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SEC/CORPORATE

SEC Amends Dormant Filing Fee Account Procedures

On May 13, the Securities and Exchange Commission amended its procedures for holding funds in a filing fee account. Under current rules, after 180 days from the last filing fee deposit, withdrawal or other adjustment, funds in an SEC filing fee account are automatically returned to the account holder. The SEC has now amended rule 3a of its Informal and Other Procedures under the Securities Act of 1933 to extend this holding period to three years. After three years of inactivity the Commission will return funds to the account holder automatically, although the account holder may always request a refund of fees at any time. The SEC explained that extending the duration of the 180-day limitation would create greater efficiencies and less administrative burdens for both account holders and the SEC. It pointed out particularly that this amended account-clearing procedure will harmonize with Securities Act Rule 415(a)(5), which permits eligible issuers to conduct primary shelf offerings on an effective registration statement for a period of three years. The three-year account clearing procedure will allow such issuers, and in particular issuers permitted to file automatic shelf registration statements, to coordinate deposits of filing fees with the life of the registration statement. The SEC noted that any additional deposits or withdrawal requests during the three-year period will extend the time period for an additional three years.

Since the SEC has determined that this amendment to its rules relates solely to the agency's procedures, the Administrative Procedure Act notice requirement for proposed rulemaking and public comment period are not applicable. Hence, the amendment to the fee account rule was effective immediately upon publication.

Read more.

SEC Schedules Open Meeting to Consider Whistleblower Incentive Rules and "Bad Boy" Disqualification Rules

On May 25, the Securities and Exchange Commission will hold an open meeting to discuss whether to adopt rules and forms to implement the whistleblower provisions added to Section 21F of the Securities Exchange Act of 1934 by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under rules proposed on November 3, 2010, the SEC will pay an award or awards to one or more whistleblowers who voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million. The proposed rules define certain terms critical to the operation of the whistleblower program, outline the procedures for applying for awards and the SEC's procedures for making decisions on claims, and generally explain the scope of the whistleblower program to the public and to potential whistleblowers. Of interest will be the SEC's response to critics who have argued that the SEC's proposed rules will thwart the effectiveness of corporate compliance programs.

The SEC will also consider whether to propose amendments to Rule 506 of Regulation D, promulgated under the Securities Act of 1933, as necessary to implement Section 926 of the Dodd-Frank Act, which would disqualify securities 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.

Click here for the SEC's Sunshine Act Notice.

BROKER DEALER

FINRA Launches Disciplinary Actions Database

On May 16, the Financial Industry Regulatory Authority announced the launch of the FINRA Disciplinary Actions Online database, a web-based searchable system that makes disciplinary documents accessible to the public. The database enables users to search FINRA actions free of charge by case number, document text, document type, action date (by date range), a combination of document text and action date, individual name and Central Registration Depository (CRD) number, or firm name and CRD number. The documents can be viewed online, printed, or downloaded as text-searchable PDF files. The disciplinary action documents made available include Letters of Acceptance, Waivers and Consent, settlements, National Adjudicatory Council decisions, Office of Hearing Officers decisions and complaints. BrokerCheck reports will now link to disciplinary actions housed in the database. In addition, starting on June 15, FINRA Monthly Disciplinary Actions will link each write-up to its corresponding action in the database.

The database is available here.
Click here to read the FINRA release.

SEC Approves Proposed Rule Changes to FINRA Rule 5131

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposed rule changes to Rule 5131 that delete paragraph (b)(1) and delay the implementation date of paragraphs (b) and (d)(4) until September 26. Removal of paragraph (b)(1) of Rule 5131, which would have required members to establish, maintain and enforce policies and procedures reasonably designed to ensure that "investment banking personnel" have no involvement or influence (directly or indirectly) in the members' new issue allocation decisions, simplifies the spinning prohibitions on FINRA members and eliminates potential constraints on certain necessary functions traditionally performed by syndicate personnel. Postponing the implementation date will enable FINRA members to develop a reliable identification process for new issues allocations and to modify existent order handling systems to prevent the acceptance of market orders in new issue shares, thereby promoting effective compliance with Rule 5131 in the future.

