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BROKER DEALER

SEC, CFTC and FINRA Issue Joint Advisory on Business Continuity and Disaster Recovery Planning

On August 16, 2013, the Securities and Exchange Commission's Office of Compliance Inspections and Examinations, the Financial Industry Regulatory Authority and the Commodity Futures Trading Commission's Division of Swap Dealers and Intermediary Oversight jointly issued a staff advisory on business continuity and disaster recovery planning. The SEC, FINRA and CFTC compiled best practices and lessons learned from firms that were impacted by the events surrounding Hurricane Sandy. The staff advisory encourages firms to review their business continuity plans (BCPs) and suggests effective practices in the following areas:

- Preparation for widespread disruption, including remote access capabilities;
- Planning for alternative locations;
- Evaluating the risk of critical vendor relationships and examining whether such vendors have adequate BCPs;
- Telecommunications services and technology;
- Communication plans with customers, other external parties and staff;
- Regulatory and compliance considerations, such as updating BCPs to include new regulatory and self-regulatory organization requirements; and
- BCP reviewing and testing.

The staff advisory is available here.

FINRA Updates Private Placement Form and Issues FAQ

The Financial Industry Regulatory Authority updated the Private Placement Form that firms must use to file offering documents and information pursuant to FINRA Rules 5123 (Private Placements of Securities) and 5122 (Private Placements of Securities Issued by Members). The updated form includes new questions, such as a disciplinary history question, that are intended to assist FINRA in prioritizing its review of private placement filings. The questions are not intended to set new standards of disclosure, due diligence or information gathering requirements. FINRA has also provided additional guidance regarding the updated form in a Private Placement Form FAQ.

The regulatory notice is available here.

SEC Approves Amendments to FINRA Rule Regarding Release of Disciplinary Complaints, Decisions and Other Information

The *Corporate and Financial Weekly Digest* edition of March 29, 2013 summarized the Financial Industry Regulatory Authority's proposed rule change to amend Rule 8313, which governs the release of disciplinary and other information by FINRA to the public. Among other things, the amendments establish general standards for the release of disciplinary information to the public to provide greater information regarding FINRA's disciplinary actions, clarify the scope of information subject to Rule 8313 and eliminate provisions that do not address the release of information to the public. The Securities and Exchange Commission has approved the rule amendments, which will become effective on December 16, 2013, and will apply prospectively.

The regulatory notice is available here.

LITIGATION

SEC's Alleged Failure to Notify SIPC of Ponzi Scheme Does Not Create Liability

A Florida federal court has dismissed a class action alleging that the Securities and Exchange Commission was negligent for failing to report that Robert Allen Stanford's $7 billion fund was a Ponzi scheme, finding the Misrepresentation Exception to the Federal Tort Claims Act (FTCA) shielded the SEC. The Misrepresentation Exception bars claims against the United States arising from alleged misrepresentation or deceit and protects the United States from tort liability for pecuniary injuries attributable to reliance on the government's negligent misstatements.

Plaintiffs asserted that the SEC, after several investigations in 1997 and 2004, concluded the Stanford Group was a Ponzi scheme but failed to report those findings to the Securities Investor Protection Corporation (SIPC). Plaintiffs sought to hold the SEC liable for its losses on the basis that the SEC is responsible for reporting the findings of its investigations to regulatory and consumer protection agencies and that their losses would have been avoidable if the SEC had reported its findings to SIPC.

The US District Court for the Southern District of Florida found that plaintiffs failed to "maneuver" their claims outside of the Misrepresentation Exception because they based their cause of action on the assertion that the SEC failed to communicate information about the Stanford Group. The court reasoned that plaintiffs "cannot disguise the essence of their negligent misrepresentation claim by repackaging the SEC's alleged negligence from having failed to 'notify' or 'report'…to having failed to send the required notification.…" Accordingly, it concluded that the plaintiffs' cause of action is a "classic claim for misrepresentation" and thus falls within the Misrepresentation Exception.

Zelaya et al. v. U.S., case number 0:11-cv-62644 (S.D. Fla. August 12, 2013).

BANKING

Agencies Seek to Bolster Leverage Ratio Standards for Largest Banks

On August 20, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies) announced that they are seeking comment on a notice of proposed rulemaking (NPR) to strengthen the leverage ratio standards for the largest, most systemically significant US banking organizations. The NPR was published in the *Federal Register* on August 20, 2013, with a 60-day comment period.

