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BROKER DEALER

SEC Approves Rule Establishing NASDAQ Data Distribution Model

The Securities and Exchange Commission has approved the NASDAQ Stock Market LLC's proposed rule change creating a new data distribution model (or Managed Data Solution) to further the distribution of NASDAQ TotalView, NASDAQ OpenView and/or NASDAQ Level 2 Information (collectively, NASDAQ Depth Information). The new Managed Data Solution is intended to offer a new delivery method to firms seeking simplified market data administration and may be offered by distributors to clients and/or client organizations that are using NASDAQ Depth Information internally. According to the SEC release, the new pricing and administrative option is in response to industry demand, as well as due to changes in the technology used to distribute market data.

Click here to read SEC Release 34-63276.

FINRA Proposes Changes to Handling of Stop Orders

The Financial Industry Regulatory Authority is proposing a rule change regarding the handling of stop orders. FINRA is proposing to delete FINRA Rule 6140(h), which would then permit members to determine whether the trigger of a stop order should be based on transactions or quotations in the subject security at the stop price. FINRA also is proposing to delete FINRA Rule 6140(i), which defines the terms "stop stock price" and "stop stock transaction," and, in an effort to reduce confusion for members, to relocate the definition of "initial public offering" from FINRA Rule 6220 to FINRA Rule 6130.

Click here to read SEC Release 34-63256.

FINRA Delays Effective Date of Changes to Trade Reporting and OATS Rules

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposal to delay the effective date of the changes to FINRA trade reporting and Order Audit Trail System rules approved by the SEC on October 4. The new effective date for the rules will be February 28, 2011, which also is the new compliance date for the amendments to SEC Regulation SHO approved on February 26.

Click here to read SEC Release 34-63277.

CFTC

Futures Industry Association Releases Recommended Risk Controls for Trading Firms

The Futures Industry Association's Principal Traders Group has released a report setting out a number of recommended risk controls for trading firms that have direct access to exchange matching engines.

The report expands on a previous set of recommendations published in April 2010 and includes recommendations for risk controls applicable to trading operations and electronic trading systems. The recommendations cover such issues as access and oversight, pre-trade risk management, trading interruptions, post-execution and back office functions, physical security, electronic security and business continuity.

The FIA report can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

FINRA Recommends Establishing Investment Adviser SRO

Section 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act directs the Securities and Exchange Commission to study the extent to which designating one or more self-regulatory organizations (SROs) to augment its efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers. In a November 2 comment letter to the SEC regarding its study, Richard Ketchum, Chairman and CEO of the Financial Industry Regulatory Authority, advocated establishing one or more investment adviser SROs. Chairman Ketchum wrote that the main problem with the oversight of investment advisers is the lack of examination resources. He pointed out that the SEC, despite its best efforts, is unlikely to successfully oversee investment advisers because of funding limits. He further added that cooperating with one or more SROs in the oversight process would help increase the frequency of examinations and resources devoted to enforcement, and suggested that FINRA would be ready and willing to assist the SEC. If FINRA were to seek authorization as an investment adviser SRO, it would create a separate affiliate, with its own Board of Governors, to ensure that the SRO establishes programs appropriate to the adviser industry.

In separate prior comment letters to the SEC, the Managed Funds Association, the Investment Adviser Association and the Investment Company Institute have each argued against establishing an investment adviser SRO.

To read FINRA's letter click here.
To read the MFA's letter click here.
To read the IAA's letter click here.
To read the ICI's letter click here.

LITIGATION

Seventh Circuit Vacates Internet Marketer's Lost Profits Award

The U.S. Court of Appeals for the Seventh Circuit vacated a $5.6 million breach of contract damages award for lost profits because the plaintiff did not establish the prospective earnings of its Internet-based marketing venture with sufficient certainty.

Publications International Ltd. operates an auto guide and a related website that provide price quotes to consumers considering potential automobile purchases. The company originally derived revenue from selling sales leads generated by its website to wholesalers, who in turn sold those leads to individual automobile dealerships. Publications International then decided to sell its sales leads directly to dealerships, and it retained Smart Marketing Corp. to develop and market the direct-sales program. But technical glitches and disappointing sales hampered the project, and after five months Publications International terminated the Smart Marketing agreement. Smart Marketing sued Publications International for breach of contract and obtained a jury award of $5.6 million for lost profits.

Publications International appealed the damages award, arguing that the amount was speculative because the direct-sales program was an unestablished venture and because Smart Marketing had lost money during its brief time in operation. Smart Marketing contended that the relevant market was sufficiently developed, as Publications International had previously sold the same leads through wholesalers, and that its losses were attributable to start-up costs. The Seventh Circuit ruled that prior sales of Internet-generated leads through wholesalers did not demonstrate that the direct-sales program was feasible and that Smart Marketing had failed to establish how successful the venture would have been. The case was remanded for retrial on damages. (*Smart Marketing Group Inc. v. Publications Intern. Ltd.,* 2010 WL 4237443 (7th Cir. Oct. 28, 2010))

Eleventh Circuit Rejects Developer's Tortious Interference Claim Against Zoning Officer

The U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a real estate developer's tortious interference claim against a zoning officer who "re-reviewed" and rejected the developer's project applications.