Click here to read the SEC's release.
Click here to read a summary of FINRA's proposed changes to Rule 5131 in the May 6 edition of *Corporate and Financial Weekly Digest*.

SEC Approves Customer Order Protection Rule

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposal to adopt a new rule governing customer order protection. FINRA Rule 5320 applies to customer market and limit orders in securities that meet the definition of "OTC Equity Security" as defined in FINRA Rule 6420, as well as securities that meet the definition of "NMS stock" as defined in Rule 600 of SEC Regulation NMS. With respect to marketable and non-marketable customer limit orders, FINRA Rule 5320 includes minimum price improvement amounts that are necessary for a member firm to execute an order on a proprietary basis when holding an unexecuted limit order in that same security, and not be required to execute the held limit order (unless an exception applies). The rule's Supplementary Material provides several exceptions, including for large orders and orders from institutional accounts; a "no-knowledge" exception; and an exception for trades made to offset a customer odd-lot order or to correct a *bona fide* error.

FINRA Rule 5320 goes into effect on September 12 and applies to a customer order at all times that the order is executable by the firm. Therefore, if a customer and firm agree to process the customer's order outside normal market hours, the protections of FINRA Rule 5320 will apply to that customer's order outside normal market hours.

Click here to read FINRA Regulatory Notice 11-24.

SEC Approves Rule Governing Fidelity Bonds

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposal to adopt a rule governing fidelity bonds. FINRA Rule 4360 is based on NASD Rule 3020 and takes into account certain requirements under New York Stock Exchange Rule 319 and its Interpretation. The rule requires each firm required to join the Securities Investor Protection Corporation (SIPC) to maintain blanket fidelity bond coverage with specified amounts of coverage based on the firm's net capital requirement, with certain exceptions. Such firms must maintain fidelity bond coverage that provides for per loss coverage without an aggregate limit of liability. Firms that do not qualify for a fidelity bond with per loss coverage and no aggregate limit of liability must maintain substantially similar bond coverage in compliance with all of the rule's other provisions, provided that the firms maintain written correspondence from two insurance providers stating that the firms do not qualify for such coverage. FINRA Rule 4360 also addresses minimum required coverage, deductible provision, annual review of coverage, and exemptions. FINRA Rule 4360 takes effect on January 1, 2012. Firms subject to the rule must have a fidelity bond in place as of January 1, 2012, that meets all of the rule's requirements.

Click here to read FINRA Regulatory Notice 11-21.

SEC Approves Amendments to Transaction Reporting and Trading Activity Fee Rules Related to Asset-Backed Securities Transaction Reporting

The Securities and Exchange Commission has approved proposed amendments to transaction reporting and notification requirements in the Financial Industry Regulatory Authority Rule 6700 Series and reporting fees in FINRA Rule 7730, which relate primarily to Asset-Backed Securities, and the method of calculating the Trading Activity Fee (TAF) for such securities in Schedule A of the FINRA By-Laws. FINRA's Trade Reporting and Compliance Engine (TRACE) rules provide for the reporting of transactions in TRACE-Eligible Securities to TRACE, and the dissemination of transaction information, with some exceptions. FINRA Rule 7730 sets forth TRACE reporting and data fees. The TAF is a regulatory fee FINRA uses to fund its member regulation activities, including examinations, financial monitoring, and policymaking, rulemaking and enforcement activities. The effective date of the approved amendments is May 16.

Click here to read FINRA Regulatory Notice 11-20.

PRIVATE INVESTMENT FUNDS

Please see "SEC Approves Proposed Rule Changes to FINRA Rule 5131" in **Broker Dealer** above and "SEC Chairman Acknowledges Extension of Investment Adviser Registration Deadlines" in **Investment Companies and Investment Advisers** below.

