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CORPORATE & FINANCIAL
WEEKLY DIGEST

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SEC/CORPORATE

SEC Announces Roundtable on Microcap Securities

On September 19, the Securities and Exchange Commission announced that it will host a public roundtable to discuss the regulatory issues surrounding the execution, clearance and settlement of "microcap securities," low-priced stocks issued by companies with small capitalizations that trade primarily on the OTC Bulletin Board or OTC Quote (previously Pink Sheets). The roundtable will take place on October 17 at the SEC's Washington D.C. headquarters. The topics expected to be discussed include some key regulatory issues such as anti-money laundering monitoring, compliance challenges and potential changes to the regulatory framework. Panelists will include representatives from The Depository Trust Company, broker-dealers and the Financial Industry Regulatory Authority.

The SEC's press release states that the purpose of the roundtable is to "gather ideas and request input," which may lead to regulatory changes affecting the execution, clearance and settlement of low-priced securities.

Click here for the SEC's press release announcing the roundtable.

CFTC

CFTC Provides Temporary Relief from Large Trader Reporting for Physical Commodity Swaps

The Division of Market Oversight (DMO) of the U.S. Commodity Futures Trading Commission has issued a letter providing temporary relief from daily large trader reporting requirements for physical commodity swaps. The reporting requirements, which apply to both cleared and uncleared swaps, were to take effect on September 20.

The DMO letter grants relief to derivatives clearing organizations and clearing members until November 21 for cleared swaps and January 20, 2012 for uncleared swaps. Reliance on this relief is voluntary, and is conditioned upon the provision of month-end open interest data by no later than February 20, 2012. Open interest attributable to uncleared swaps must also be reported separately by the counterparty to such swaps.

The DMO letter may be found here.

BROKER DEALER

FINRA Seeks Public Comment on Proposed Amendments to Rule 5210 Regarding Publication of Indications of Interest

The Financial Industry Regulatory Authority (FINRA) requests comment on proposed amendments to FINRA Rule 5210 to require that member firms receive a customer order in a security before displaying a quotation or indication of interest (IOI) in a way that purports to represent that the quotation or IOI originated with a customer. Similarly, a firm could not continue to display a quotation or IOI as representing a customer order once the customer order was executed or cancelled.

Indications of interest are non-firm expressions of trading interest that contain one or more of the following elements: security name, side, size, capacity and/or price. Firms have the ability to communicate or advertise proprietary or customer trading interest in the form of IOIs to the marketplace through their own systems or several service providers that disseminate the information to subscribers and/or the marketplace. One attribute that is often associated with an IOI is whether the IOI originated with a customer (what is commonly referred to as a "natural" IOI), rather than with the firm.

In May 2009, FINRA published Regulatory Notice 09-28 (the Notice) reminding firms that, to the extent that they disseminate or use services to communicate indications of interest, IOIs must be truthful, accurate and not misleading. The Notice stated that FINRA could view as untruthful, inaccurate or misleading a firm's continuing dissemination of a "natural" IOI to the marketplace when the firm no longer represents any such interest on behalf of a customer.

Under the proposed amendments to Rule 5210, firms would not be permitted to label an IOI in any way that indicates the IOI represented customer interest until the firm had received a customer order and had recorded the order on its books and records by, for example, creating an order ticket or entering the terms of the order into the firm's order management system. Importantly, the proposed amendment does not prohibit firms from displaying IOIs or quotations when they have not received a customer order; it merely prohibits the firm from labeling any such IOI or quotation in a way that indicates that the interest arose with a customer. Similarly, a firm could not continue to display such a quotation or IOI as representing a customer order once the customer order was executed or cancelled.

The proposed rules will be published in the Federal Register for a 30-day public comment period.

To read FINRA Regulatory Notice 11-43, click here.
To read FINRA Regulatory Notice 09-28, click here.

LITIGATION

Ninth Circuit Allows Discharge of Debt Related to Securities Law Violation

The U.S. Court of Appeals for the Ninth Circuit has found that debts relating to a securities law violation could be discharged in a Chapter 7 bankruptcy proceeding if the debtor himself was not responsible for violating federal securities laws.

The debtor, an attorney, represented his client in an Securities and Exchange Commission enforcement action. A receiver appointed in the enforcement action directed the debtor to disgorge sums for legal fees the debtor received from his client on retainer but had not yet used. The debtor filed for bankruptcy and sought to discharge his obligation to disgorge the retainer account sums.

