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CORPORATE & FINANCIAL
WEEKLY DIGEST

June 29, 2012

Due to the holiday, *Corporate and Financial Weekly Digest* will not be published on July 6. The next issue will be distributed on July 13.

SEC/CORPORATE

Congress Pressures SEC on Two Fronts

Last week, members of Congress sent letters to the Securities and Exchange Commission, encouraging them to reconsider rules related to the initial public offering (IPO) process, and to adopt rules relating to conflict minerals and resource extraction.

IPO Process

In a June 19 letter to the SEC, the House Committee on Oversight and Government Reform (the Committee) put pressure on the SEC to take a closer look at the IPO process and consider whether current rules governing the IPO process suffer “substantial flaws.” The Committee expressed concern that underwriters are able to “dictate” the price of an IPO “while only indirectly considering market supply-and-demand in their price evaluation.”

The Committee also expressed concern that underwriters’ ability to provide information to institutional clients that is not available to the general public disadvantages individual investors. The letter cites the Facebook IPO as an example of a situation where certain institutional investors received information not available to the general public, resulting in losses to individual investors. The Committee asked the SEC to consider the communications restrictions imposed by the Securities Act of 1933 and the rules thereunder and whether these rules provide institutional investors with an informational advantage.

The letter also urges consideration of market-based IPO pricing, noting that shares are frequently undervalued in IPOs while substantial underwriting fees are imposed, to the disadvantage of new public companies. The Committee stated that this process “places a direct drag on economic growth” and that a market-based approach would lower the cost of capital formation and eventually increase the size of domestic capital markets. The letter suggests a “Dutch Auction” approach to IPO pricing, where bids determine the price the market is willing to pay for shares, as a market-based alternative to the current process.

The Committee requested information collected by the SEC relating to IPO pricing and allocation of shares and a response to the numerous questions posed throughout the letter by July 3.

To view the complete text of the letter, click here.

Conflict Minerals

In a June 22 letter to the SEC, 58 members of Congress urged the SEC to vote on final rules to implement Sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which require public companies to make disclosures relating to the use of conflict minerals and payments for extraction of

resources. The SEC did not meet the April 17, 2011 statutory deadline for adoption of final rules, and the comment period for the proposed rules closed over one year ago. These Congressmen expressed concern that a delay in rulemaking would create a risk to investors and undermine efforts to create transparency in the mining and natural resource extraction industries. They requested an SEC vote on final rules by July 1 or a response by June 29 setting a definitive date for the vote.

To view the complete text of the letter, click here.

New General Solicitation and Advertising Rules To Be Delayed

In testimony before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs Oversight and Government Reform Committee of the U.S. House of Representatives, Mary L. Shapiro, Chairman of the Securities and Exchange Commission, provided testimony with respect to the rule-making required of the SEC under the Jumpstart Our Business Startups Act (JOBS Act). Title II of the JOBS Act requires the SEC to revise Rule 506 under the Securities Act of 1933, which provides a safe harbor from registration, to allow general solicitation and general advertising for offers and sales made under Rule 506, provided that securities purchasers are accredited investors. Chairman Shapiro testified that the 90-day deadline for such rule-making set by the JOBS Act will not be met. She stated that the “90-day deadline does not provide a realistic time frame for the drafting of the new rule, the preparation of an accompanying economic analysis, the proper review by the Commission and an opportunity for public input.” Nevertheless Chairman Shapiro stated that the Staff has “made significant progress” on a recommendation and economic analysis and while the 90-day deadline (July 4) will not be met, a proposal will be forthcoming “in the very near future.”

For more information, click here.

BROKER DEALER

Proposed Rule Change Relating to Distribution of Auction Messages

On June 18, the Chicago Board Options Exchange, Incorporated (CBOE) filed a proposed rule change regarding who is eligible to respond to auction messages. The proposed rule change would allow the CBOE to permit all Trading Permit Holders to respond to the Simple Auction Liaison (SAL), Hybrid Agency Liaison 2 system (HAL2) and complex order request for responses (COA) auction messages instead of limiting this functionality to Qualifying Trading Permit Holders. The proposal provides that the purpose of this proposed change is to increase the opportunities for all types of market participants (e.g., public customers, broker-dealers and market-makers) to participate in SAL, HAL2 and COA auctions in certain classes. According to the CBOE, this broader participation could lead to more robust competition in these auctions because more market participants will be able to submit responses, which may result in better prices for customers. The proposed rule change also seeks to delete the rule governing the Hybrid Agency Liaison system, as it is outdated and no longer applicable, and to rename HAL2 as HAL.

