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SEC/CORPORATE

SEC Publishes Final Rule Removing Rating Agency Exemption from Regulation FD

On September 29, the Securities and Exchange Commission adopted an amendment, effective upon publication in the *Federal Register*, to remove the specific exemption from Regulation FD for issuer disclosures made to nationally recognized statistical rating organizations and credit rating agencies, as required by Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Under Rule 100(b)(2)(iii) of Regulation FD as in effect prior to the SEC's final rule, the issuer or person acting on its behalf need not publicly disclose the material nonpublic information if the disclosure of such information is made to a credit rating agency that makes its credit ratings publicly available, or is made pursuant to Rule 17g-5(a)(3) to a nationally recognized statistical rating organization.

Regulation FD was adopted to address the problem of selective disclosure made to those who would reasonably be expected to trade securities on the basis of the information or provide others with advice about securities trading, by requiring that when an issuer, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons (including brokers, dealers, investment advisers, institutional investment managers, investment companies and certain persons associated with the foregoing and holders of the issuer's securities), the information must also be publicly disclosed.

Following the removal of the Regulation FD exemption for rating agencies, if a rating agency is determined to be one of the enumerated persons covered by Regulation FD, or if a rating agency is deemed to be acting on behalf of the issuer and the rating agency discloses material nonpublic information to one of the enumerated persons covered by Regulation FD, then the obligations of Regulation FD could apply to information disclosed by the issuer to the rating agency, unless the rating agency expressly agrees to maintain the disclosed information in confidence as set forth in Rule 100(b)(2)(ii) of Regulation FD.

Click here for the complete text of the SEC's adopting release.

BROKER DEALER

SEC Approves Amendments to FINRA's Single-Stock Circuit Breakers and Potentially Erroneous Trades Rules

On September 10, the Securities and Exchange Commission approved amendments to Financial Industry Regulatory Authority (FINRA) Rule 6121 (Trading Halts Due to Extraordinary Market Volatility). Rule 6121 was originally adopted on June 10 and instituted an individual stock-trading pause (i.e., a single-stock circuit breaker) pilot program. The amendments expand the trading-pause pilot program to include all stocks in the Russell 1000 Index and certain exchange-traded products.

The SEC also approved amendments to FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities). The amendments seek to provide uniformity in the review process of such potentially erroneous trades. Specifically, the amendments provide for uniform treatment of (1) multi-stock events involving 20 or more securities and (2) transactions that trigger an individual stock trading pause by a primary listing market and subsequent transactions that occur before the trading halt is in effect for over-the-counter trading.

Click here to read FINRA Regulatory Notice 10-43.

CBOE Proposes Rule Changes Regarding Registration and Qualification Requirements

On September 22, the Securities and Exchange Commission released a notice of proposed rule changes submitted by the Chicago Board Options Exchange (CBOE). The CBOE proposes to amend its qualification, registration and continuing education requirements for individual Trading Permit Holders and individual associated persons.

The proposed amendments expand the CBOE's registration and qualification requirements to include additional types of individual Trading Permit Holders and individual associated persons. Under the proposed amendments, the CBOE will require additional Trading Permit Holders and associated persons to submit appropriate application for registration online through the Central Registration Depository system (Web CRD), which is operated by the Financial Industry Regulatory Authority, complete any qualification examinations and submit any required registration and examination fees.

The CBOE rules currently include registration requirements for Financial/Operations Principals for each Trading Permit Holder (TPH) and TPH organization. The proposed amendments will add registration and qualification requirements for individual TPHs and individual associated persons "engaged or to be engaged in the securities business of a Trading Permit Holder or TPH organization."

Under the proposed interpretations to the rules, the CBOE seeks to define what it means to be "engaged in the securities business of a Trading Permit Holder or TPH organization." An individual TPH or an individual associated person shall be considered a person "engaged in the securities business of a Trading Permit Holder or TPH organization" if the individual TPH or individual associated person:

1) conducts proprietary trading, acts as a market-maker, effects transactions on behalf of a broker-dealer account, supervises or monitors proprietary trading, market-making or brokerage activities on behalf of a broker-dealer, supervises or conducts training for those engaged in proprietary trading, market-making or brokerage activities on behalf of a broker-dealer account; or
2) engages in the management of any individual TPH or individual associated person identified in (1) above as an officer, partner or director.

The CBOE's proposed rules also consider various alternatives for qualification examinations for TPHs and associated persons that will be required to register under the proposed rules. The CBOE is considering either requiring such registrants to successfully complete the CBOE's TPH Qualification Examination or developing a new qualification examination.

To read the SEC release, click here.

CFTC

CFTC Seeks Comment Regarding Agricultural Swaps

The Commodity Futures Trading Commission has published an Advanced Notice of Proposed Rulemaking seeking public comment regarding the appropriate regulatory treatment of agricultural swaps.

The Dodd-Frank Wall Street Reform and Consumer Protection Act provides that "swaps" (which are defined to include options) in an "agricultural commodity" (as defined by the CFTC) are prohibited unless entered into pursuant to a rule, regulation or order of the CFTC adopted pursuant to section 4(c) of the Commodity Exchange Act (CEA), the CFTC's general exemptive authority.