Section 523(a)(19) of the bankruptcy code provides that a debtor should not be discharged from any debt that is for "the violation of any of the Federal securities laws." The debtor argued that the section required that the debtor himself violate the securities laws. The bankruptcy court agreed and found that because the debtor did not violate any securities laws – but merely held funds belonging to a person who had – the debt was dischargeable. The district court, taking a broader view, found that the section was not so limited and refused to discharge the debt.

The Circuit Court agreed with the bankruptcy court. It found that the bankruptcy code includes protections against attempting to conceal assets or defraud creditors, or otherwise failing to disgorge available assets, and further found that there was no additional need to expand the scope of the discharge-exception law to cover innocent debtors. Accordingly, the Circuit Court held that the discharge exception prevents the discharge of debts for securities-related wrongdoing only in cases where the debtor is responsible for the wrongdoing, but that innocent debtors who may have received funds derived from a securities violation remain entitled to a complete discharge of any resulting disgorgement order.

Sherman v. Securities and Exchange Commission, No. 09-55880, D.C. No. 2:08-cv-02517-CAS (9th Cir. Sept. 19, 2011).

Delaware Chancery Court Enjoins Texas Lawsuit Based on Forum Selection Clause

The Delaware Chancery Court enjoined a lawsuit pending in Texas state court based on a forum selection clause providing for exclusive jurisdiction in Delaware over claims arising out of the parties' agreements.

Several contracts between defendant Richard Malouf and plaintiff ASDC Holdings contained a forum selection clause providing the Delaware Courts with exclusive jurisdiction of "any claim or cause of action arising under or relating to th[e] Agreement[s]" Other plaintiffs in the Delaware action, however, were not signatories to the agreements containing the forum selection clause.

After Malouf sued the plaintiffs in Texas, the plaintiffs sued in Delaware and sought to enjoin the Texas case based on the Delaware forum selection clause. Malouf asserted that the plaintiffs should make their forum selection argument in Texas, not Delaware, and sought dismissal of the Delaware action.

The Delaware Chancery Court granted the plaintiffs' motion and enjoined the Texas case. It found that the language in the forum selection clause that any action "arising under or relating" to the agreements must be heard in Delaware was sufficiently broad to reflect the parties' agreement to litigate *any* dispute relating to the agreements in Delaware. The Chancery Court further found that the plaintiffs, although they were not signatories to the agreements, were entitled to invoke the forum clause against Malouf because they were "closely related" to the agreements' signatories.

ASDC Holdings LLC v. The Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust, C.A. No. 6562-VCP (Del. Ch. Sept. 14, 2011)

BANKING

Federal Reserve Says Motor Vehicle Dealers Need Not comply With Dodd-Frank Data Collection Requirements

The Federal Reserve Board (the Board) on September 20 issued a final rule amending Regulation B to provide that motor vehicle dealers are not required to comply with new data collection requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) until the Board issues final regulations to implement the statutory requirements. The Dodd-Frank Act amended the Equal Credit Opportunity Act to require creditors to collect information about credit applications made by women- or minority-owned businesses and by small businesses. The Consumer Financial Protection Bureau (CFPB) must implement this provision for all creditors except certain motor vehicle dealers who are subject to the Board's jurisdiction. The CFPB previously announced that creditors are not obligated to comply with the data collection requirements until the CFPB issues detailed rules to implement the law. The Board is amending Regulation B to apply the same approach to motor vehicle dealers.

To view the final rule, click here.

Office of Comptroller Applies Forex Rules Applicable to National Banks to Federal Savings Banks

The Office of the Comptroller of the Currency (OCC) announced on September 12 that it adopted an interim final rule amending its rule governing retail foreign exchange transactions to apply to Federal savings associations and making conforming changes to the required risk disclosure statements. As amended effective on July 16, 2011, by the Dodd–Frank Wall Street Reform and Consumer Protection Act, the Commodity Exchange Act forbids Federal savings associations from engaging in certain off-exchange transactions in foreign currency with retail customers (retail forex transactions), except pursuant to a rule authorizing the transaction (a retail forex rule). The OCC promulgated a retail forex rule for national banks on July 14. See 76 Fed. Reg. 41375 (codified at 12 CFR part 48). On July 21, the OCC obtained the authority to promulgate a retail forex rule for Federal savings associations. This interim final rule authorizes Federal savings associations to engage in retail forex transactions on the same terms as national banks. As required by the Commodity Exchange Act, the retail forex rule includes requirements for conducting retail forex transactions with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation. This interim final rule also makes conforming changes to the risk disclosures required by the retail forex rule.