Click here to read Release No. 34-67209.

SEC Adopts New Procedures for Review of Certain Clearing Agency Actions

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, on June 28, the Securities and Exchange Commission adopted final rules that establish new procedures for the SEC’s review of certain clearing agency actions. Most of the rules become effective 60 days after the date of publication in the Federal Register.

Among other things, the rules require clearing agencies to electronically submit information to the SEC regarding security-based swaps that such clearing agencies plan to accept for clearing. The requested information is intended to aid the SEC’s determination of whether the security-based swaps should be subject to mandatory clearing. The rules also require clearing agencies to post such submissions on their public websites within two business days.

In addition, the rules describe when a "systematically important" clearing agency must electronically submit advance notice to the SEC of certain changes to its rules, procedures or operations. Generally, advance notice will be required if: (1) the proposed change would affect the risk management functions performed by the clearing agency that are related to systematic risk and/or (2) the proposed change could affect the clearing agency's ability to continue performing its core clearing and settlement functions. The rules require such "systematically important" clearing agencies to post such advance notices on their public websites within two business days.

Click here to read the Final Rule.

CFTC

CFTC Proposes Block Trades Rules for Swap Contracts

On June 27, the Commodity Futures Trading Commission issued a notice of proposed rulemaking concerning block trades in swap contracts. The CFTC has defined a block trade as a publicly reportable transaction that: (1) involves a swap that is listed on a registered swap execution facility (SEF) or designated contract market (DCM); (2) occurs away from the registered SEF or DCM's trading system or platform (and is executed pursuant to the rules of such SEF or DCM); (3) has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) is reported subject to the rules and procedures of the SEF or DCM and CFTC regulations, including the appropriate time delay requirements.

Like futures contracts, the proposed rules would prohibit the aggregation of orders for different trading accounts in order to satisfy the minimum block size or cap size requirements ("cap size" defined as the maximum notional or principal amount of a publicly reportable swap transaction that is publicly disseminated) except for orders aggregated by certain commodity trading advisors (CTA), investment advisers and certain foreign persons with more than $25 million in total assets under management. In addition, parties to a block trade must individually qualify as eligible contract participants (ECP), except where a DCM allows certain CTAs, investment advisers and foreign persons, to transact block trades for customers who are not ECPs, if such CTA, investment adviser or foreign person has more than $25 million in total assets under management. Persons transacting block trades on behalf of customers must receive prior written instruction or consent from the customer.

Any comments to the proposed rules must be received on or before July 27.

The proposed rule is available here.

NFA Reminds Members of Changes to CPO Exemption Rules

On June 25, the National Futures Association (NFA) issued guidance regarding the Commodity Futures Trading Commission's final rules rescinding the exemption from Commodity Pool Operator (CPO) registration granted under CFTC Rule 4.13(a)(4). Persons that are currently exempt from registration as a CPO under Rule 4.13(a)(4) may continue to operate qualifying pool(s) until December 31, 2012. After December 31, any pool operator relying on the Rule 4.13(a)(4) exemption must register with the CFTC, unless the operator qualifies for an exemption from registration under Rule 4.13(a)(3). The final rules also require any person that claims an exemption from CPO or Commodity Trading Advisor (CTO) registration to reaffirm its claim of exemption within 60 days of the end of each calendar year.

After December 31, any NFA member that carries an account or transacts business with any person that is currently exempt from CPO registration under CFTC Regulation 4.13(a)(4) must assure that the person has filed a claim of exemption under CFTC Regulation 4.13(a)(3) or has properly registered and become an NFA member. In addition, any NFA member that carries an account or transacts business with an unregistered person claiming an exemption from registration must verify that the unregistered person has properly filed the annual notice reaffirming the exemption. FCMs must adopt adequate policies and procedures to identify accounts of exempt persons and conduct an annual review to assure that the notices of exemptions are properly reaffirmed.

