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SEC/CORPORATE

Dodd-Frank Reform Bill May Put a Damper on Private Placements

Two little-noted provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), enacted on July 21, have the potential to make less attractive a “safe harbor” exemption for private placements of securities currently available under the Securities Act of 1933, as amended (the ’33 Act).

Rule 506 of Regulation D, promulgated under the ’33 Act, has provided, subject to other provisions of Regulation D, a “safe harbor” for the sale of securities to an unlimited number of “accredited investors” as well as to no more than 35 sophisticated investors who are not “accredited investors.” The Dodd-Frank Act provides for the narrowing of the definition of “accredited investor” and adds “bad boy” provisions to Rule 506 of Regulation D.

Currently, an “accredited investor,” as defined in Rule 501 of Regulation D, includes natural persons whose individual net worth or joint net worth with a person’s spouse exceeds $1 million at the time of his purchase of securities or who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person’s spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year. That definition has been unchanged since 1982. Section 413 of the Dodd-Frank Act excludes the value of a person’s primary residence from the Rule 501 formulation and requires the Securities and Exchange Commission to review the entire accredited investor definition to determine whether any adjustments are appropriate “for the protection of investors, in the public interest and in light of the economy,” except that until July 21, 2014 (four years after enactment) the $1,000,000 net worth test and the primary residence exclusion may not be changed. After July 21, 2014 and at least once every four years thereafter, the SEC is directed to review the definition in its entirety, including the income and worth levels in the Rule 501 test.

While it is not clear from a reading of Section 413 when the primary residence exclusion is effective—immediately upon enactment on July 21 or following SEC rulemaking, the SEC Staff has provided oral guidance to the effect that the exclusion became effective on enactment on July 21.

Separately, in Section 926 of the Dodd-Frank Act, the SEC is required, within one year of enactment, to adopt amendments to Rule 506 that are “substantially similar” to the provisions of Rule 262 of Regulation A, covering limited offerings by companies. Such rules would disqualify offerings by companies (and, presumably, individuals associated with companies) subject to “bad boy” orders barring them from financial or securities activities or association with certain regulated entities, who are subject to a final order based on fraud violations within the past 10 years, or who have been convicted of a felony or misdemeanor in connection with the purchase or sale of any security or involving the making of false filings with the SEC. The precise scope of the disqualifications and the extent to which they will apply to officers, other employees, directors or control persons who are or were “bad actors” so as to disqualify an issuer from conducting a Rule 506 offering will have to await SEC rulemaking.

These provisions will likely limit the population of “accredited investors” eligible under Rule 506 of Regulation D and, more consequentially, for the first time upon SEC implementation, will limit the availability of Rule 506 itself for companies who are, or whose specified personnel are, or in the past have been, “bad boys.”

Click here to read the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

CFTC

National Futures Association Amends Financial Requirements for Forex Dealers

The National Futures Association (NFA) has amended Sections 11(b) and (c) of the NFA Financial Requirements. These rules currently provide that a Forex Dealer Member (FDM) may include assets as current for purposes of determining adjusted net capital and as cover for currency positions, only if the assets are held at the following regulated entities not affiliated with the FDM: (1) a financial institution regulated by a U.S. banking regulator; (2) a broker-dealer registered with the Securities and Exchange Commission; (3) a futures commission merchant or a retail forex dealer registered with the Commodity Futures Trading Commission; (4) a state-regulated insurance company; or (5) a regulated foreign equivalent of such entities.

The amended rules remove regulated foreign entities from the list of regulated entities. However, the NFA will continue to have authority to approve the use of certain regulated foreign equivalents that are appropriately regulated and capitalized.

The amendments will become effective October 1.

The NFA notice concerning the amendments can be found here.

Commodity Futures Trading Commission Begins Publishing New Large-Trader Report for Financial Futures Markets

The Commodity Futures Trading Commission will begin publishing a new report, entitled Traders in Financial Futures (TFF). The TFF report expands upon the disaggregation of data in the CFTC’s weekly Commitments of Traders (COT) Reports implemented by the CFTC last year.

