Commission and Securities and Exchange Commission have adopted final rules further defining swap, security-based swap, security-based swap agreement, and mixed swap. The final rules also include provisions governing the maintenance of books and records for security-based swap agreements.

The compliance dates for many other rules promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) are based on the effective date of these rules.

The Dodd-Frank Act adopted a comprehensive definition of the term swap, which includes interest rate swaps, commodity swaps, equity swaps and credit default swaps. The final rules clarify that the following transactions fall within the definition of swap: foreign exchange forwards, foreign exchange swaps, foreign currency options (not traded on a national securities exchange), non-deliverable forward contracts involving foreign exchange, currency swaps, cross-currency swaps, forward rate agreements, contracts for differences, and certain combinations and permutations of (or options on) swaps and security-based swaps.

The CFTC and SEC also clarified that the following products are not considered swaps or security based swaps: (1) traditional insurance products that meet specified product and provider criteria; (2) certain consumer transactions that are entered into for personal, family or household purposes; (3) commercial transactions that involved customary business arrangements; and (4) loan participations. The CFTC also issued an interpretation clarifying the scope of the forward contract exclusion for non-financial commodities.

The final rules provide guidance on classifying particular agreements, contracts, or transactions as swaps, security-based swaps, or mixed swaps. Swap instruments based on interest rates, other monetary rates (such as money market rates, government target rates, general lending rates, and rates from indexes), government debt obligations, and exchange-traded futures contracts are classified as swaps. Swap instruments based on yields (where yield is a proxy for the price or value of a debt security, loan or narrow-based security index), total return swaps on a single security, loan or narrow-based security index, security futures, and certain equity swaps are classified as security-based swaps. Mixed swaps, such as a total return swap with embedded interest-rate optionality and a non-securities component, are classified as both swaps and security-based swaps.

In addition, the final rules clarified that the CFTC's rules governing books and records for swaps also apply to security-based swap agreements.

To view the final rule related to the end-user exception, click here.

To view more information, including a webcast of the CFTC adopting meeting, Commissioner's statements, and links to fact sheets related to the final rules, click here.

CFTC Adopts End-User Exception and Proposes Exemption from the Swap Clearing Requirement for Certain Cooperatives

On June 10, the CFTC issued a final rule implementing an exception to the mandatory clearing requirement for non-financial entities and small financial institutions that use swaps to hedge or mitigate commercial risk set out in Section 2(h)(1) of the Commodity Exchange Act (CEA). CEA Section 2(h)(1) makes it unlawful for any person to enter into a swap that is required to be cleared unless that person submits the swap to a derivatives clearing organization for clearing. CEA Section 2(h)(7) provides that the clearing requirement shall not apply if one of the swap counterparties: (1) is not a financial entity; (2) is using swaps to hedge or mitigate commercial risk; and (3) notifies the CFTC how it generally meets the financial obligations associated with non-financial swaps.

Under the final rule, the reporting counterparty must fulfill the notification requirement by reporting the election of the end-user exception and the identity of the electing counterparty to a swap data repository. Each electing counterparty must provide the following additional information on a swap-by-swap basis or through an annual filing: (1) whether the electing counterparty is a financial entity electing the exception on behalf of an affiliate or as a small financial institution; (2) whether the swap for which the exception is being elected is used to hedge or mitigate commercial risk; (3) information regarding how the electing counterparty generally meets its financial obligations associated with entering into non-cleared swaps; and (4) if the electing counterparty is an "SEC Filer," whether its board of directors has approved generally the decision to enter into swaps that are exempt from the clearing and trading requirements.

For purposes of the end-user exemption, small financial institutions are exempt from the definition of financial entity. Financial entity is defined as a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, commodity pool, private fund, employee benefit plan, or banking entity. The small financial institutions exemption applies to banks, savings associations, farm credit system institutions, and credit unions with less than $10 billion of total assets.

The CFTC also proposed a rule that would exempt certain swaps executed by cooperatives from the swap clearing requirement. Under the proposed rule, a cooperative could elect this exemption if all of its members are non-financial entities, financial entities that are eligible for the small financial institutions exemption, or cooperatives whose members fall into the two prior categories. The cooperative exemption would only apply to swaps entered into with a member of the exempt cooperative in connection with originating loans for members or swaps entered into by a cooperative that hedge or mitigate risks associated with member loans or loan-related swaps.

