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Corporate and Financial Weekly Digest

MAY 7, 2010

BROKER DEALER

FINRA to Assume Responsibility for Regulating NYSE Euronext Markets

NYSE Euronext and the Financial Industry Regulatory Authority recently announced an agreement under which FINRA will assume responsibility for performing market surveillance and enforcement functions for the New York Stock Exchange, NYSE Arca and NYSE Amex. FINRA already provides these types of regulatory services for NASDAQ Stock Market, NASDAQ Options Market, NASDAQ OMX Philadelphia, NASDAQ OMX Boston, The BATS Exchange and The International Securities Exchange. The announcement states that the effective date for the arrangement is expected to be at or prior to the end of June, subject to approval by the Securities and Exchange Commission.

The functions FINRA is assuming are currently performed by NYSE Regulation, and many current NYSE Regulation staff will be transferred to FINRA. NYSE Regulation will retain staff associated with rule interpretations and oversight of listed issuers' compliance with financial and corporate governance standards.

Read more.

LITIGATION

Second Circuit Affirms No Duty to Disclose Merger Negotiations

The U.S. Court of Appeals for the Second Circuit held that a company has no duty to disclose merger negotiations to its shareholders and that omitting any reference to such merger discussions in public filings or statements is not misleading.

Class action plaintiffs brought claims pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act, alleging that corporate defendant Bioenvision, Inc., made materially misleading filings and public statements by virtue of its failure to disclose ongoing merger negotiations with non-party Genzyme Corporation.

In affirming the district court's dismissal of plaintiff's claims, the Second Circuit first noted that "it is by now axiomatic that a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." It held that no express duty exists to disclose merger negotiations, as opposed to a definitive merger agreement. Because Bioenvision merely omitted disclosure of the merger discussions, as opposed to making an affirmative (factually incorrect) statement, the Second Circuit upheld dismissal of plaintiffs' claims. (*Thesling v. Bioenvision, Inc.,* 2010 WL 1337699 (2d Cir. Apr. 7, 2010))

Third Party May Not Compel Signatories to an Arbitration Agreement

The U.S. Court of Appeals for the Second Circuit reversed a district court's grant of individual co-defendants' motion to dismiss and to compel arbitration between plaintiff and entity co-defendant, on the grounds that the movants (1) were non-signatories to the Fulfillment Agreement between plaintiff and entity co-defendant which contained the arbitration provision they were attempting to enforce, and (2) had explicitly disclaimed any right to participate in the arbitration they were seeking to compel.

The action involved claims for breach of contract and breach of guaranty arising from a Fulfillment Agreement and guaranties between plaintiff Baker & Taylor, Inc. and Alphacraze.com, an online retailer. Plaintiffs alleged that Alphacraze became delinquent in its payments under the Fulfillment Agreement, and that, pursuant to the terms of that agreement and related guaranties, the full amount of the delinquent payments was due and owing from defendants. The individual defendants moved to dismiss plaintiffs' complaint, arguing, among other things, that while they were not parties to the Fulfillment Agreement, the agreement nonetheless required Baker to arbitrate its claims against Alphacraze, and that the claims against the individual defendants should be dismissed or stayed in favor of that arbitration. The district court granted the individual defendants' motion and dismissed the claims against them.

In reversing the district court's decision and reinstating the claims against the individual defendants, the Second Circuit held that because the individual defendants—all non-signatories to the Fulfillment Agreement—had disclaimed any right to arbitration under the Fulfillment Agreement, they could not compel signatories Baker and Alphacraze to arbitrate claims pursuant to that agreement. (*Baker & Taylor, Inc. v. Alphacraze.com Corp,* 2010 WL 1688465 (2d Cir. Apr. 28, 2010))

BANKING

Banking Agencies Issue Final Guidance on Correspondent Concentration Risks

On April 30, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision released final guidance to address the risks associated with funding and credit concentrations arising from correspondent relationships (the Guidance). A "correspondent relationship" is defined in the Guidance as one where a financial organization provides another financial organization with services related to deposits, lending and other banking activities.

The Guidance clarifies that financial institutions should consider taking actions beyond the minimum requirements established in the Federal Reserve's Regulation F, *Limitations on Interbank Liabilities*, to identify, monitor and manage correspondent concentration risks in a safe and sound manner, especially when there are rapid changes in market conditions or in a correspondent's financial condition. The Guidance also clarifies that each financial institution should establish appropriate internal parameters (such as information, ratios, trends or other factors) commensurate with the nature, size and risk characteristics of their correspondent concentrations.