The NFA's notice to members is available here.

NFA Reminds Members of New Filing Requirements for Segregated Investment Detail Reports

On June 27, the National Futures Association (NFA) issued a notice reminding members that, beginning July 2, 2012, all member futures commission merchants (FCMs) that hold customer futures and option segregated funds or foreign futures and options secured amount funds will be required to file Segregated Investment Detail Reports (SIDRs) as of the 15th day of each month (or following business day) and the last business day of each month.

FCMs will be required to provide the following information on all SIDRs: (1) the dollar amount of customer segregated funds held in cash and each type of permitted investment; (2) the identity of each depository holding customer segregated funds and the dollar amount held at each depository; (3) the dollar amount of foreign futures and foreign option secured amount funds held in cash and each type of permitted investment; and (4) the identity of each depository holding foreign futures and foreign option customer secured amount funds and the dollar amount held at each depository.

The first SIDR filed pursuant this requirement will report the information as of the close of business on July 16 and must be filed by 11:59 p.m. Eastern time on July 17. FCMs for which NFA is the designated self regulatory organization currently file a monthly SIDR through the NFA's EasyFile system; however, beginning with the SIDR due on July 17, all FCMs must file SIDRs electronically through the WinJammer system.

In addition to the SIDR filing requirement, NFA reminded members that, beginning July 17, all FCMs will be required to file daily segregation and secured amount statements and monthly financial statements with NFA.

NFA's notice to members is available here.

CFTC Proposes Rules to Enhance Identification of Futures and Swaps Market Participants

On June 28, the Commodity Futures Trading Commission approved for publication in the Federal Register proposed rules designed to enhance its identification of futures and swaps market participants. The proposed rules build on the CFTC's existing large trader reporting system. In addition to collecting information with respect to participants that hold open positions, the proposed rules will require information with respect to accounts that meet a certain "volume threshold." Concurrently, the CFTC has withdrawn its proposed rules that would have established a dedicated ownership and control reporting system.

Comments on the proposed rules must be filed with the CFTC within 60 days following publication in the Federal Register.

The proposed rules are available here.

LITIGATION

Delaware Chancery Court Grants Request to Dismiss Judicial Dissolution Proceeding

The Delaware Chancery Court exercised its discretion to dismiss a judicial dissolution proceeding in deference to a prior pending action in New Jersey, the latter of which involved issues that "overlap[ped] substantially" with the Delaware action. The petitioner requested a judicial dissolution of his company, which the respondent moved to stay or dismiss on the ground that a similar action was pending in New Jersey Superior Court. Under Delaware's first-filed rule, a court may exercise its discretion to stay a second-filed action in favor of a first-filed action; however, when the second-filed action is a summary proceeding like a judicial dissolution action, the Chancery Court often allows the second-filed action to proceed, given the Chancery Court's "strong interest in resolving issues concerning the internal affairs of a Delaware corporation promptly and efficiently." Here, however, the Chancery Court determined that the substantial overlap between the dissolution action before it and the first-filed New Jersey action, the progression of the case in New Jersey, and the petitioner's filing of another action in the Southern District of California on a set of separate issues indicated that the interests of efficiency would be better served by dismissing the dissolution action without prejudice and allowing the New Jersey action to proceed.

McElroy v. Schornstein, Civil Action No. 67233-CS (Delaware Chancery Court, June 20, 2012).

Court Declines to Apply Economic Loss Doctrine to Tortious Interference with Contract Claim

The United States District Court for the District of Idaho held that the Economic Loss Doctrine, which prohibits recovery of purely economic losses in product liability and negligence cases, did not preclude the recovery of damages in connection with a tortious interference with contract claim. In this action, plaintiffs, inter alia, asserted a claim for tortious interference with a contract for the sale of real property and, at trial, were awarded $15,000 in damages in connection with such claim. In opposition, defendant argued that the jury's award was improper on the ground that Idaho's Economic Loss Doctrine prohibited the recovery of economic losses under a tortious interference with contract theory. The Court found that under Idaho law, the Economic Loss Doctrine did not bar tortious interference with contract claims, reasoning that a such a claim was designed to protect a party's economic interest in contractual relations and was a party's only means of recourse against a third-party who caused him damage but with whom he was not in contractual privity. In its analysis, the Court cited similar holdings by courts in the Ninth and Tenth Circuits as well as Florida, Illinois, Michigan, and New York. The Court also granted in part and denied in part plaintiffs' motions for an award of costs and attorneys fees based on an independent analysis of the reasonableness of the awards and fees requested.