To view the final rule related to the end-user exception, click here.

To view the proposed rule related to the cooperative exemption, click here.

LITIGATION

Southern District of New York Applies Dodd-Frank Section 929A Retroactively

The U.S. District Court for the Southern District of New York recently addressed the question of whether Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) applied retroactively to whistleblower claims under Section 806 of the Sarbanes-Oxley Act.

Plaintiff, Phillip Leshinsky, was an employee of a subsidiary of a publicly traded company, Telvent GIT, and was terminated in July 2008. Leshinsky alleged that he was terminated for raising objections to a proposal to use fraudulent information in connection with a bid for a contract with the MTA. Leshinsky alleged that his termination was a violation of the whistle-blower protections provided by Section 806 of the Sarbanes-Oxley Act. Leshinsky's employer argued that the court lacked subject matter jurisdiction over the case because Section 806 applied only to publicly traded companies and not their wholly owned subsidiaries.

The court held that it did have subject matter jurisdiction over the case under Section 806 of the Sarbanes-Oxley Act, as amended by Section 929A of the Dodd-Frank Act. In 2010, the Dodd-Frank Act amended Section 806 to explicitly extend whistle-blower protections to certain subsidiaries of publicly traded companies. The court's decision turned on the question of whether the Dodd-Frank amendment would apply to Leshinsky's termination, which occurred two years before the amendment was passed.

The court examined the factors for determining whether a statute has retroactive application in the absence of a clear statement from Congress. Those factors are: (1) statement of legislative intent; (2) whether there was, before the amendment, conflict or ambiguity in either the statutory language or court decisions; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. The court then applied the relevant factors to determine whether Congress "merely made what was intended all along even more unmistakably clear."

The court determined that the Dodd-Frank Act amendment's legislative history suggests that it was passed to make clear that subsidiaries and affiliates of publicly traded companies may not retaliate against whistle-blowers. The court also found that the original statute was ambiguous, and that several courts had struggled with its application before the Dodd-Frank Act amendment. Finally, the court held the Dodd-Frank Act amendment was consistent with a reasonable interpretation of the original law. Accordingly, the court determined that the amendment should be applied retroactively to Leshinsky's termination, and that the court had subject matter jurisdiction over his case.

Leshinsky v. Telvent GIT, S.A., No. 10 Civ. 4511 (S.D.N.Y. July 9, 2012).

Criminal Court of New York City Holds That Tweets Are Public Information and Can Be Subpoenaed

The Criminal Court of the City of New York recently addressed whether Twitter, Inc. (Twitter) users have standing to challenge a third-party disclosure request of Twitter content, and whether a court order subpoenaing Twitter for user information violated any federal or New York State law.

Twitter sought to quash a subpoena issued by the New York County District Attorney's Office in connection with a criminal case against a defendant, Malcolm Harris, who was charged with disorderly conduct. Prosecutors expected the information sought would provide evidence that contradicts Harris's expected defense, and includes both content data in the form of tweets and account information.

The court held that Twitter users do not have standing to challenge a third-party disclosure request. Twitter argued that a decision to deny defendant standing would place an undue burden on Twitter by forcing it to choose between either providing user communications or account information in response to all subpoenas or moving to quash each subpoena themselves. The court found this unpersuasive, noting that every third party respondent to a subpoena has this burden. The court also noted that because tweets are made available to the public and online, the defendant has no proprietary interest in the information. Thus, the court held that tweets are not analogous to e-mails for purposes of a subpoena.

Additionally, the court held that subpoenaing Twitter did not violate any federal or state law, provided certain content was obtained only after the issuance of a search warrant. First, the court examined the application of the Fourth Amendment to a court order subpoenaing Twitter information. Noting that the defendant had purposely broadcast his Twitter information to the public, the court found no physical intrusion into the defendant's protected area. Further, the court held that there was no subjective expectation of privacy that society recognizes as reasonable in Twitter information. Because the Fourth Amendment does not protect information revealed by third parties, publicly posted content on the internet is not subject to a reasonable expectation of privacy.

Second, the court examined the application of the Stored Communications Act (SCA). Recognizing that a court order for disclosure shall only be issued if the information sought is relevant and material to an ongoing criminal investigation, the court found that the electronic communication sought was valid. The district attorney sought both content information and non-content information in connection with the case. The SCA allows the subpoena of non-content information, but requires that any content information in "temporary electronic storage" for 180 days or less must be obtained with a search warrant. The court held that all non-content information, and any content information outside the 180 day window were covered by the court order, but any content information within the window would not be granted until a search warrant was obtained.