The TFF report uses the same data that appears in the COT reports, but separates large traders in the financial futures markets into the following four categories: Dealer/Intermediary; Asset Manager/Institutional; Leveraged Funds; and Other Reportables. Like the COT reports, the TFF report provides a breakdown of each Tuesday’s open interest for markets in which 20 or more traders hold positions equal to or above the reporting levels established by the CFTC. The report will be published in futures-only and futures-and-options-combined formats and will be published concurrently with the legacy COT. The TFF report is not a disaggregation of the COT data for the financial markets. The traders classified into one of the four categories in the TFF report may be drawn from either the “commercial” or “noncommercial” categories of traders in the legacy COT reports. The CFTC anticipates releasing four years of historical data for the new report.

The CFTC press release announcing the TFF reports can be found here.

Explanatory notes from the CFTC on the TFF reports can be found here.

Commodity Futures Trading Commission Determines that Certain Contracts Traded on IntercontinentalExchange Inc. are Significant Price Discovery Contracts

The Commodity Futures Trading Commission has determined that certain contracts traded on IntercontinentalExchange Inc. perform significant price discovery functions and, therefore, must be traded in compliance with the statutory provisions, including core principles, applicable to “significant price discovery contracts” (SPDCs).

A list of the relevant final orders declaring certain contracts to be SPDCs can be found here.

The CFTC press release can be found here.

Commodity Futures Trading Commission Releases List of Areas of Rulemaking for Over-the-Counter Derivatives

The Commodity Futures Trading Commission has released a list of 30 separate rulemakings that it must undertake to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act and is soliciting public input prior to publishing proposed rules for comment. The CFTC is generally required to promulgate these rules in 360 days from the date of enactment (July 21), although certain of the rules must be promulgated within 90, 180 or 270 days.

The CFTC has established a separate e-mail address for each of the rulemakings to which comments may be submitted. The email address for a particular subject can be accessed by clicking on the link below, and then clicking on the subject in question. The user will be directed to a page containing an email address to which comments should be addressed.

The list of rule-writing subjects and access to the email addresses to which comments should be directed can be found here.

The CFTC press release can be found here.

PRIVATE INVESTMENT FUNDS

Dodd-Frank Excludes Primary Residence from Accredited Investor Net Worth Calculation

See "Dodd-Frank Reform Bill May Put a Damper On Private Placements" in SEC/Corporate above. For purposes of the "accredited investor" test under Regulation D, effective immediately, the value of an individual's primary residence is no longer included as a component of net worth. All issuers, including hedge and private equity funds, currently engaged in private placements in the U.S. relying on Rule 506 of Regulation D must update their subscription documents immediately and take this new standard into account for pending and future subscriptions that were not consummated prior to July 21.

Click here to read the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Adopts Changes to Form ADV to Provide More Effective Disclosure

On July 21, the Securities and Exchange Commission voted unanimously to adopt changes to Form ADV, Part 2. Commonly referred to as the "brochure," Form ADV, Part 2 is the principal disclosure document that SEC registered investment advisers must provide to their clients and prospective clients. Currently, Form ADV, Part 2 consists primarily of a "check-the-box" format, in which investment advisers respond to a series of multiple-choice and fill-in-the-blank questions that are designed to inform investors of advisers' qualifications, investment strategies, and business practices. Unfortunately, the current format frequently does not correspond well to an adviser's business.

Under the amended rules, SEC-registered investment advisers are required to prepare a narrative, plain English, brochure, presented in a consistent, uniform manner that will make it easier for clients to compare different advisers' disclosures. The new brochure will contain enhanced disclosures on those topics the SEC believes are most relevant to clients, including, a description of: the adviser's business, fees and compensation, performance-based fees and side-by-side management (with an explanation of any conflicts of interest that arise from the simultaneous management of accounts that are charged a performance fee and accounts that are not and how the adviser addresses those conflicts), methods of analysis and investment strategies and the attendant risks of loss, disciplinary information material to a client's evaluation of the adviser's business and the integrity of its management, the adviser's code of ethics and the nature of its participation or interest in client transactions and personal trading and factors it considers in selecting broker-dealers.