Developer Forum Architects LLC, and its partner Isaac Walton Investors, LLC, submitted six project applications to a zoning officer of Yankeetown, Fla. That zoning officer sent a letter to town officials indicating that the applications were in order but did not submit formal certificates of approval. After the first zoning officer resigned, a second Yankeetown zoning officer reviewed the applications and rejected five of them. Forum Architects sued the second officer for tortious interference, alleging that the officer was biased against commercial development and was not authorized to "re-review" the previously approved plans. The district court granted the zoning officer's summary judgment motion, and Forum Architects appealed.

Forum Architects argued that its allegations raised triable issues of fact regarding the zoning officer's alleged bias and intentional interference with the firm's construction contracts. The Eleventh Circuit disagreed, holding that the zoning officer was entitled to review any unapproved development applications and that the absence of formal certificates of approval warranted dismissal of the developer's claim. (*Forum Architects LLC v. Jetton,* 2010 WL 4358386 (11th Cir. Nov. 4, 2010))

BANKING

FDIC Approves Final Rule Fully Insuring Noninterest-Bearing Accounts

On November 9, the Federal Deposit Insurance Corporation approved a final rule to implement Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 343 provides temporary unlimited coverage for noninterest-bearing transaction accounts. This separate coverage will become effective on December 31, 2010, and will end on December 31, 2012. All funds held in such accounts are fully insured, without limit, and this coverage is separate from, and in addition to, the coverage provided to depositors for other accounts at an insured depository institution.

Noninterest-bearing accounts, as defined in Dodd-Frank, include only traditional, noninterest-bearing demand deposit (or checking) accounts that allow for an unlimited number of transfers and withdrawals at any time, whether held by a business, individual or other type of depositor. The final rule expressly states that Negotiable Order of Withdrawal (NOW) and Interest On Lawyers Trust Accounts (IOLTAs) are not covered under the Dodd-Frank definition of noninterest-bearing transaction accounts and do not qualify for temporary unlimited coverage. Insured institutions must post a notice in the main office, in every branch and on the bank's website, and must further mail notice to all holders of NOW and IOLTA accounts no later than December 31.

Read more.

FDIC Board Proposes Implementation of Dodd-Frank Assessment Changes and Revised Assessment System for Large Institutions

On November 9, the Federal Deposit Insurance Corporation approved two proposed rules that would amend the deposit insurance assessment regulations. The first would implement a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act that changes the assessment base from one based on domestic deposits (as it has been since 1935) to one based on assets. The second proposal would re-propose changes for the deposit insurance assessment system for large institutions ($10 billion and higher) given Dodd-Frank's changes to the assessment base. This proposal replaces a proposed rule approved by the FDIC Board in April.

In accordance with a provision in Dodd-Frank, the FDIC is proposing to change the assessment base from adjusted domestic deposits to average consolidated total assets minus average tangible equity. Since the new base would be much larger than the current base, the FDIC is also proposing to lower assessment rates, which achieves the FDIC's goal of not significantly altering the total amount of revenue collected from the industry.

The second assessment-related item replaces a proposed rule revising the deposit insurance assessment system for large institutions that was approved by the FDIC on April 13. The proposal approved on November 9 would eliminate risk categories and debt ratings from the assessment calculation for large banks and would instead use scorecards. The scorecards would include financial measures that are predictive of long-term performance.

The proposed rule incorporates a change in the timing of assessments in that it appears to measure when risk is assumed as opposed to when problems develop. Speaking of this forward view of assessment, FDIC Chairman Sheila Bair stated, "Over the long term, institutions that pose higher risk would pay higher assessments when they assume these risks rather than when conditions deteriorate. During the crisis, it became clear that our large bank pricing metrics were lagging indicators of financial deterioration, to a greater extent than the metrics we use for smaller institutions."

Both proposals will have a 45-day comment period upon publication in the *Federal Register*. The FDIC is also proposing that both changes in the assessment system be effective as of April 1, 2011.

Click here to read the first notice of proposed rulemaking.
Click here to read the second notice of proposed rulemaking.

EXECUTIVE COMPENSATION AND ERISA

DOL Proposes Rule Defining "Fiduciaries" of Employee Benefit Plans

The Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor has proposed a rule to define more broadly the term "fiduciary." The proposed rule would amend 29 CFR 2510.3-21(c), which was issued in 1975 following the enactment of the Employee Retirement Income Security Act (ERISA), and defines when a person who renders investment advice becomes a fiduciary under ERISA. The amendment is based on findings that indicate that the 1975 rule's approach to fiduciary status may inappropriately limit its ability to protect plans, participants and beneficiaries in the current marketplace.

The proposed amendment takes account of changes in the expectations of plan officials and participants who receive investment advice, and details added circumstances where providing investment advice is subject to ERISA's fiduciary duties. It also takes account of industry changes, including, among other things, the variety of complex fee practices currently in use and the conflicts of interest that may arise from these practices. If enacted, the amendment could result in an increased number of service providers being classified as fiduciaries of the plans to which they provide services. Classification as a fiduciary could result in higher costs of doing business due to increased exposure to liability.

"We believe that this proposal more closely reflects the statutory language of ERISA and the realities of the current investment marketplace, and therefore will ensure those who provide investment advice are held accountable as fiduciaries under the law," said Phyllis Borzi, Assistant Secretary of Labor for EBSA.

Click here for the DOL release.

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