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CORPORATE & FINANCIAL
WEEKLY DIGEST

July 22, 2011

SEC/CORPORATE

Court Vacates Shareholder Nomination Rule

On July 22, the United States Court of Appeals for the District of Columbia Circuit vacated Rule 14a-11 promulgated by the Securities and Exchange Commission. Rule 14a-11 permitted certain shareholders of public companies to nominate candidates for the board of directors outside a company's normal nomination process. The court held that the SEC was "arbitrary and capricious in promulgating Rule 14a-11" and thus violated the Administrative Procedure Act, and failed to adequately consider the rule's effect upon efficiency, competition and capital formation as required by Section 3(f) of the Securities Exchange Act of 1934 and Section 2(c) of the Investment Company Act of 1940.

Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission, No. 10-1305 (D.C. Cir.)

Executive Order Directs Independent Agencies to Perform Cost-Benefit Analysis of Regulation

On July 11, President Barack Obama signed an Executive Order directing "independent regulatory agencies", including the Securities and Exchange Commission, Commodities Futures Trading Commission, Board of Governors of the Federal Reserve System, and several other federal agencies, to comply, to the extent permitted by law, with Executive Order 13563. Executive Order 13563, which the President signed on January 18, directed federal agencies, other than independent regulatory agencies, to engage in a cost-benefit analysis, with the participation of the public, of proposed and existing regulation and to develop means to better coordinate regulation across multiple agencies.

The July 11 Executive Order also directed that within 120 days of the date of the Order, independent regulatory agencies are to "develop and release to the public a plan. . . under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Click here to view the complete text of the July 11 Executive Order.
Click here to view the complete text of Executive Order 13563.

BROKER DEALER

FINRA Proposes New Rules Regarding Communications with Public

The Financial Industry Regulatory Authority has proposed, among other things, new Rules 2210 and 2212 through 2216 to replace NASD Rules 2210 and 2211 and NASD Interpretative Materials 2210-1 and 2210-3 through 2210-8. NASD Rules 2210 and 2211, and the related NASD Interpretative Materials, generally govern all member firms' communications with the public. New Rule 2210 would incorporate, subject to certain changes, the provisions of

current NASD Rules 2210 and 2211, as well as NASD Interpretive Materials 2210-1 and 2210-4, and the provisions of Incorporated New York Stock Exchange Rule 472 that do not pertain to research analysts and research reports. In addition, for example, the proposed rule change would reduce the number of current communication categories from six to three: (1) institutional communication would include communications falling within the current definition of "institutional sales material" under NASD Rule 2211(a)(2); (2) retail communication would include any written (including electronic) communication distributed or made available to more than 25 retail investors within any 30 calendar-day period; and (3) correspondence would include any written (including electronic) communication distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. Comments on FINRA's proposal are due on or before 21 days after publication in the Federal Register.

Click here to read Rule Filing SR-FINRA-2011-035.

FINRA Provides Additional Guidance Concerning Reporting Requirements under Rule 4530

The Financial Industry Regulatory Authority has issued additional guidance regarding Rule 4530 reporting requirements in Regulatory Notice 11-32 (Notice) to assist member firms in their implementation of the Rule. Rule 4530 requires member firms to: (1) report to FINRA certain specified events and quarterly statistical and summary information regarding written customer complaints; and (2) file with FINRA copies of certain criminal actions, civil complaints and arbitration claims. For example, Rule 4530.01 requires a member firm to report, among other things, violations that have widespread or potential widespread impact to the "markets," which refers to any organized market relating to any securities, insurance, commodities, financial or investment product. In addition, under Rule 4530.07, where a member firm receives or becomes aware of a customer complaint under Rules 4530(a)(1)(B) or 4530(d) involving a former associated person and the underlying conduct occurred while the individual was with the firm, the firm is expected to report the customer complaint.

Click here to read Regulatory Notice 11-32.

CFTC

CFTC Publishes Rule Proposals and Approves Final Rules Under Dodd-Frank

At a July 19 meeting, the Commodity Futures Trading Commission approved three final rulemakings and two rule proposals under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), as described below.