Advisers must deliver the brochure to a client before or at the time the adviser enters into an advisory contract with such client. In addition, advisers must provide each client with an annual summary of material changes to the brochure and either deliver a complete updated brochure or offer to provide the updated brochure. Brochures must be filed electronically and posted on the SEC's website so that they are easily accessible to clients.

The SEC will also require advisers to prepare and deliver brochure supplements to new and prospective clients disclosing résumé-like information on the specific individuals who will provide services to the clients.

The SEC has not yet published the revised Form ADV, Part 2 and is currently working with the states to accommodate state-specific changes to the items and instructions of the Form. The amended rules and uniform SEC-state Form ADV, Part 2 will be effective 60 days after publication in the Federal Register.

To read the SEC's press release click here.

LITIGATION

SEC Enforcement Actions Not Subject to Same Reliance Requirements as Private Actions

A Connecticut federal district court recently denied a motion for summary judgment by an individual, Gary Richetelli, seeking dismissal of claims brought in an enforcement action by the Securities and Exchange Commission. The SEC alleged that Richetelli carried out a fraudulent stock purchase scheme in violation of Section 10(b) of the Securities Exchange Act of 1934 by providing several New Haven Savings Bank depositors with the financing to obtain shares of newly-issued stock through the bank's initial public offering (IPO) in exchange for repayment of the loans in full shortly after the IPO, as well as payment of the majority of the profits from the sale of those shares. The terms of the IPO prohibited such arrangements and each of the depositors executed stock order forms in which they declared under oath that they were "purchasing solely for [their] own account, and there is no agreement or understanding regarding the sale or transfer of the shares or the right to subscribe for the shares."

In support of his motion for summary judgment, Richetelli argued that the Supreme Court's decision in *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), precludes the SEC from imposing primary liability under Section 10(b) and Rule 10b-5 where the misrepresentation was not made by the defendant or attributed to him at the time of its dissemination. In *Stoneridge*, the Supreme Court ruled that parties who aid and abet Section 10(b) violations cannot be held liable in suits brought by private individuals because the reliance element necessary for such a claim could not be satisfied if the alleged misrepresentation could not be attributed to the defendants.

Following several other district court decisions, the district court declined to extend *Stoneridge* to SEC enforcement actions, finding that primary liability could be imposed on a defendant in an enforcement action, as long as the defendant was sufficiently responsible for the misrepresentation. As the court pointed out, the Supreme Court's decision in *Stoneridge* was not intended to limit the reach of the SEC, but rather was meant to restrict the judicially-created private right of action so as not to "undermine Congress' determination that this class of defendants should be pursued by the SEC and not private litigants."

SEC v. Richetelli, 2010 WL 2802911 (D. Conn. July 12, 2010).

Court Denies Motion for Summary Judgment to Dismiss Aiding and Abetting Claims

The Securities and Exchange Commission recently brought an enforcement action against six former officers and directors of Fischer Imaging Corporation (Fischer), a designer, manufacturer and seller of medical imaging systems used for the diagnosis and screening of diseases. The SEC alleged that the officers and directors engaged in a fraudulent scheme to inflate reports of Fischer's profits by improperly recording income from sales transactions that were not complete. Contrary to Generally Accepted Accounting Principles, Fischer recognized income when equipment was shipped to Fischer-controlled warehouses, where the equipment was stored and insured by Fischer for significant periods of time before purchasers were ready to accept delivery ("ship in place sales").