CFTC

CFTC Adopts Exemptions for Commodity ETFs

The Commodity Futures Trading Commission has adopted amendments to CFTC Rules 4.12 and 4.13 to provide relief from certain disclosure, reporting and recordkeeping requirements for commodity pool operators (CPOs), as well as relief from registration requirements for certain independent directors and trustees, of pools with units of participation that are publicly offered and traded on a national securities exchange (Commodity ETFs). The final rules are substantially similar to the rules that were proposed by the CFTC in September 2010.

The CFTC also has issued an order authorizing the National Futures Association to process claims of exemption under the newly adopted rules.

The rules will take effect on June 17.

The CFTC rules can be found here.
The CFTC order can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Chairman Acknowledges Extension of Investment Adviser Registration Deadlines

Section 403 of the Dodd-Frank Wall Street Reform and Consumer Protection Act repeals, as of July 21, the private adviser exemption in Section 203(b)(3) of the Investment Advisers Act of 1940 and will require advisers relying on that exemption (including advisers to many hedge funds and other private funds) to register with the Securities and Exchange Commission.

On April 8, in a letter from SEC Division of Investment Management Associate Director Robert Plaze to the North American Securities Administrators Association, Inc., Mr. Plaze noted that "given the time needed for advisers to register and come fully into compliance with the obligations applicable to them once they are registered, we expect that the Commission will consider extending the date by which these advisers must register and come into compliance with the obligations of a registered adviser until the first quarter of 2012."

On May 12, in testimony by SEC Chairman Mary Schapiro before the U.S. Senate Committee on Banking, Housing and Urban Affairs, when discussing the impending private fund adviser registration requirement, Chairman Schapiro noted that "Under Title IV of the Dodd-Frank Act, hedge fund advisers and private equity fund advisers will be required to register with the Commission, *which is expected to occur in the first quarter of 2012*" (emphasis added).

While it is important to note that no official extension has yet been announced, the foregoing SEC letters and testimony, as well as other reported informal discussions between the SEC and industry groups, indicate that the private fund adviser registration deadline is expected to be extended, most likely to the first quarter of 2012.

For a copy of the SEC letter to NASAA, see here.
For a copy of the April 14 Katten *Client Advisory* discussing the SEC letter, see here.
For a copy of Chairman Schapiro's testimony, see here.

Please see "SEC Approves Proposed Rule Changes to FINRA Rule 5131" in **Broker Dealer** above.

LITIGATION

Supreme Court Rules That Whistleblowers Cannot Rely on FOIA Requests in FCA Cases

On May 16, the U.S. Supreme Court ruled that claims brought by private plaintiffs under the federal False Claims Act (FCA) could not be based on information received from Freedom of Information Act (FOIA) requests. In a 5-3 decision that reversed the U.S. Court of Appeals for the Second Circuit, the Supreme Court found that FOIA requests qualify as "reports" that trigger the public disclosure bar for *qui tam* actions under the FCA.

Respondent, U.S. Army veteran Daniel Kirk, filed suit against his former employer Schindler Elevator Corp., alleging that Schindler failed to meet its obligations as a government contractor. Specifically, Mr. Kirk alleged that Schindler did not comply with the reporting provisions of the Vietnam Era Veterans' Readjustment Act of 1972 (VEVRA). To support his allegations, Mr. Kirk used information obtained through FOIA requests for the company's VEVRA reports. Mr. Kirk contended that Schindler had submitted hundreds of false claims for payments under its government contracts.

Schindler argued that because these FOIA responses were administrative reports, the public disclosure bar, which generally precludes FCA claims based on public disclosure of allegations or transactions in a government report, hearing, audit or investigation, precluded Mr. Kirk's lawsuit. The district court dismissed the action, but the Second Circuit reversed, holding that an agency's response to a FOIA request is neither a "report" nor an "investigation" under the public disclosure bar.