- Final Rule Implementing Procedures for Review of Swaps for Mandatory Clearing: The CFTC unanimously adopted new CFTC Regulation 39.5 to establish processes for (1) determining the eligibility of derivatives clearing organizations (DCOs) to clear swaps; (2) the submission of swaps by DCOs to the CFTC for mandatory clearing determinations; (3) reviews of swaps initiated by the CFTC; and (4) stays of the clearing requirement.

  (1) Rule 39.5(a) provides that, subject to CFTC review, a DCO would be presumed eligible to accept for clearing any swap within a group, category, type or class of swaps that the DCO already clears. A DCO would be required to request a CFTC determination as to its eligibility to clear any swap that does not meet this criterion. The CFTC noted that while a DCO's authority to clear particular swaps transactions would not be conditioned on its ability to clear the entire market volume of such swaps transactions, its inability to do so would be taken into account in the CFTC's determination of whether the swap must be cleared.

  (2) Rule 39.5(b) sets forth the process by which a DCO may submit a swap to the CFTC and the information that must be included in such a submission. For example, the DCO must include a "description of the manner in which the [DCO] has provided notice of the submission to its members and a summary of any views on the submission expressed by the members." The CFTC has eliminated additional proposed submission requirements for DCOs previously set forth in Regulation 40.2. Upon receipt of a DCO's swap submission, the CFTC will publish the submission in the Federal Register and on its website for a 30-day public comment period, as required under the Dodd-Frank Act, and conduct a 90-day review, taking into account certain factors specified by CFTC Rule 39.5(b)(3)(ii).

(3) Rule 39.5(c) requires the CFTC, on an ongoing basis, to review swaps not accepted for clearing by a DCO to determine whether such swaps should be required to be cleared. In conducting such CFTC-initiated reviews, the CFTC would use the same criteria as for DCO-submitted reviews set forth in Rule 39.5(b)(3)(ii). Upon a determination that any swap or group, category, type or class of swaps that no DCO has accepted for clearing should be subject to mandatory clearing, the CFTC may take such actions as it "determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of [uncleared] swaps." The CFTC noted that it does not anticipate imposing margin or capital requirements under this rule on any swap counterparty otherwise permitted by CFTC regulations to exercise the end-user exception to mandatory clearing.

(4) Under Rule 39.5(d), after determining that a swap or group, category, type or class of swaps is required to be cleared, the CFTC may stay the clearing requirement until after it has reviewed the terms of the swap and the clearing arrangement. After such a review, the CFTC could either impose mandatory clearing requirements or choose to not apply the clearing requirement, but allow clearing to continue on a non-mandatory basis (subject to any terms or conditions it deems appropriate). The CFTC has declined to specify what factors it will consider in determining whether to stay a clearing requirement or to adopt a deadline by which it must respond to a request for a stay.

- Final Rule Regarding Provisions Common to Registered Entities: The CFTC also unanimously approved rules implementing a new procedural framework for certifying and approving new products, rules and rule amendments submitted by designated contract markets, DCOs, swap execution facilities and swap data repositories.

- Final Rule Removing References to Credit Ratings from CFTC Regulations: The CFTC also unanimously adopted a final rulemaking to carry out the Dodd-Frank Act mandate to remove certain credit ratings references from agency regulations and substitute such references with alternative standards.

- Proposed Rule on Customer Clearing Documentation and Timing of Acceptance for Clearing: By a vote of 3-2, the CFTC approved the publication of proposed rules that would prohibit certain arrangements involving clearing customers and establish regulatory timeframes for the acceptance or rejection of trades for clearing by DCOs and their clearing members. The proposed rulemaking would prohibit futures commission merchants (FCMs), swap dealers (SDs), major swap participants (MSPs) or DCOs from entering into arrangements with customers that would (1) disclose to an FCM, SD or MSP the identity of a customer's original executing counterparty; (2) limit the number of counterparties with whom a customer may enter into a trade; (3) restrict the size of the position a customer may take with any individual counterparty (apart from an overall credit limit across all of the customer's positions); (4) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (5) prevent compliance with specified time frames for acceptance of trades into clearing. With respect to the acceptance or rejection of trades for clearing, the proposed rules would require DCOs and their clearing members to accept or reject trades submitted for clearing as quickly as would be technologically practicable if fully automated systems were used. DCOs and their FCM, SD and MSP clearing members would be required to coordinate in establishing systems for prompt processing of trades.