At issue were the SEC's allegations that Robert Hoffman, who served as, among other things, Fischer's National Sales Manager during the relevant period, aided and abetted the fraudulent scheme in violation of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Hoffman argued that the aiding and abetting claim failed for lack of evidence that Hoffman provided substantial assistance to any primary violator, a necessary element of the claim, because there was no evidence that he concealed information or altered documents. The court held that such evidence was not necessary and instead examined whether the SEC's evidence was sufficient to support an inference that Hoffman knew his conduct was making a substantial contribution to the scheme to misrepresent Fischer's financial results in public documents.

The court held that there was sufficient evidence that Hoffman knew he was making a substantial contribution to the scheme to create a genuine issue of material fact precluding the entry of summary judgment. In so holding, the court pointed out that: (i) Hoffman had substantial sales experience before joining Fischer and knew that documenting contingent terms in side agreements and offering terms that supported Fischer's use of "ship in place sales" were contrary to common business practices; (ii) Hoffman's exercise of stock options before the accounting fraud was revealed, and his immediate sale of that stock at a profit, supported an inference that Hoffman understood that the market price was buoyed by inflated revenue reports; and (iii) the amount of Hoffman's commissions was related to Fischer's reported quarterly revenues, which could support the conclusion that Hoffman understood that Fischer was using improper accounting practices to inflate revenues which would yield a benefit to him.

SEC v. Rivelli, 2010 WL 2775623 (D. Colo. July 14, 2010).

INSURANCE CAPITAL MARKETS

SEC Report Recommends Defining Life Settlements as "Securities"; GAO Releases Separate Study

On July 22, the Securities and Exchange Commission released a staff report recommending that life settlements be clearly defined as "securities" for purposes of the federal securities laws in order to better protect investors.

The report was prepared by the Commission's Life Settlements Task Force, which had been created in August 2009 to examine emerging issues in the life settlements market and to advise the Commission on the need to improve market practices and regulatory oversight. The Task Force is comprised of members from multiple divisions of the Commission, including Corporation Finance, Enforcement, Investment Management, and Trading and Markets.

In its report, the Task Force noted that while a total of 45 states have adopted some form of life settlement legislation under their insurance laws, and 48 states treat life settlements as securities, these laws vary considerably. The Task Force also pointed out that life expectancy underwriters are not subject to significant regulation at the state level.

Accordingly, the report recommends that the full Commission consider proposing to Congress amendments to the definition of "security" in the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to include life settlements. By clarifying the legal status of life settlements, the Commission would help ensure more consistent treatment under both federal and state laws.

The classification of life settlements as "securities" would result, under the Exchange Act, in bringing market intermediaries under the jurisdiction of the Commission and Financial Industry Regulatory Authority; these intermediaries would be required to be registered in order to sell or trade life settlements and would be subject to a comprehensive set of requirements designed to protect investors from abusive practices and to promote business conduct that facilitates fair, orderly and efficient markets.

Making life settlements "securities" for purposes of the Securities Act would require that offers and sales be registered with the SEC unless an exemption from registration were available. This classification would mean that misstatements in offering materials, whether distributed in connection with a public transaction or a private sale, would be covered by the antifraud provisions of the act.

Under the Investment Company Act, amending the definition of "security" would mean that a pool of life settlements in which interests were offered to investors would be an "investment company" unless it qualified for an exemption. Pool investors would benefit from the comprehensive federal regulatory framework established by the act for investment companies.

For the SEC's press release, click here; for the full task force report, click here.

Also on July 22, the General Accounting Office (GAO) released its own study of life settlements addressing how the market is organized and regulated, and the challenges faced by policy owners, investors and others. Consistent with its effort to modernize the financial regulatory system, the GAO concluded that two key elements—consistent consumer and investor protection and consistent financial oversight for similar institutions and products—have not been achieved with respect to the life settlements market. Consequently, the GAO suggests that Congress consider taking steps to address these issues, including the possibility of creating a federal insurance regulatory entity.

For highlights of the GAO study, click here; for the full study, click here.

