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CORPORATE & FINANCIAL
WEEKLY DIGEST

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SEC/CORPORATE

Mary Jo White, Nominee for Chair of the SEC, Appears Before Senate Banking Committee

On March 12, Mary Jo White, President Obama's nominee to chair the Securities and Exchange Commission, appeared at her confirmation hearing before the US Senate Committee on Banking, Housing and Urban Affairs.

In prepared testimony, Ms. White highlighted a few of her priorities for the SEC, if she is confirmed. First, Ms. White noted the need to complete, "in as timely and smart a way as possible," rulemaking required under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Jumpstart Our Business Startups Act. In that regard, Ms. White underscored the need for a "transparent and robust" analysis of the economic impact of any such rulemaking, from the outset, to ensure effective and efficient rulemaking without unnecessary burdens or competitive harm. Second, she highlighted the need to strengthen the enforcement function of the SEC, with a view toward instilling confidence and a sense of fairness among investors and other market participants. Finally, she expressed the need for the SEC to keep pace with a high-tech, high-speed and dispersed marketplace, noting a greater sense of urgency is required to address issues associated with modern-day securities markets.

Although most committee members appeared supportive of Ms. White's confirmation, committee members raised issues relating to potential conflicts of interest arising from her (and her husband's) legal practices. Questions posed by committee members also evidenced concerns about a so-called "revolving door" between the SEC and the businesses it regulates. Ms. White responded that she does not necessarily embrace the policy views of her private clients, and will "work as zealously as is possible" on behalf of the American public as her client.

To view the complete text of Mary Jo White's prepared testimony, click here.

BROKER DEALER

SEC Proposes Rules Regarding Technology Systems

On March 8, the Securities and Exchange Commission proposed Regulation Systems Compliance and Integrity (Regulation SCI), which would require certain self-regulatory organizations, alternative trading systems, plan processors and exempt clearing agencies (SCI Entities) to comply with certain requirements with respect to their technology systems. Proposed Regulation SCI would supersede and replace the SEC's current Automation Review Policy.

Under the proposed regulation, SCI Entities must establish written policies and procedures to ensure that their technology systems have adequate levels of capacity, integrity, resiliency, availability and security. SCI Entities must also require participation by designated members and participants in testing the SCI Entities' business continuity and disaster recovery plans, and coordinate such testing with other SCI Entities. Upon the occurrence of certain events, including systems disruptions, systems compliance issues and systems intrusions, SCI Entities must file proposed Form SCI with the SEC and take appropriate corrective action.

Comments should be submitted on or before 60 days after the proposed rules are published in the *Federal Register*.

The text of the proposed rules is available here.

FINRA Amends Rules to Address Extraordinary Market Volatility

The Financial Industry Regulatory Authority adopted rule amendments in furtherance of the joint industry Regulation NMS Plan to Address Extraordinary Market Volatility (Plan). Pursuant to the Plan, FINRA amended its rules to, among other things, require members that are trading centers in national market system (NMS) stocks to have written policies and procedures preventing the execution and display of offers outside the Plan's price band for each tier of NMS stocks. Trading centers must also have written policies and procedures to prevent the execution of trades in NMS stocks during a trading pause. The rule amendments are effective April 8, 2013.

FINRA also expanded the scope of Rule 11892 to apply to all over-the-counter transactions, including transactions subject to the Plan. Transactions that occur within the Plan's price bands could still be deemed clearly erroneous under Rule 11892. Certain transactions occurring outside the Plan's price bands will also be deemed clearly erroneous. The rule amendments became effective on January 30.

More information is available here.

FINRA Changes Membership Application Fees

The Financial Industry Regulatory Authority announced that it will waive continuing membership application (CMA) fees when a CMA proposes minor changes that do not require substantial review by FINRA staff, such as certain changes in ownership, control or business operations. In addition, FINRA will refund application fees for new or continuing membership applications that are withdrawn within 30 days of filing. The application fee refunds are subject to a $500 processing fee.

More information is available here.

SEC Approves OBS Supplemental Schedule

The Securities and Exchange Commission approved the adoption of a supplemental schedule for derivatives and other off-balance sheet items. The supplemental schedule requires carrying or clearing firms to report certain information, including gross exposures in financing transactions, interests in and exposure to variable interest entities, non-regular way settlement transactions, underwriting activities and derivatives transactions. Subject to a *de minimis* exception, carrying or clearing firms are required to file the supplemental schedule with FINRA on a quarterly basis using the eFOCUS system. The initial supplemental schedule must be filed by July 31, 2013.

More information is available here.

CFTC

FCMs Required to Have Chief Compliance Officer by March 29

Commodity Futures Trading Commission Regulation 3.3, which requires each futures commission merchant (FCM) to designate a chief compliance officer (CCO), will become effective on March 29, 2013 in respect of FCMs that are not regulated by a prudential regulator or registered with the Securities and Exchange Commission as a broker-dealer (FCMs that fall into either of those categories have been required to have CCOs since October 1, 2012).

National Futures Association (NFA) Notice to Members I-13-07 sets forth information for FCMs to consider as they designate CCOs. First, if an FCM designates a CCO that is not already registered with the NFA as a principal of the FCM, the FCM must file CFTC Form 8-R for the CCO (which must be reviewed and verified by the CCO) and a set of fingerprint cards for the CCO. Second, each FCM must also update its Form 7-R to ensure the CCO

Contact Information section is complete. These forms must be completed prior to the March 29 deadline and must be completed using the NFA's Online Registration System.