- Proposed Rule on Clearing Member Risk Management: Finally, also by a vote of 3-2, the CFTC approved the publication of proposed rules governing risk management by FCMs, SDs and MSPs that are clearing members. The proposed rulemaking would require such entities to: (1) establish credit and market risk-based limits based on factors including position size, order size and margin requirements; (2) use automated means to screen orders for compliance with the risk-based limits; (3) monitor for adherence to the risk-based limits intra-day and overnight; (4) conduct stress tests of all positions in their proprietary accounts and all positions in any customer account (in the case of an FCM) that could pose material risk to the entity at least once per week; (5) evaluate their ability to meet initial margin requirements at least once per week; (6) evaluate their ability to meet variation margin requirements in cash at least once per week; (7) evaluate their ability to liquidate positions they clear in an orderly manner, and estimate the cost of the liquidation at least once per month; and (viii) test all lines of credit at least once per quarter.

Each of the final rules adopted at the meeting will take effect 60 days from the date the respective rulemaking notice is published in the *Federal Register*; the comment period for each of the proposed rules will close 60 days from the date of the proposal's publication in the Federal Register.

Information regarding the final and proposed rules, including the releases, CFTC fact sheets and Q&As, is available here.

CFTC and SEC Staffs to Hold Joint Public Roundtable Discussion Regarding International Issues Relating to the Implementation of Title VII of the Dodd-Frank Act

The staffs of the Commodity Futures Trading Commission and the Securities and Exchange Commission will jointly conduct a public roundtable discussion to address international issues in connection with the implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The roundtable will take place on August 1 at the CFTC Headquarters in Washington, D.C.

Further information about the public roundtable, including how to submit remarks to the CFTC and the SEC, is available here.

LITIGATION

Court Finds Martin Act Does Not Preempt Non-Fraud Tort Claims

Plaintiffs brought claim in New York federal court for common law fraud, negligent misrepresentation, and breach of fiduciary duty against Defendant ThinkStrategy Capital Management, LLC ("ThinkStrategy"), a "fund of funds" in which plaintiffs invested. Plaintiffs alleged that ThinkStrategy had represented that it would conduct adequate due diligence on its managers, but failed to do so when it placed assets with a manager that was later found to be engaged in fraud. ThinkStrategy moved for summary judgment on all of Schwarz's claims.

ThinkStrategy argued that Schwarz's non-fraud claims were preempted by the Martin Act, a provision of the New York General Business Law that empowers the New York Attorney General to prosecute financial fraud. The court held that, despite certain case law that supported ThinkStrategy's position, the Martin Act did not preempt common law tort claims that relied on the same facts as potential violations of the Act. The court was persuaded by recent state court opinions holding that the language, legislative history, and purpose of the Martin Act did not support a finding of preemption, and concluded that the New York Court of Appeals, if it were to address the issue, would find likewise. Accordingly, the court denied defendant's summary judgment motion.

Schwarz, et. al. v. ThinkStrategy Capital Management, LLC, No. 09 Civ. 9346 (LAK), 2011 WL 2732218 (S.D.N.Y. July 14, 2011).

Generic Drug "Sham" Litigation Claim Accrues on Date of Competitor Drug Approval

Medical Mutual of Ohio, Inc. ("MMOH"), a medical insurer, brought an antitrust class action on behalf of similarly situated indirect purchasers of a constipation drug produced by Braintree Laboratories ("Braintree") in Delaware federal court. The class action claim arose from a patent infringement case filed by Braintree against a generic drug maker, Schwartz Pharma, Inc. ("Schwartz"), in 2003. The patent case was dismissed and Schwartz's generic drug was approved soon after the dismissal. MMOH later asserted that Braintree's suit against Schwartz was a "sham litigation" designed to extend Braintree's monopoly over the constipation drug market. Braintree moved to dismiss, arguing that MMOH's claim was time-barred.