Finally the court examined whether under New York state law there was any reason to deny the court order, and found none. Accordingly, the court ordered Twitter to disclose information relevant to this case.

People v. Harris, No. 2011 NY 080152 (N.Y. Crim. Ct. June 30, 2012).

BANKING

OCC Releases Report on Risks Facing National Banks and Federal Savings Associations

On July 5, the Office of the Comptroller of the Currency (OCC) released a report detailing the top risks facing national banks and federal savings associations, which include the lingering effects of a weak housing market, revenue challenges related to slow economic growth and market volatility, and the potential that banks may take excessive risks in an effort to improve profitability.

The OCC discussed those risks in its new report, the Semiannual Risk Perspective for Spring 2012. According to the OCC, key points regarding these risks facing banks include:

- The overhang of severely delinquent and in-process-of-foreclosure residential mortgages continues to challenge large banks with extensive mortgage operations and continues to affect the economic environment for all banks.

- Increased operational risk is a key concern as banks try to economize on systems and processes to enhance income and operating economies. This risk may be amplified by the use of third-party products or distribution systems.

- Asset-quality indicators show continuing improvement across small and large banks. Small bank delinquency and loss rates did not reach the peaks seen at the larger banks, but their pace of

- Outside of commercial and industrial lending, loan growth remains tepid, which has weighed on net interest income by pressuring asset yields for banks of all sizes. Underwriting standards are under pressure as banks compete for higher earning assets to improve profitability.

- The persistence of historically low interest rates continues to hamper margin upside, by limiting the ability of many banks to further reduce funding costs. As net interest income has declined, non-interest income faces pressures from legislative, regulatory, and market changes that have depressed fee income, servicing and securitization income, and may restrain future trading revenue.

- More generally, the low interest rate environment continues to make banks vulnerable to rate shocks. Small banks, in particular, are increasingly adding to investment portfolio positions and increasing duration to obtain higher yields. “New product” risk is increasing as banks seek to enter new or less familiar markets to offset declines in revenues from core lines of business.

- European sovereign debt issues and the threat of a break-up of the Euro have led to a sharp slowdown in European economic growth, contributed to worsening credit quality, increased financial market uncertainty, and perceptibly weakened global economic activity. These developments have contributed to an increase in the cost of long-term debt and equity financing for large European and U.S. financial institutions as these issues continue to weigh on market confidence and the economic recovery in Europe and the United States.

According to the report, levels of capital and allowance for loan losses across the industry are more robust and of higher quality than prior to the recession. "The higher levels and better quality of capital are noticeable across the industry, but most notable at the largest banks. However, the U.S. banking industry continues to recover from the recent recession and to adjust to significant shifts in its operating and regulatory environments. These shifts are inducing large changes in the risk and profitability profiles of all banks, but may affect community banks differently than large banks. Combined, these conditions present significant operational risk for banks of all sizes."

The report presents data in four main areas: the operating environment; the condition and performance of the national banking system; funding, liquidity, and interest rate risk; and regulatory actions. The report reflects data as of December 31, 2011. The OCC plans to release the report twice a year.

To view more information, click here.

Federal Reserve Announces Optional Pre-Filing Screening Process

On July 12, the Board of Governors of the Federal Reserve System (Board) issued supervisory guidance describing a new optional process for an applicant to request a response on a potential bank acquisition or other proposal before the submission of a formal application or notice.

Federal Reserve System staff will review submitted questions about potential filings, otherwise known as pre-filings, before the submission of formal filings. Pre-filings may include a variety of information such as business plans, presentations outlining potential proposals, or other items about which potential applicants may have questions. This process is expected to benefit community banking organizations that do not file applications frequently and also pre-filers with novel proposals. Pre-filings are inquiries related to potential applications and notices that include, but are not limited to, information about a specific aspect of a proposal or a potential issue, business plans or pro forma financial information related to a potential filing, or presentations outlining specific potential proposals (i.e., not just proposal concepts). Pre-filings also may include draft transactional and structural documents such as shareholder agreements, purchase agreements, voting agreements, side letters, offering documents, partnership agreements, or qualified family partnership agreements. In addition, pre-filings may include questions regarding the type of filing required, if any; the individuals or entities that would need to join a filing; and whether an entity would be considered to be a “company” or have “control” under the Bank Holding Company Act or the Home Owners’ Loan Act. The Board noted that under the provisions of the Freedom of Information Act (FOIA), written inquiries and documents submitted in connection with a pre-filing inquiry become public records of the Board and may be requested by any member of the public. Board records generally must be disclosed unless they are determined to fall, in whole or in part, within the scope of one or more of the FOIA exemptions from disclosure.