Finally, all FCMs must file annual reports produced by each respective FCM's CCO with the CFTC (Annual Report), as required by CFTC Regulation 3.3(e). The CCO's Annual Report must cover the entire fiscal year and must be filed through the Winjammer™ system. FCMs that were (i) registered with the CFTC as of June 4, 2012 and (ii) regulated by a prudential regulator or registered with the SEC were required to have CCOs by October 1, 2012, and to file such Annual Reports within 90 days after their fiscal year ends. However, the CFTC granted time-limited no-action relief to such FCMs that submit Annual Reports for the fiscal year that ends on or before March 31, 2013 and that fails to satisfy the requirements of CFTC Regulation 3.3(e) and (f). This no-action relief limits the substantive scope of the Annual Report. To qualify for such no-action relief, the Annual Report must, among other things, still cover the entire fiscal year of its FCM, but may limit the CEO and/or CCO certification to the period from October 1, 2012 through the FCM's fiscal year end. The Annual Report must also include a review of policies and procedures reasonably designed to ensure compliance with certain customer protection rules set forth in the no-action letter.

All other FCMs registered with the CFTC, but not regulated by a prudential regulator or registered with the SEC (i.e., FCMs subject to the March 29, 2013 deadline), must file their respective Annual Reports within 90 days after such FCM's fiscal year end. Such FCMs are not required to submit Annual Reports for any fiscal year ending on or before March 29, 2013. The CFTC has not granted no-action relief to such FCMs.

For more information, click here. The CFTC's no-action letter can be found here.

CFTC Reminds Market Participants of Swap Data Reporting Requirements

The Commodity Futures Trading Commission's Division of Market Oversight issued an advisory to remind market participants that pursuant to Parts 43 and 45 of the CFTC's regulations, swap dealers were required to begin reporting data to a swap data repository (SDR) pertaining to equity, foreign exchange and other commodity swaps on February 28. The advisory further reminds market participants that under Part 46 of the CFTC's regulations, swap dealers must also report data regarding swaps entered into prior to the compliance date for Part 45 reporting. Part 46 compliance with respect to equity, foreign exchange and other commodity swaps is required by March 30, 2013. February 28 also marked the beginning of major swap participants' requirement to report data pertaining to swaps of all asset classes. All other swap counterparties (i.e., entities that are not swap dealers or major swap participants) must be in compliance with the swap data reporting rules for all asset classes by April 10, 2013. All swap data reported is accessible electronically by the public through each SDR's website.

The CFTC's advisory can be found here. For more information, click here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Risk Alert Identifies Common Adviser Custody Rule Deficiencies

On March 14, the Office of Compliance Inspections and Examinations of the Securities and Exchange Commission released a National Exam Program Risk Alert (Risk Alert). The Risk Alert discussed common deficiencies in respect of Rule 206(4)-2 under the Investment Advisers Act of 1940 (Custody Rule) that were reported by SEC staff in conducting investment adviser examinations.

In the Risk Alert, the SEC identified four primary categories of deficiencies:

- Failure by an adviser to recognize situations in which it has custody under the Custody Rule;
- Failure to meet the Custody Rule's surprise examination requirements;
- Failure to satisfy certain "qualified custodian" requirements under the Custody Rule; and
- Failure to properly engage independent auditors or otherwise comply with the requirements for audits of pooled investment vehicles under the Custody Rule.

For additional details regarding the nature of the deficiencies commonly identified and SEC guidance on compliance with the Custody Rule, the Risk Alert may be found here.

LITIGATION

Texas District Court Addresses Misappropriation Theory of Insider Trading

The US District Court for the Northern District of Texas recently denied a defendant's motion for summary judgment in a Securities and Exchange Commission civil enforcement action under the "misappropriation" theory of insider trading, finding that an implicit agreement may be sufficient to establish liability.

The SEC alleged that Defendant Mark Cuban (Cuban) violated federal securities laws by selling shares of stock in Mamma.com after learning material, nonpublic information concerning a planned private investment in a public equity (PIPE) offering by Mamma.com. The SEC alleged that Cuban agreed to maintain the confidentiality of the material, nonpublic information concerning the PIPE, and not to trade on the information, but then sold his stock. The SEC contended that these allegations were sufficient to establish Cuban's liability under the "misappropriation" theory of insider trading.

Cuban moved for summary judgment, arguing that under the misappropriation theory the SEC was required to prove that there had been "a valid offer and acceptance plus a meeting of the minds [between Mamma.com and Cuban] supported by consideration," which are required to show a traditional contract. The court rejected that argument, ruling that the SEC needed only to establish that Cuban implicitly agreed to maintain the confidentiality of Mamma.com's material, non-public information and not trade on it. The court found that the SEC had raised a triable issue of fact as to whether Cuban implicitly agreed to maintain the confidentiality of the material, nonpublic information and to not sell the company stock, including a conversation between Cuban and a Mamma.com executive where the executive characterized the information as "confidential" and Cuban reacted angrily to news of the PIPE. In light of this and other evidence, the court denied Cuban's motion.

SEC v. Cuban, Civil Action No. 3:08–CV–2050–D (SAF) (N.D. Tex. March 5, 2013).

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