The court held that the accrual date for sham litigation claims is generally the date that the original "sham" litigation was filed. However, the court held that in cases where the sham litigation allegedly deprived plaintiff of competitive drug pricing, the statute of limitations should not begin to run until the new drug is approved. The court concluded that the damages to MMOH became ascertainable only on the date that Schwartz received tentative approval to sell its generic competitor drug. Using this accrual date, the court dismissed MMOH's claims as time-barred.

Medical Mutual of Ohio, Inc. v. Braintree Laboratories, Civ. No. 10-604-SLR, 2011 WL 2708818 (D. Del. July 12, 2011).

BANKING

Office of Comptroller of the Currency Implements Rules Including Transfer of OTS Functions and Preemption and Visitorial Powers

The Office of the Comptroller of the Currency (OCC) on July 20 issued a final rule implementing several provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including changes to facilitate the transfer of functions from the Office of Thrift Supervision (OTS) and revisions to the OCC's rules on preemption and visitorial powers. The OCC issued a notice of proposed rulemaking for this final rule on May 26. Under the Dodd-Frank Act, the OCC assumed responsibility for the ongoing examination, supervision, and regulation of federal savings associations on July 21.

The preamble to the final rule expands the discussion of the preemption and visitorial powers provisions to address more thoroughly certain points raised in public comment letters received by the OCC. In particular, the preamble notes that the OCC has reconsidered its position concerning precedent that relied on the "obstructs, impairs, or conditions" standard. To the extent that an existing preemption precedent relies exclusively on the phrase "obstructs, impairs, or conditions" as the basis for a preemption determination, the preamble states that the validity of the precedent would need to be reexamined to ascertain whether the determination is consistent with the Barnett conflict preemption analysis. There is debate on both sides of the preemption issue as to the true significance of OCC's reconsideration of its position to remove the "obstructs, impairs, or conditions" standard. Those favoring preemption believe that this was a tactical retreat, to be read narrowly. Others, favoring state enforcement, take the position that the agency had no choice but to remove the language and that its removal has broad significance (i.e. diminution of federal preemption for national banks and federal thrifts.) The issue is likely to be played out in the courts over time.

The preemption and visitorial-powers amendments:

- eliminate preemption for operating subsidiaries of national banks and operating subsidiaries of Federal savings associations;
- apply to federal thrifts the same preemption standard – that is, a conflict preemption standard and not an occupation of the field standard – as applies to national banks, and apply to federal thrifts the visitorial powers standards applicable to national banks;
- eliminate ambiguity concerning the preemption standards in OCC regulations by removing language from OCC rules that provides that state laws that "obstruct, impair, or condition" a national bank's powers are preempted; and
- revise the OCC's visitorial powers rule to conform the Supreme Court's Cuomo decision, recognizing the ability of state attorneys general to bring enforcement actions in court to enforce applicable laws against national banks as authorized by such laws.

In response to public comments received, the text of the preemption and visitorial powers amendments was revised to:

- add language to clarify that, going forward, federal savings associations will be subject to the same preemption standards that apply to national banks;
- clarify the definition of "visitorial powers" in Section 7.4000(a)(2)(iv) of the OCC regulations to include direct investigations of national banks, such as through requests for documents or testimony directed to the bank to ascertain the bank's compliance with law through mechanisms not otherwise authorized under the rule; (this definition would not include collecting information from other sources, or from the bank through actions that do not constitute visitations, or as authorized under federal law) and
- modify a new paragraph, Section (b) 7.4000 of the OCC regulations, added in the proposed rulemaking which specifically provides that "[i]n accordance with the decision of the Supreme Court in *Cuomo* . . ., an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce an applicable law against a national bank and to seek relief

as authorized by such law is not an exercise of visitorial powers under 12 U.S.C. 484." The phrase "applicable law" was added in place of "non-preempted state law" in order to address concerns expressed by public commenters that the latter could be interpreted more narrowly than the former.