The CFTC notes that, under the current regulatory framework, Part 35 of its Regulations permits bilateral over-the-counter agricultural swaps between eligible counterparties subject to certain requirements, while Part 32 of the Regulations separately permits certain counterparties to enter into "agricultural trade options," also subject to certain requirements.

Because Part 35 of the CFTC Regulations was promulgated under the CFTC's exemptive authority under Section 4(c) of the CEA, the swaps exemption under Part 35 continues to be effective pursuant to Section 723(c)(3) of the Dodd-Frank Act. However, Part 32 of the CFTC Regulations, which was promulgated under the CFTC's plenary authority regarding commodity options under Section 4c(b) of the CEA, has been superseded by Dodd-Frank, and the CFTC must therefore promulgate new regulations concerning options on agricultural commodities.

The CFTC is seeking comment on the appropriate conditions, restrictions or protections to be included in any CFTC regulation or order governing the trading of agricultural swaps and agricultural options, as well as information regarding the current market in agricultural swaps and options and the impact of clearing requirements on the current market.

The *Federal Register* release concerning the proposed rulemaking, including the method for submitting comments, can be found here.

LITIGATION

Fifth Circuit Finds That Accurate Reporting of Manipulated Prices Is Not Fraud

The Fifth Circuit found that buyers of natural gas did not commit fraud by reporting artificially low sales prices to an industry index in order to reduce market prices.

Plaintiff Rio Grande Royalty Co., Inc. sold natural gas at prices based on those published in an industry index. Defendants, who sold and bought natural gas but were net buyers, strategically sold gas from 2003 through 2005 at below-market prices and reported these sales to the index to suppress published prices. Rio Grande alleged that the defendants were liable for fraud for reporting their artificially low prices to the industry index. The U.S. District Court for the Southern District of Texas dismissed Rio Grande's fraud claim, and Rio Grande appealed.

Rio Grande argued that the truthful reporting of transactions tainted by market manipulation can amount to fraud and that failure to disclose this misrepresentation constituted a fraudulent omission of material fact. The Fifth Circuit rejected the argument, holding that defendants reported actual data from the transactions and were not obligated to correct their accurate reports. (*Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P.*, 2010 WL 3565192 (5th Cir. Sept. 15, 2010))

Expert Opinion of Lost Profits Deemed Unreliable

A beverage distributor was precluded from presenting an expert's assessment of its purportedly lost profits because the expert's conclusions regarding revenue forgone by the new business were not based on relevant data.

R&R International, Inc., a beverage distributor, accused Manzen, LLC, of breaching the distribution agreement they entered in 2008 and sought $8.1 million in lost profits based on an expert's report. The expert, a former financial advisor with substantial experience in the beverage industry, had gathered information about R&R's potential earnings from industry contacts and estimated certain costs based on market averages. The defendants sought to exclude the expert's report as unreliable.

The U.S. District Court for the Southern District of Florida held that plaintiffs generally can recover profits lost by new businesses pursuant to the "yardstick" test, by which statistics from comparable businesses are used to estimate lost profits to "a reasonable certainty." The district court rejected R&R's expert's opinion, holding that a survey of the expert's contacts, which included results from distributors of alcoholic and non-alcoholic beverages, was not based on sufficiently comparable businesses because R&R distributed only non-alcoholic drinks. The expert's estimation of market costs was similarly unsupported by relevant data. The district court also found that other aspects of the expert's conclusions were unreliable and excluded the expert's assessment of R&R's lost profits. (*R&R Intern., Inc. v. Manzen, LLC*, 2010 WL 3605234 (S.D. Fla. Sept. 12, 2010))

BANKING

FDIC Board Proposes Rules on Temporary Unlimited Deposit Insurance Coverage for Noninterest-Bearing Transaction Accounts

On September 27, the Federal Deposit Insurance Corporation (FDIC) Board of Directors approved the issuance of a proposed rule to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act to provide depositors at all FDIC-insured institutions unlimited deposit insurance coverage on noninterest-bearing transaction accounts beginning December 31, 2010, through December 31, 2012. Under the proposal, the FDIC will create a new, temporary deposit insurance category for noninterest-bearing transaction accounts. These accounts are primarily checking accounts used by businesses for payrolls, accounts payable and other purposes.

Unlike the FDIC's voluntary Transaction Account Guarantee (TAG) Program, which will expire at the end of this year, the Dodd-Frank provision will apply at all FDIC-insured institutions, and it will cover only traditional checking accounts that do not pay interest. The proposed rule emphasizes that, starting January 1, 2011, low-interest consumer checking accounts and Interest on Lawyer Trust Accounts (IOLTAs) (currently protected under the TAG Program) will no longer be eligible for an unlimited guarantee.

The proposed rule requires insured depository institutions to provide notice and disclosure requirements to ensure that depositors are aware of and understand the types of accounts that will be covered by this temporary deposit insurance coverage. To comply with the disclosure and notification requirements, institutions must: post a notice in their main office, each branch and, if applicable, on their website; notify customers currently covered by the FDIC's TAG Program that, beginning January 1, 2011, low-interest checking accounts and IOLTAs no longer will be eligible for unlimited guarantee; and notify customers individually of any action they take that will affect the deposit insurance coverage of funds held in noninterest-bearing transaction accounts.