The Supreme Court held that a federal agency's written response to a FOIA request for records constituted a report within the meaning of the FCA's public disclosure bar. Deciding that "report" in this context carried its ordinary meaning, and using several dictionary definitions, the Court ruled that a "report" is "something that gives

information," a "notification," or "[a]n official or formal statement of facts or proceedings," and reversed the Second Circuit. (*Schindler Elevator Corp. v. The United States ex rel Kirk*, 2011 WL 1832825, No. 10-188 (May 16, 2011))

SEC Requires $5.4 Million Payment in First-Ever Deferred Prosecution Agreement

The Securities and Exchange Commission entered into a Deferred Prosecution Agreement (DPA) with Tenaris S.A. in the SEC's first-ever use of such agreement to facilitate and reward cooperation with the SEC. When Tenaris, a global manufacturer of steel pipe products, conducted a worldwide internal review of its operations and controls, it discovered that its personnel in Uzbekistan violated the Foreign Corrupt Practices Act (FCPA) by bribing Uzbekistani government officials to secure an advantage during a bidding process to supply pipelines for transporting natural gas. Tenaris informed the SEC of the violation. The SEC alleged that Tenaris made almost $5 million in profits when it was awarded several contracts as a result of the alleged bribery.

The SEC and Tenaris entered into a DPA, a new approach designed to encourage companies to provide information about misconduct and assist with an SEC investigation. Under the terms of the DPA, Tenaris is required to pay $5.4 million in disgorgement and prejudgment interest, and the SEC will refrain from prosecuting the company in a civil action as long as Tenaris continues to comply with certain undertakings. Tenaris further agreed to cooperate with the SEC, the Justice Department and any other law enforcement agency, and pay a $3.5 million criminal penalty in a Non-Prosecution Agreement announced by the Justice Department.

Read more.

BANKING

Federal Reserve Proposes Changes to Regulation E

On May 12, the Board of Governors of the Federal Reserve System published for comment changes to Regulation E, which implements the Electronic Fund Transfer Act. The proposal contains new protections for consumers who send remittance transfers to consumers or entities in a foreign country.

The proposed changes were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires that consumers get certain disclosures in connection with remittances to foreign countries, including information about fees, the applicable exchange rate, and the amount of currency to be received by the recipient. The Dodd-Frank Act also requires that senders of remittance transfers have certain error resolution rights.

Comments are due 60 days after publication in the *Federal Register*.

For more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Supreme Court Rules Summary Plan Descriptions Are Not "Terms" Under ERISA

On May 16, the U.S. Supreme Court issued its long-awaited opinion in the case of *Cigna Corp. v. Amara*. This decision will have a substantial impact on plan sponsors, both with respect to how a sponsor is to design its plan and disclose terms in its summary plan description, as well as what relief may be available for plan participants and beneficiaries for plan violations.

The Supreme Court determined that summary plan descriptions (SPDs), although important, are not plan "terms" under the Employee Retirement Income Security Act (ERISA). Citing a concern over whether SPDs could become overly complex, the Court decided that SPDs "provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan for purposes of Section 502(a)(1)(B) [of ERISA]."

Next, the Supreme Court decided that although ERISA may provide a remedy for plan participants based on mistakes in an SPD under Section 502(a)(3) of ERISA, the participants must show, by a preponderance of the

evidence, that they were actually harmed, potentially limiting the ability to bring large class action claims against a plan sponsor.

Tempering these two findings, the Supreme Court also determined that equitable relief is available to participants of a plan under Section 502(a)(3) of ERISA. In its discussion of what constitutes equitable relief under an ERISA plan, the Court considered numerous possible remedies, including some remedies that traditionally have not been discussed before such as monetary relief. However, the Supreme Court ultimately left the decision on the type of relief to be granted up to the district court to decide on remand.

The concurring opinion by two justices stated that the question of whether relief under Section 502(a)(3) was available went too far.

Although it will be difficult to determine the exact extent of the case until the district court makes its findings on remand, the *Cigna* case is beneficial to plan sponsors with respect to defining the terms of a plan and with respect to raising the burden plaintiffs must show to establish harm. (*Cigna Corp. v. Amara*, U.S., No. 09-804, 5/16/11)

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