Under the revised capital regulations, which the OCC approved on July 9, 2013 (new capital rule), the agencies established a minimum supplementary leverage ratio of three percent (supplementary leverage ratio). The supplementary leverage ratio, which is different from the general leverage ratio, is the ratio of an institution's tier 1 capital to its *total leverage exposure*, which includes all on-balance-sheet assets and many off-balance-sheet exposures. Under the new capital rule, banks subject to the supplementary leverage ratio requirement are required to calculate and report their supplementary leverage ratios beginning in the first quarter of 2015. The new minimum requirement, however, does not apply until 2018.

In this NPR, the Agencies propose to further increase the leverage capital requirements for the largest, most systemically significant US banking organizations. The NPR applies to any bank holding company (BHC) with more than $700 billion in consolidated total assets or $10 trillion in assets under custody (covered BHC) and any insured depository institution subsidiary of these BHCs (covered IDI). Using these asset thresholds, the NPR currently would apply to the eight largest, most systemically significant US banking organizations. The Agencies propose to establish a "well-capitalized" threshold of six percent for the supplementary leverage ratio under the Agencies' respective prompt corrective action regulations for any covered IDI. In addition, the Agencies propose to establish a leverage buffer for covered BHCs, which would require them to maintain at least two percentage points above the minimum supplementary leverage ratio requirement of three percent, for a total of five percent. Failure to maintain this buffer would result in limitations on dividend distributions and discretionary bonus payments.

The proposal, if adopted, will take effect on January 1, 2018, concurrent with the three percent minimum supplementary leverage ratio requirement in the new capital rule.

Comments on the NPR are due by October 21, 2013.

Read more.

Federal Reserve Issues Paper on Capital Planning and Rule for Assessments for Large Banks

On August 19, one day before issuing its notice of proposed rulemaking on bolstering leverage ratio standards (as discussed above in "Agencies Seek to Bolster Leverage Ratio Standards for Largest Banks"), the Board of Governors of the Federal Reserve System (Board) issued a paper on capital planning for large banks. The paper, *Capital Planning at Large Bank Holding Companies: Supervisory Expectations and Range of Current Practice*, "is intended to promote better capital planning at bank holding companies generally, and to provide greater clarity on the standards against which those practices are evaluated as part of the CCAR [Comprehensive Capital Analysis and Review] exercise. In particular, the Board emphasized that bank holding companies, when considering their capital needs, should focus on the specific risks they could face under potentially stressful conditions."

In its evaluation, the Board found that firms needed to improve a number of aspects of their capital planning processes, "including their accounting for risks most relevant to the specific business activities, their methods of projecting the effect of certain stresses on their capital needs, and their governance of the capital planning processes."

The Federal Reserve will start the 2014 CCAR process in the fall. In addition to the 18 firms that participated in 2013, 12 firms with more than $50 billion in total assets that have not previously been part of the CCAR are expected to participate.

On August 16, the Board issued a final rule establishing annual assessment fees for its supervision and regulation of large financial companies. The final rule outlines how the Board determines which companies are charged, estimates the applicable expenses, determines each company's assessment fee and bills for and collects the assessment fees for large banks.

Read more.

OCC Revises Guidance on Commercial Real Estate Lending

On August 20, the Office of the Comptroller of the Currency (OCC) issued the "Commercial Real Estate Lending" booklet of the *Comptroller's Handbook* to replace the OCC's "Commercial Real Estate and Construction Lending" booklet issued in 1995. The booklet also replaces sections 210, "Income Property Lending," and 213, "Construction Lending," of the former Office of Thrift Supervision's (OTS) *Examination Handbook* issued in 2009 and 1994, respectively.

The booklet reflects guidance issued since the release of the 1995 booklet. Updated guidance includes:

> prudent loan workouts, management of concentrations, stress testing, updated interagency appraisal guidelines, and statutory and regulatory developments in environmental risk management. Discussions of statutes and regulations governing federal savings associations have also been incorporated. Guidance for acquisition, development, and construction (ADC) lending are expanded and issues unique to ADC and income-producing real estate lending are discussed in separate sections. Other topics that are new or expanded include supervisory loan-to-value, project feasibility, investor-owned residential real estate, amortization, debt yield, owner-occupied real estate, environmental risk management, and underwriting considerations for various property types.

The OCC also announced that the following documents are rescinded:

- OCC Bulletin 2012-27, "Investor-Owned One- to Four-Family Residential Properties: Supervisory Guidance on Risk Management and Reporting Requirements" (September 17, 2012); and
- OCC Advisory Letter 2003-7, "Guidelines for Real Estate Lending Policies" (August 8, 2003).

Read more.

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