This interim final rule took effect on September 12. Federal savings associations that were engaged in a retail forex business prior to July 16, 2011, must request a supervisory no-objection to continue their retail forex business within 30 days of the effective date of the interim final rule.

To view the final rule, click here.
To view the interim final rule, click here.

Office of Comptroller Updates Enforcement Action Policy for Federal Savings Associations

On September 9, the Office of the Comptroller of the Currency (OCC), pursuant to section 316 of the Dodd–Frank Wall Street Reform and Consumer Protection Act, revised the scope of its *Policies & Procedures Manual* (PPM) policy for taking appropriate enforcement action in response to violations of law, rules, regulations, final agency orders and unsafe and unsound practices or conditions (Enforcement Action Policy) to include federal savings associations. The revised PPM (linked below) will provide for consistent and equitable enforcement standards for national banks and federal savings associations. This PPM supersedes PPM 5310-3, Enforcement Action Policy, dated July 30, 2001, and Supplement 1 to PPM 5310-3(REV), dated November 10, 2004. It also supersedes *Office of Thrift Supervision* (OTS) *Examination Handbook Section 080, Enforcement Actions*, dated July 18, 2008, and any OTS policies and guidance that relate to issues addressed by OTS Examination Handbook Section 080 that are addressed in this PPM.

This bulletin makes public PPM 5310-3 (REV), which describes the OCC's Enforcement Action Policy, as revised to include federal savings associations. This PPM is applicable to all types of national banks, federal branches and agencies of foreign banks, and federal savings associations. It is also applicable to enforcement actions that the OCC may take against bank service companies under 12 USC 1861 and service providers under 12 USC 1464(d)(7)(D).

To review the *Policies & Procedures Manual*, click here.
To review the enforcement actions, click here.

EXECUTIVE COMPENSATION AND ERISA

DOL to Revise Definition of Benefit Plan "Fiduciary"

On September 19, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) announced its intention to revise and re-propose amendments to its definition of "fiduciary." The new proposal is expected to be issued in early 2012.

Background. The regulations issued under Employee Retirement Income Security Act (ERISA) define the term "fiduciary" to include any person who provides investment advice with respect to assets of the plan for a fee. If an investment advice provider is considered a fiduciary for ERISA purposes, then such provider is then subject to increased ERISA compliance obligations primarily related to avoiding prohibiting transactions and satisfying heightened fiduciary duties.

First promulgated in 1975, the ERISA regulations set forth a multi-prong test for determining when an individual becomes a fiduciary as a result of providing investment advice for a fee. Under the 1975 rule, an investment advice provider would not be considered a fiduciary unless each of the prongs were met. In October 2010, the DOL proposed an amendment to the 35-year-old regulation based on findings that indicated that the rule's approach to fiduciary status may inappropriately limit its ability to protect plans, participants and beneficiaries in the current marketplace. Specifically, the DOL cited changes in the expectations of plan officials and participants who receive investment advice, unanticipated circumstances in which providing investment advice is subject to ERISA's fiduciary duties, industry changes, including, among other things, the variety of complex fee practices currently in use and the conflicts of interest that may arise from such practices.

The DOL's original proposal broadened the scope of service providers who would be classified as fiduciaries. The original proposal would have eliminated, for example, the requirement that there be a "mutual understanding" that the fiduciary's advice would form the primary basis for investment advice or that the advice be provided on a "regular basis." Significantly, the original proposal's elimination of such requirements would likely have caused an investment advice provider that appraised plan assets just one time to become a plan fiduciary. Classification as a fiduciary under the original proposal would likely have resulted in higher transaction costs for benefit plans due

to the increased exposure to liability. Because of the business costs associated with such an expanded view of fiduciary status, the DOL's original proposal was met with much resistance.

Revised Proposal. The recent announcement indicates that the revised proposal will clarify the issues of limiting fiduciary advice to "individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals" and the "rule's application to arm's length commercial transactions, such as swap transactions." The revised proposal will include new or amended exemptions addressing broker fee practices that will endeavor to preserve beneficial fee practices while protecting plan participants and individual retirement account owners from abusive practices and conflicted advice. While the terms of the re-proposed amendment will not specifically be known until it is released in early 2012, it is expected that the pool of fiduciaries will not increase as dramatically as it would have under the original proposal.

For the DOL release, please click here.

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