While the Guidance is not binding as a matter of law, institutions that do not incorporate it into their policies and procedures may find themselves subject to supervisory criticism.

For more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Health Plans' Coverage of Adult Children Is Tax-Free

The newly enacted Patient Protection and Affordable Care Act mandates employer-sponsored health plans to allow coverage of eligible employees' children until the end of the year in which the children reach age 26 (Adult Children). The Department of Health and Human Services is expected to issue guidance that further explains who qualifies as an Adult Child, but we anticipate a broad definition.

Tax Guidance

To address the questions about the tax ramifications of extending coverage to children who for tax purposes are not otherwise considered dependents of the employee, the IRS issued Notice 2010-38, which provides the following guidance:

- Health plan coverage of an Adult Child will be tax-free to the employee and the child. Neither the benefits provided nor the value of the coverage will be subject to income tax or employment taxes, such as Federal Insurance Contributions Act taxes and unemployment. The benefit is tax-free even if the child is married, lives independently from the employee, has separate employment or is eligible for other group health plan coverage.
- The value of the coverage provided through a parent's employer-sponsored plan to the spouse of an Adult Child is taxable to the employee-parent.
- Cafeteria plans and premium-only plans may allow employees to pay an Adult Child's share of any health plan premium or contribution using pre-tax dollars.
- For purposes of health reimbursement arrangements, flexible spending accounts and voluntary employee benefits associations, Adult Children are eligible dependents.

Effective Date

Under the Act, employer-sponsored plans are either grandfathered (generally, plans in existence as of March 23, 2010) or not grandfathered (generally, plans that are new after March 23, 2010). For plan years beginning on or after September 23, 2010, non-grandfathered plans must offer coverage to all Adult Children, while grandfathered plans must offer coverage only to Adult Children who are not eligible to participate in another employer-sponsored health plan. For plan years beginning on and after January 1, 2014, grandfathered plans must expand the availability of coverage to all Adult Children. Even though coverage of Adult Children is not yet mandated, the Notice allows employers to voluntarily offer such benefits before the required date, and the tax-free benefits described above may apply on and after March 30, 2010.

Employer Action

Employers electing to voluntarily cover Adult Children may immediately begin allowing employees to pay for their Adult Children's share of the premium with pre-tax dollars. By December 31, 2010, such employers must amend the relevant plans retroactively to the first date employees were able to elect such coverage through the plan, but no earlier than March 30, 2010.

The Notice can be found here.

UK DEVELOPMENTS

FSA Fines Firm and MLRO for Anti-Money Laundering Failings

On May 5, the UK Financial Services Authority (FSA) announced that it had fined Alpari (UK) Ltd., an online foreign exchange firm, £140,000 (approximately $210,000) for failing to have adequate anti-money laundering systems and controls. Its former money laundering reporting officer (MLRO), Sudipto Chattopadhyay, was fined £14,000 (approximately $21,000).

Between September 2006 and November 2008, Alpari failed to carry out the risk assessments of the money laundering and financial crime risks required under FSA rules. Alpari's failures included:

- failing to carry out satisfactory customer due diligence procedures at the account opening stage and inadequate monitoring of accounts—these were regarded as particularly serious, as Alpari's customer base included those from higher-risk jurisdictions and its customer relationships did not operate on a face-to-face basis;
- failing to have in place adequate systems for screening customers against UK and global sanctions lists and for determining whether customers were politically exposed persons; and
- failing to expand its compliance and anti-money laundering function in line with an increase in its customer base from 400 to 11,500 live accounts.

As Alpari's MLRO during this period, with responsibility for compliance oversight and money laundering reporting, Mr. Chattopadhyay was accountable for these breaches and was therefore also fined. He also gave an undertaking to the FSA that he will not, for three years, apply to be permitted to hold a compliance oversight or MLRO role.

Both Alpari and Mr. Chattopadhyay received a 30% discount applied to their fine for cooperating fully with the FSA investigation and agreeing to settle at an early stage. The FSA also took into account the fact that Alpari and Chattopadhyay had put in place a remedial action plan to address the failings.

Margaret Cole, the FSA's Director of Enforcement, said: "The FSA expects firms to assess the financial crime risks to which they are exposed properly. The FSA also expects expanding businesses to commit sufficient resource to their compliance and anti-money laundering functions. Alpari failed to operate and maintain adequate money laundering systems and controls, leaving it open to the risk of financial crime."

To read more, click here.

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