The FDIC will be accepting comments on the proposed rule through October 15.

Read more.

EXECUTIVE COMPENSATION AND ERISA

Employers Permitted to Allow Conversion of Retirement Plan Accounts to In-Plan Roth Accounts

Employers that sponsor defined contribution retirement plans, such as 401(k), 403(b) plans and governmental 457(b) plans, can now allow certain participants to convert their retirement plan accounts into "Roth" accounts within the plan, through an "in-plan Roth conversion." In-plan Roth conversions are permitted under the Small Business Jobs Act of 2010, which was signed by President Obama on September 27. The chief tax advantage of a Roth account is that, when distributions are made from it, they are entirely tax-free, in the same manner as a Roth IRA.

An in-plan Roth conversion is an in-plan rollover of any or all of a plan participant's account (other than amounts made as Roth contributions to the plan) to a designated Roth account in the plan. The plan must permit Roth contributions and be amended to permit the in-plan Roth conversions. In addition, the participant must be at least age 59½ to make the in-plan Roth conversion. If the plan does not now permit in-service distributions at age 59½, it must be amended to do so, and the amendment can limit such distributions to amounts used in an in-plan Roth conversion.

Prior to this legislation, a participant who was eligible for an in-service distribution could achieve the same result by making a direct transfer to a Roth IRA, but this feature allows the money to stay in the plan, where it can remain invested in the plan's investment options.

A participant who elects an in-plan Roth conversion has taxable income to the same extent as if he or she simply took a distribution from the plan. Participants who elect a Roth conversion during 2010 recognize the income evenly in 2011 and 2012, unless an election is made to recognize it in 2010. After 2010, the participant recognizes taxable income for the year of the in-plan Roth conversion. There is no income limitation above which one cannot make an in-plan Roth conversion, either in 2010 or in subsequent years.

Employers who would like to offer the in-plan Roth conversion feature should begin the process as soon as possible, so that participants who wish to can take advantage of the spreading of income from the conversion over two years. The explanation of these provisions issued by the Joint Committee on Taxation states that it is intended that employers can offer the in-house Roth conversion in 2010, and that the IRS will provide a "remedial amendment period" sufficient for later amendment of plans to reflect these changes.

The Small Business Jobs Act of 2010 can be found here.
The Joint Committee on Taxation explanation of the Small Business Jobs Act of 2010 can be found here.

UK DEVELOPMENTS

FSA Cracks Down on Cash Equities Broker for Paying Kickbacks

On September 27, the UK Financial Services Authority (FSA) published its final notice previously issued to Fabio Massimo De Biase fining him a total of £252,239 (approximately $398,800).

Mr. De Biase's former employers TFS Derivatives Ltd carried out cash equities trades on an execution-only basis for AKO Capital LLP. Mr. De Biase agreed with hedge fund trader Anjam Ahmad to increase the commission rate and split the income received.

As a result, AKO was overcharged by $739,000. The FSA found Mr. De Biase in breach of Principle 1 of the FSA's Statements of Principles and Code of Practice for Approved Persons.

The fine consists of the £198,000 (approximately $313,260) increased income earned by Mr. De Biase and a penalty of £54,239 (approximately $85,800). The initial fine was reduced by 30% to reflect the early settlement.

The final notice issued to Mr. De Biase can be found here.

The final notice issued to Mr. Ahmad can be found here.

AIMA Publishes AIFMD Campaign Update

On September 30, the Alternative Investment Management Association (AIMA) released its latest campaign update, detailing further delays to the progress of the Alternative Investment Fund Managers Directive. The plenary sitting of the European Parliament has been postponed from October 6 to October 19.

The Belgian government, which currently holds the rotating Presidency of the European Council, has drafted a new compromise text. For the controversial third country issue, a dual system of EU passports and private placement regimes is proposed.

France has rejected Belgium's text and produced its own, which rules out passporting. Although the French version is backed by Germany, Italy and Spain, AIMA deemed it "unacceptable."

Currently, neither texts are available to the public. The Belgian text will be submitted at the meeting of the Member State ambassadors on October 6, but without a qualified majority, it will need to be re-drafted. Given the French opposition, AIMA is of the opinion that Belgium will have to enter into negotiations.

Lord Turner Explains Key to Successful Regulatory Reform

On September 30, the UK Financial Services Authority (FSA) published a speech given by its Chairman, Lord Turner, on essential regulatory reforms.

Lord Turner's speech outlined three key proposals:

- Higher capital and liquidity standards, plus more volatility buffers. Lord Turner believes a satisfactory capital requirements directive would be brought under Basel III.
- EU measures to solve the problem of "too big to fail" systemically important financial institutions
- Macroprudential analysis and policy tools to reduce excessive credit growth. Again Lord Turner advised EU-level implementation from the European Systemic Risk Board.

To read the speech in full, click here.

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