EXECUTIVE COMPENSATION AND ERISA

Congress Provides Pension Funding Relief

On June 25, President Obama signed legislation that provides short-term funding relief to sponsors of underfunded defined benefit pension plans. The new law, known as the Preservations of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (the Relief Act), permits temporary modification of existing pension funding rules by allowing plan sponsors of single-employer plans to elect one of two methods for delaying payments to pension plans. By delaying those payments, sponsors should have more cash available in the short term to help fund ongoing operations—a result which is likely to be seen as a benefit to many plan sponsors given recent economic turmoil. However, because the delay methods do not decrease the net amount that must eventually be contributed to a pension plan, use of the Relief Act provisions will likely result in contributions for later years being larger than they otherwise would have been. Sponsors should keep in mind the probable effect of increased contributions in later years when deciding how to satisfy their plan funding obligations.

Under current pension funding rules, which were enacted in 2006 and apply to most single-employer plans, a pension plan's funding shortfall for any year is required to be amortized and paid into the plan over a seven year period. The Relief Act's methods for delaying payments allow a plan sponsor to choose either to (a) make "interest only" payments (using the plan's effective interest rate) for two years, and then amortize the shortfall for the following seven years, or (b) amortize the shortfall over 15 years. Plan sponsors are also free to use existing funding rules and not take advantage of the assistance provided under the Relief Act. To chose one of the methods under the Relief Act, sponsors must follow rules which are expected to be released by the IRS, and must also notify the Pension Benefit Guaranty Corporation (PBGC) and plan participants pursuant to rules to be released by the PBGC. If either of the Relief Act's methods is selected, in order to help ensure that sponsors do not misuse the increased short-term cash flow created by a reduction in the current pension funding obligation, certain make-up contributions may be required if a sponsor pays annual compensation to any employee in excess of $1 million (including by way of contributing assets to a rabbi trust), or pays an extraordinary dividend.

For more information, the Relief Act can be found here.

UK DEVELOPMENTS

HMRC Anti-Money Laundering Guidance for Money Service Businesses

On July 16, HM Revenue and Customs (HMRC) published a revised version of its anti-money laundering guidance for money services businesses which it supervises. The revised guidance addresses issues arising under the Counter-Terrorism Act 2008. HMRC also stated that guidance for e-money issuers will be incorporated into a further revised version of the guidance which will be issued shortly.

Read more.

FSA Fines Father and Son for Market Abuse

On July 19, the UK Financial Services Authority (FSA) announced that it had fined Jeremy Burley £144,200 (approx. US$219,700) and his father, Jeffery Burley, £35,000 (approx. US$53,300) for market abuse in relation to the shares of Tower Resources plc (Tower), an oil and gas exploration company, in June 2009.

Jeremy Burley, a British citizen resident in Uganda, was at the relevant time the Managing Director of BMS Minerals, a Ugandan company which provided vehicles and equipment to oil and gas exploration companies in Uganda, including Tower Resources. Jeffery Burley opened a share trading account in the UK, which he used to trade shares on behalf of his son.

On about June 11, 2009 Jeremy Burley learned that drilling at Tower's first Ugandan oil well was unlikely to produce oil and that the exploration of a second well was unlikely to proceed.

Before Tower announced this negative news on June 15, 2009, Jeremy Burley passed this information on to his father and another person, instructing his father to sell his entire holding of 790,000 shares in Tower. Jeremy Burley advised his father to try and avoid attention by selling the shares in multiple small lots. By selling his 790,000 shareholding ahead of the announcement, Jeffery Burley avoided a loss of £21,700 (approx. US$33,000).

Margaret Cole, FSA's director of enforcement and financial crime, said: "The FSA views the conduct of Jeremy and Jeffery Burley as particularly serious. Jeremy Burley acquired inside information through the course of his employment in Uganda, passed that information to others and used it for his own personal benefit. The actions of father and son were deliberate and premeditated and they took steps to disguise their insider dealing."