The final rule also revises OCC rules in areas that are central to internal agency functions and operations immediately upon the transfer of supervisory jurisdiction for federal savings associations. These include amendments to the OCC's assessment fee rule to include federal savings associations. Following a transition period, the final rule provides a single assessment schedule for both national banks and federal savings associations. To facilitate the transition of federal thrift supervision from the OTS to the OCC, the OCC will compute assessment fees under both the OCC and OTS schedules for assessments charged in September 2011 and March 2012. Federal savings associations will pay the lesser of the two fees. Beginning with assessments charged in September 2012, the OCC will assess institution fees based on a single fee schedule regardless of charter.

The rule also includes rules related to OCC organization, the availability and release of information under the Freedom of Information Act, and post-employment restrictions for senior examiners.

As part of the integration of the OTS functions into the OCC, the OCC also plans to issue an Interim Final Rule, with a request for comments, that republishes those OTS regulations the OCC has the authority to promulgate and enforce as of the transfer date, renumbered and issued as new OCC rules, with nomenclature and other technical amendments to reflect OCC supervision of federal savings associations. The OCC will consider more comprehensive substantive amendments to these regulations, as appropriate, later this year.

Federal Reserve Seeks Comment on Transfer of OTS Thrift Holding Company Functions

The Federal Reserve Board is seeking comment on a notice that outlines the regulations previously issued by the Office of Thrift Supervision (OTS) that the Federal Reserve will continue to enforce after assuming supervisory responsibility for savings and loan holding companies (SLHCs).

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, supervisory and rule-writing authority for SLHCs and their non-depository subsidiaries was transfered from the OTS to the Board on July 21, 2011. Specifically, with respect to the supervision of SLHCs and their non-depository subsidiaries, Section 312 of the Dodd-Frank Act provides that all functions of the OTS and the Director of the OTS (including authority to issue orders) transfered to the Board on July 21. All rulemaking authority related to SLHCs was also transfered to the Board on that date pursuant to Section 312 of the Dodd-Frank Act. Section 316 of the Dodd-Frank Act provides that all orders, resolutions, determinations, agreements, and regulations, interpretive rules, other interpretations, guidelines, and other advisory materials issued, made, prescribed, or allowed to become effective by the OTS on or before the transfer date with respect to SLHCs and their non-depository subsidiaries will remain in effect and shall be enforceable until modified, terminated, set aside, or superseded in accordance with applicable law by the Board, by any court of competent jurisdiction, or by operation of law. The Dodd-Frank Act includes parallel provisions applicable to the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation with respect to federal savings associations and state savings associations, respectively. The Board requests comments on the notice by August 31.

The Board, in its release, described certain sections of the old OTS regulations that it does not expect to enforce. The Board intends to issue an interim final rule soon that will include technical, nomenclature, and other changes to certain OTS regulations to accommodate the transfer of supervisory authority to the Board and to address modifications made by the Dodd-Frank Act.

Read more.

FINANCIAL STABILITY OVERSIGHT COUNCIL

Final FSOC Rule on Designations of Systemically Important Financial Market Utilities

On July 18, the Financial Stability Oversight Council (FSOC) adopted its final rule on the designation of systemically important financial market utilities (FMUs) under Title VIII of the the Dodd-Frank Wall Street Reform and Consumer Protection Act Dodd-Frank Act. The rule contemplates that the designation process will have four phases:

1. Preliminary identification (using publicly available information) by FSOC of FMUs that are, or may become, systemically important, meaning that "the failure or disruption to the functioning of [that] financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States."

2. Consultation between FSOC and specific FMUs triggered by a written notice from FSOC informing an FMU that is it is a candidate for designation. An FMU that receives such a notice has the right to submit written materials to FSOC, but FSOC also has the right to require submission of materials from an FMU or its supervisory authority.