Kayser v. McClary, No. CV 10-00119-REB, 2012 WL 23780092 (D. Idaho June 22, 2012).

BANKING

FDIC To Offer Assistance to Community Banks in Understanding Proposed Capital Rules

In a letter dated June 25 to community bank CEOs, Martin Gruenberg, Chairman of the Board of the Federal Deposit Insurance Corporation, stated that the FDIC will offer assistance to community bankers to help them understand the complicated new rules that have been proposed by the FDIC, the Federal Reserve and the Office of the Comptroller of the Currency (OCC) with respect to capital requirements. Gruenberg said, "We recognize…that the proposed rules …are extensive. Because of this, the FDIC is offering technical assistance to aid community banks in identifying and understanding the aspects of the proposals most likely to apply to them." To that end, the FDIC will conduct informational sessions with community bankers in each of the six FDIC geographic regions to provide an overview of the proposed regulations. "The sessions will be presented live and bankers will have the option to attend in person or listen to the presentation by phone."

Dates for the sessions are:

- Dallas - July 20
- New York - July 23
- Atlanta - July 26
- Kansas City - July 26
- Chicago - July 31
- San Francisco - August 1

The letter also stated that the FDIC will post a webcast overview of the proposed regulations on the FDIC's website for those institutions that cannot participate in the regional sessions. "This webcast should be available by mid- to late-July."

The FDIC asked that any questions regarding this initiative be directed to Area Director Daniel Frye at 781-794-5678. It was not clear whether the other two banking agencies, the Federal Reserve and the OCC, would conduct similar sessions for their community bank regulatees, or whether the education effort would be conducted solely by the FDIC.

For more information, click here.

OCC Issues Final Regulations Requiring Alternatives to the Sole Use of External Credit Ratings and Takes Other Actions

The Office of the Comptroller of the Currency (OCC) announced on June 26 that it had published final rules that remove references to credit ratings from its regulations pertaining to investment securities, securities offerings, and foreign bank capital equivalency deposits at 12 CFR 1, 16, 28, and 160. In finalizing the regulation, the OCC

explained that "to determine whether a security is “investment grade,” banks must determine that the probability of default by the obligor is low and the full and timely repayment of principal and interest is expected. …[B]anks may not rely exclusively on external credit ratings, but they may continue to use such ratings as part of their determinations. Consistent with existing rules and guidance, an institution should supplement any consideration of external ratings with due diligence processes and additional analyses that are appropriate for the institution’s risk profile and for the size and complexity of the instrument. In other words, a security rated in the top four rating categories by a nationally recognized statistical rating organization is not automatically deemed to satisfy the revised “investment grade” standard."

The OCC also has revised its regulations pertaining to financial subsidiaries of national banks at 12 CFR 5 to better reflect the language of the underlying statute, as amended by section 939(d) of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd–Frank Act). Pursuant to Section 939(d) of the Dodd–Frank Act, "a national bank that is one of the 100 largest insured banks may control a financial subsidiary, directly or indirectly, or hold an interest in a financial subsidiary if the bank has not fewer than one issue of outstanding debt that meets such standards of creditworthiness or other criteria as the Secretary of the Treasury and the Federal Reserve Board may jointly establish. As is the case under current law, this statutory creditworthiness requirement does not apply to an insured depository institution that is not among the 100 largest insured depository institutions. Therefore, this revision will not affect the ability of such an institution to control or hold an interest in a financial subsidiary." As neither Treasury nor the Federal Reserve have establish such standards, they do not apply at this time. "Importantly, however, the requirements at 12 CFR 5.39(g)(1) and (2) still apply. These provisions generally provide that a national bank may control or hold an interest in a financial subsidiary only if it and each depository institution affiliate is well-capitalized and well-managed, and the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the consolidated total assets of the parent bank or $50 billion."