Both Jeremy and Jeffery Burley agreed to settle this case at an early stage and therefore qualified for a 30% discount. Had the fines not been discounted, Jeremy Burley would have been fined £175,000 (approx. US$267,000) in addition to the disgorgement of £21,700 (approx. US$33,000) and Jeffery Burley would have been fined £50,000 (approx. US$76,000).

Read more.

FSA Secures £3.7 Million Compensation for Victims of Upton & Co. Unauthorized Collective Investment Scheme

On July 20, the UK Financial Services Authority (FSA) announced that it had secured £3,717,000 (approx. US$5,660,000) in compensation for investors in an unauthorized collective investment scheme operated by Upton & Co. Accountants Limited (Upton), owned and controlled by Darren Upton, a member of the Association of Chartered Certified Accountants.

The Wakefield-based firm, which was not authorized by the FSA to do so, operated a collective investment scheme known as the "Currency Plan" promising investors high rates of return allegedly derived from foreign exchange investments. However, limited foreign exchange trading occurred and very little was ever returned in cash.

In February 2009 the FSA commenced an investigation into Upton and promptly realized that the firm was carrying out unauthorized business. A month later, the FSA secured a High Court injunction to stop the activity and freeze the firm's assets.

The July 2010 High Court ruling approved the immediate distribution of £3,717,000 (approx. US$5,660,000) to investors on a *pro rata* basis and Upton has agreed to make further monthly payments of £10,000 (approx. US$15,000) which will be used for further *pro rata* distributions to investors.

Margaret Cole, FSA's director of enforcement and financial crime, said: "This is a fantastic result. It is so rare for victims of unauthorized businesses to get any money back because normally the money is misappropriated and victims of unauthorized firms are not protected by the Financial Services Compensation Scheme."

Read more.

EU DEVELOPMENTS

CESR Publishes Consultation Paper on Transaction Reporting

On July 19, the Committee of European Securities Regulators (CESR) published consultation paper CESR/10-809 setting out proposals for transaction reporting for over-the-counter (OTC) derivatives and the extension of the scope of transaction reporting obligations.

CESR's OTC derivatives transaction reporting proposal is based on the assumption that all persons not exempted from European Market Infrastructure Legislation (EMIL) (including Markets in Financial Instruments Directive (MiFID) authorized firms) would have to report their OTC derivatives transactions to trade repositories (TRs) after these will have been established and registered under EMIL.

However, CESR proposes that investment firms would retain the possibility of complying with their transaction reporting obligations with respect to OTC derivatives under MiFID provisions.

Investment firms choosing to report their transactions to a TR, supporting MiFID standards, would be exempted from direct reporting as long as they communicate their decision to the competent authority. The MiFID regime would therefore apply to reporting obligations but these could be dealt with by TRs for the account of investment firms in order to avoid duplication. TRs would be recognized as a valid third-party reporting mechanism under Article 25(5) of MiFID.

Until EMIL has been finalized and implemented, OTC derivatives transactions would be reported under MiFID rules, where applicable.

CESR is also considering to propose to the European Commission to extend, through a change in Article 25 of MiFID, the scope of transaction reporting obligations to financial instruments that are admitted to trading only on MTFs and to OTC derivatives.

The comment period ends on August 16.

Read more.

CESR Consults on the UCITS IV Key Investor Information Document

On July 20, the Committee of European Securities Regulators published the following four consultation papers on the key investor information document (KII) under the Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (2009/65/EC) (knows as "UCITS IV").

- A consultation on level 3 guidance on the selection and presentation of performance scenarios in the KII for structured UCITS (that is, certain types of capital-protected and guaranteed UCITS). Read more.
- A consultation on guidelines for the transition from the simplified prospectus to the KII. Read more.
- A consultation on a guide to clear language and the layout for the KII. Read more.
- A consultation on a template for the KII. Read more.

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