3. Formal hearing of an FMU before FSOC after the FMU receives an advance notice of proposed designation and proposed findings of fact. The FMU has to request the opportunity to demonstrate that the proposed designation is not supported by substantial evidence but, if the request is made, FSOC must allow the FMU to submit written materials in support of its position. Oral testimony and oral argument is at the discretion of FSOC.

4. Formal FSOC designation of systemic importance of an FMU by vote of two-thirds of the members of FSOC, including the Chairperson of FSOC. Written notice of the vote must be given to the FMU within 60 calendar days of any submission/hearing, or 30 days after the date that the right to request the opportunity to make submission or have a hearing expires.

All materials submitted to FSOC in connection with the designation process are exempt from disclosure under the Freedom of Information Act. Designations will be reviewed periodically by FSOC but there is no mechanism for an FMU to request designation or rescission of a designation.

The rule will be effective 30 days after it is published in the Federal Register. The FSOC designation process can begin at any time thereafter.

Click here to view the final rule.

EXECUTIVE COMPENSATION AND ERISA

DOL Sets Coordinated Effective Dates for Service Provider, Participant Fee Disclosures

On July 19, the Employee Benefits Security Administration of the U.S. Department of Labor issued a final rule (the Final Rule) on the applicability dates of two related disclosure requirements under Employee Retirement Income Security Act:

1. Service provider disclosure. Under amendments to regulations under Section 408(b)(2) of the ERISA, "covered service providers," including fiduciaries, investment advisers, and record keepers, must provide disclosure of direct, indirect, and related party compensation received for services performed for a pension, 401(k), or other retirement plan to a fiduciary of the plan. In addition, if requested by a plan fiduciary or administrator,, a covered service provider must provide additional information which is necessary to comply with the ERISA's reporting and disclosure requirements.

2. Disclosure to participants. Under Section 404(a)(5) of ERISA and the related regulations, plan administrators of 401(k) and other plans which permit participant-directed investments must provide annual disclosure of investment performance, fees and expenses for each investment alternative under the plan and of administrative fees and expenses that may be charged against a participant's account, as well as quarterly disclosures of administrative fees and expenses actually charged against a participant's account.

The two disclosure requirements are inter-related; some of the information disclosed by covered service providers (such as investment advisers and record keepers) will be included in the disclosure to participants. In addition, a plan may determine that it is necessary to request additional information from a covered service provider in order to fulfill its disclosure obligations.

The Final Rule coordinates the disclosure requirements as follows:

1. The effective date for the initial disclosure of compensation by covered service providers under Section 408(b)(2) of ERISA is April 1, 2012.

2. The first annual disclosure to participants under Section 404(a)(5) of ERISA must be made not later than 60 days later, i.e., no later than May 31, 2012. Thereafter, the annual disclosure must be made once in any 12-month period, which need not be the same as the plan year.

3. The first quarterly disclosure to participants under Section § 404(a)(5) of ERISA must be made 45 days after the end of the quarter in which the § 404(a)(5) initial disclosure is provided, i.e., no later than August 14, 2012. Thereafter, quarterly disclosures must be made once in any 3-month period, which need not correspond to the quarters of the plan year.

Click here to view the Final Rule.
Click here to view ERISA Section 408(b)(2).
Click here to view ERISA Section 404(a)(5).

UK DEVELOPMENTS

FSA Fines Willis Limited £6.895 Million for Anti-bribery and Corruption Systems and Controls Failings

The UK Financial Services Authority announced on July 21 that it had fined Willis Limited £6.895 million (approximately$11.2 million) for failings in its anti-bribery and corruption systems and controls. This is the biggest fine imposed by the FSA in relation to financial crime systems and controls to date. The FSA said that these failings created an unacceptable risk that payments made by Willis to overseas third parties could be used for corrupt purposes.