The OCC also has published related guidance to assist national banks and federal savings associations in their exercise of due diligence to determine whether particular securities are “investment grade” when assessing credit risk for portfolio investments.

The final rules and guidance were published in the Federal Register on June 13. The revisions to the OCC’s rules at 12 CFR 1, 16, 28, and 160 will become effective on January 1, 2013. The amendments to the OCC’s regulations pertaining to financial subsidiaries of national banks became effective immediately upon publication.

To read the final rules, click here. To read the guidance, click here.

Federal Reserve and FDIC Announce Disclosure and Evaluation Timetable for First Living Wills

The Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve Board announced the process for receiving and evaluating the initial resolution plans--also known as living wills--from the largest banking organizations operating in the United States. The agencies also gave a timetable for release of the public portion of such plans, which are due on July 2.

The Dodd-Frank Wall Street Reform and Consumer Protection Act requires that bank holding companies with total consolidated assets of $50 billion or more and nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve submit resolution plans annually to the FDIC and the Federal Reserve. Each plan "must describe the company's strategy for rapid and orderly resolution under the Bankruptcy Code in the event of material financial distress or failure of the company." The FDIC and Federal Reserve must review each resolution plan and jointly may determine that a resolution plan is not credible or would not facilitate an orderly resolution of the company in bankruptcy. Companies subject to the rule are required to file their initial resolution plans in three groups and on a staggered schedule. By regulation, the plans must be divided into a public section and a confidential section. The public section of the plans will contain detailed information to allow the public to understand the business of the covered company. Information in the public portion will include details such as a description of the company's core business lines and financial information regarding assets, liabilities, capital, and major funding sources.

Following submission of a resolution plan, the FDIC and Federal Reserve will:

- Release the public section of the resolution plans by close of business on Tuesday, July 3, 2012;
- Preliminarily review the plan for informational completeness within 60 days; and

- Review each plan for its compliance with the requirements of the rule.

This first group of submissions will include Bank of America, Barclays, Citibank, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan Chase, Morgan Stanley and UBS.

For more information, click here.

UK DEVELOPMENTS

UK Quoted Companies to be Required to Report Greenhouse Gas Levels

The UK Government has announced that it intends to introduce regulations taking effect from April 2013 requiring all companies quoted on the Main Market of the London Stock Exchange to report details of their levels of emissions of greenhouse gases such as carbon dioxide, nitrous oxide and methane. The regulations will be reviewed in 2015, at which time a decision will be made as to whether to extend the requirement to all large companies from 2016.

For more information, click here.

EU DEVELOPMENTS

ESMA Consults on EMIR Rules

On June 25, the European Securities and Markets Authority (ESMA) issued a consultation paper on its proposed technical standards under the EU Regulation on OTC Derivatives, Central Counterparties and Trade Repositories. The Regulation generally known as the European Market Infrastructure Regulation (EMIR), was adopted by the European Parliament on March 29, 2012 (as reported in the March 30, 2012 edition of *Corporate and Financial Weekly Digest*). It is intended to improve the functioning of OTC derivatives markets in the European Union by reducing risks via the use of central clearing and risk mitigation techniques, increasing transparency via trade repositories and ensuring sound and resilient central counterparties (CCPs).

The Consultation Paper contains draft Regulatory Technical Standards and draft Implementing Technical Standards which set out the specific details of how EMIR's requirements are to be implemented. The requirements set out in the draft standards are designed to ensure:

Reduction of counterparty risks by:

- Defining the framework for the application of the clearing obligation;
- Specifying the risk mitigation techniques for OTC derivatives not centrally cleared;
- Laying down the requirements for the application of exemptions to non-financial counterparties and intragroup transactions.

Increased transparency by:

- Specifying the details of derivatives transactions that need to be reported to trade repositories;
- Defining the trade repositories' data to be made available to relevant authorities; and
- Setting the information to be provided to ESMA for the authorization and supervision of trade repositories.

Safe and resilient CCPs by:

- A comprehensive set of organizational, conduct of business and prudential requirements for CCPs.

The consultation closes on August 5 and the final draft standards are intended to be submitted to the EU Commission for endorsement by September 30, 2012.

For more information, click here.

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