Pre-filings should be submitted to the appropriate Reserve Bank or through the System's Electronic Applications System, E-Apps. The Federal Reserve anticipates that the review of pre-filings will take no more than 60 days. While most types of pre-filings should take considerably less than 60 days to review, the evaluation of complex or novel proposals may require the full 60 days or longer.

To view more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Upcoming Affordable Care Act Deadlines

Now that the U.S. Supreme Court has largely upheld the key provisions of the Patient Protection and Affordable Care Act, several deadlines are approaching in the near term. Employers need to focus and prepare to comply with these deadlines, even in an uncertain political climate.

The major deadlines that employers face for the remainder of 2012 with respect to their employer-sponsored group health plans are as follows:

Deadline Date	Requirement
August 1	Medical Loss Rate Rebates: Have procedures in place to handle any rebates received from insurer in accordance with rules for distribution.
August 1	Preventative Health Services for Women: Non-grandfathered group health plans must provide recommended preventative health services without cost-sharing and adjust services covered in accordance with changes to recommended preventative service guidelines.
September 23	Summary of Benefits and Coverage: Self-insured plans and insurance issuers (or plans for which they provide coverage) must supply a summary of benefits and coverage explanation to participants and beneficiaries in addition to the summary plan description.
December 31	Annual Limits: Plans that choose to extend waivers of restricted limits must resubmit application information.
Upon Issuance of Guidance	Quality of Care Reporting: If guidance is issued soon, non-grandfathered plans may need to disclose (during their fall 2012 open enrollment for 2013) information about plan or coverage benefits and health care provider reimbursement structures.
Upon Issuance of Guidance	Nondiscrimination Rules: If guidance is issued soon regarding prohibition of non-grandfathered insured plans from discrimination in favor of highly compensated employees, plans must comply for plan years beginning a specified period after issuance of guidance.

To view more information, click here.

EU DEVELOPMENTS

European Commission Adopts Detailed Rules on Short Selling

On June 29 and July 5, the European Commission announced detailed rules under EU Regulation 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps (the Short Selling Regulation). The Short Selling Regulation was adopted on February 12 (as reported in the February 24, 2012 edition of *Corporate and Financial Weekly Digest*). The detailed rules are based on work by the European Securities and Markets Authority (ESMA) including its March 30 consultation covered in the April 13, 2012 edition of *Corporate and Financial Weekly Digest*. For technical reasons they are divided among four separate instruments: an implementing regulation, a delegated regulation, a delegated act and regulatory technical standards.

The detailed rules address the following issues:

- method and format of disclosure of information on significant net short positions to relevant national regulators;
- requirements for locate agreements to ensure settlement of permitted short sales of shares and sovereign debt;
- types of third parties, including investment firms and central counterparties, and the requirements they must meet to be eligible to enter into arrangements with short sellers to ensure settlement;
- format and content for the periodic information on net short positions to be provided to ESMA by national regulators;
- technical rules for ESMA to determine whether the principal trading venue of a share is inside or outside the European Union and subsequently implement the exemption in the Short Selling Regulation for shares whose principal trading venue is outside the European Union;
- details of the information on short positions that must be notified to national regulatory authorities and disclosed to the public;
- details of the requirements to be met in order for sovereign credit default swaps (CDS) to be considered covered and therefore permitted – quantitative and qualitative correlation between the sovereign CDS and the hedged assets/liabilities;
- how to calculate the significant short positions that must be disclosed to regulators or the market;
- how short positions are calculated and reported by fund managers managing several funds, or other different entities within a group;
- levels at which short positions on sovereign debt must be notified to regulators;
- thresholds for different financial instruments which can trigger a short term suspension of short selling by regulators; and
- the decline in liquidity which permits Member States to suspend restrictions on uncovered short sales of sovereign debt.

The detailed rules will all apply November 1, 2012, when the Short Selling Regulation comes into effect.

To view more information, click here.

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