Between January 2005 and December 2009, Willis made payments totaling £27 million (approximately$44 million) to overseas third parties who assisted it in winning and retaining business from overseas clients. The FSA investigation found that Willis breached Principle 3 of the FSA's Principles for Business and the Senior Management Arrangements, Systems and Controls sourcebook (SYSC 3.2.6R) in that Willis failed to:

- ensure that it established and recorded an adequate commercial rationale to support its payments to overseas third parties;

- ensure that adequate due diligence was carried out on overseas third parties to evaluate the risk involved in doing business with them;

- adequately review its relationships on a regular basis to confirm whether it was still necessary and appropriate for Willis to continue with the relationship;

- adequately monitor its staff to ensure that each time Willis engaged an overseas third party, an adequate commercial rationale had been recorded and that sufficient due diligence had been carried out. (Although Willis improved its policies in August 2008, it failed to ensure that its staff was adequately implementing them.); and

- ensure that senior management received sufficient information about the performance of Willis's relevant policies to allow them to assess whether bribery and corruption risks were being mitigated effectively.

Tracey McDermott, the FSA's acting director of enforcement and financial crime, said that Willis's failure was particularly disappointing as the FSA had repeatedly communicated with the industry on this issue and had previously taken enforcement action for failings in this area.

The UK's Bribery Act 2010 came into force on July 1, 2011 as reported in the April 1, 2011 edition of *Corporate and Financial Weekly Digest* and in a Katten *Client Alert*.

Read more.

EU DEVELOPMENTS

ESMA Releases Consultation Paper on High Frequency Trading

On July 20, the European Securities and Markets Authority (ESMA) issued a consultation paper on systems and controls relating to high frequency trading (HFT) and other forms of automated trading.

The consultation paper (entitled *Consultation on the Guidelines on systems and controls in a highly automated trading environment for trading platforms, investment firms and competent authorities)* sets out ESMA's proposals for detailed guidelines for trading platforms, investment firms and regulators to address HFT and other challenges of a highly automated trading environment. ESMA stated that the guidelines are intended to clarify the obligations of trading platforms and investment firms under the existing EU legislative framework and that it believes that the proposed guidelines "contribute to the efficiency, orderly functioning and resilience of trading in a highly automated environment". The Consultation follows on from certain of the issues addressed in the April 2010 call for evidence by CESR (ESMA's predecessor) on micro-structural issues of the European equity markets. This sought information on HFT, sponsored access (SA), co-location services, fee structures, tick size regimes and indications of interest as reported in the April 9, 2010 edition of Corporate and Financial Weekly Digest.

The Consultation explains the background to the draft guidelines in the context of ESMA's work on micro-structural issues. It also sets out and explains the draft guidelines on organizational requirements which are considered to be relevant in a highly automated trading environment for electronic trading systems, fair and orderly trading and dealing with market abuse (in particular markets manipulation). There are separate standards in each of these areas for trading platforms (regulated markets and multilateral trading facilities) and investment firms executing orders on behalf of clients and/or dealing on own account. The final section sets out and explains the draft guidelines covering direct market access (DMA) and sponsored access (SA). There are separate sets of standards for trading platforms and investment firms.

The draft guidelines are one part of ESMA's work on HFT and other micro-structural issues. They address issues where no legislative change is required and are separate from the work of the European Commission in related areas as part of its proposals to revise MiFID - the EU Markets in Financial Instruments Directive (the MiFID Review). ESMA has decided at this stage to concentrate on issues related to organizational requirements in a highly automated trading environment, including direct market access and sponsored access services. So the Consultation does not propose guidelines for co-location, fee structures or tick sizes since these topics do not relate directly to systems and controls issues.

The consultation period ends on October 3and ESMA expects to publish its final guidelines before the end of the year.

Read more.

European Commission Releases CRD IV proposals

On July 20, the European Commission published its proposals for a regulation and a directive which will implement the Basel III capital reforms and replace the existing Capital Requirements Directive (2006/48/EC and 2006/49/EC). This proposal is known as CRD IV or CRD 4.

The draft regulation contains detailed prudential requirements for credit institutions and investment firms and provisions designed to implement the key Basel III reforms. The draft directive restates many of the existing CRD provisions, such as passporting and principles for prudential supervision. It also includes proposals relating to capital buffers as well as proposals outside the Basel III framework relating to corporate governance, sanctions, supervision and reliance on ratings provided by rating agencies.

Read more.

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