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SEC/CORPORATE

SEC Issues Statement on the Effect of the Recent US Court of Appeals Decision on the Conflict Minerals Rule

On April 29, Keith Higgins, the Director of the Securities and Exchange Commission's Division of Corporation Finance, issued a public statement offering guidance on companies' compliance with the conflict minerals rule in light of the recent decision by the US Court of Appeals for the District of Columbia Circuit. As discussed previously in the *Corporate and Financial Weekly Digest* edition of April 18, 2014, on April 14 the US Court of Appeals for the District of Columbia Circuit issued an opinion which reversed, in part, the prior decision of the US District Court for the District of Columbia that had upheld the conflict minerals rule and remanded the case back to the District Court for further proceedings. Specifically, the court found that, to the extent that the conflict minerals rule requires a company to disclose that any of its products "have not been found to be 'DRC conflict free,'" such portion of the rule violates the First Amendment's prohibition against compelled speech. The court's decision raised significant questions about compliance with the conflict minerals rule, and there was speculation that the SEC might voluntarily stay the application of the rule until the courts reach a final decision.

In the statement released by Mr. Higgins, he advised companies that they are expected to file any reports required by the conflict minerals rule on or before the scheduled due date and comply with those portions of the rule that were upheld by the court. A company is not, however, required to characterize its products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." Although no longer required to do so, a company may voluntarily elect to label a product as "DRC conflict free" in its conflict minerals report, provided that the company has obtained an independent private sector audit as required by the rule.

The public statement is available here.

CFTC

CFTC Extends Relief From Oral Communication Recording Requirement

On April 25, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight issued No-Action Letter No. 14-60, which extends relief for commodity trading advisors (CTAs) that are members of a swap execution facility (SEF) or designated contract market (DCM) from the oral communications recordkeeping requirement of CFTC Regulation 1.35(a). Letter No. 14-60 extends previous relief for CTAs issued in CFTC Letters Nos. 13-66 and 14-33 that would have expired on May 1. A CTA that is a member of a SEF or DCM will now have until December 31, 2014 to comply with the requirement to record oral communications in connection with the execution of swap transactions.

CFTC Letter No. 14-60 is available here.

CFTC Provides Relief Regarding Package Transactions

On May 1, the Commodity Futures Trading Commission's Divisions of Market Oversight and Clearing and Risk (Divisions) issued No-Action Letter No. 14-62 extending relief previously granted to market participants, swap

execution facilities (SEFs) and designated contract markets (DCMs) from the trade execution requirement in Commodity Exchange Act (CEA) Section 2(h)(8) and from CFTC Regulations 37.9(a)(2), 37.203(a) and 38.152 with respect to certain package transactions. Under Letter 14-62, a "package transaction" is a transaction: (i) between two or more counterparties involving two or more instruments; (ii) priced or quoted as one economic transaction with simultaneous or near-simultaneous execution of all components; (iii) that contains at least one component that is subject to the trade execution requirement; and (iv) where the execution of each component is contingent upon the execution of all other components.

As previously reported in the *Corporate and Financial Weekly Digest* edition of February 14, 2014, the Division of Market Oversight had issued No-Action Letter No. 14-12, in which it granted relief from the trade execution requirement with respect to all package trades until May 15, to enable market participants to continue their efforts toward compliance with the trade execution requirement and to enable CFTC staff to address the issues surrounding package transactions where at least one component is not subject to the trade execution requirement. In Letter No. 14-62, the Divisions confirmed that package transactions in which all components are swaps that are subject to the trade execution requirement are subject to such requirement by May 15. The Divisions also extended their relief from the trade execution requirement for the following categories of package transactions for the time periods indicated:

- Package transactions in which (i) at least one swap component has been made available to trade and is subject to the trade execution requirement and (ii) each of the other swap components is subject to the clearing requirement under CEA Section 2(h)(1)(A) and CFTC Regulation 50.4 must comply with the trade execution requirement by June 1.
- Package transactions in which (i) all swap components have been made available to trade and are subject to the trade execution requirement and (ii) all other components are US Treasury securities must comply with the trade execution requirement by June 15.
- Package transactions in which (i) at least one swap component has been made available to trade and is subject to the trade execution requirement and (ii) at least one swap component is under the CFTC's exclusive jurisdiction and not subject to the clearing requirement under CEA Section 2(h)(1)(A) and CFTC Regulation 50.4 must comply with the trade execution requirement by November 15.
- Package transactions in which (i) at least one swap component has been made available to trade and is subject to the trade execution requirement and (ii) at least one swap component is not under the CFTC's exclusive jurisdiction (e.g., mixed swaps, security-based swaps) must comply with the trade execution requirement by November 15.
- Package transactions in which (i) at least one swap component has been made available to trade and is subject to the trade execution requirement and (ii) at least one component is not a swap must comply with the trade execution requirement by November 15. (This category specifically excludes situations where all other components are US Treasury securities, in which case compliance is required by June 15.)

Additionally, No-Action Letter No. 14-62 also provides time-limited no-action relief to SEFs and DCMs from the CFTC's straight-through processing requirements, which generally provide that a swap transaction which is rejected from clearing for credit-related reasons (Rejected Transaction) must be treated as being void *ab initio.* Because package transactions are currently cleared on a leg-by-leg basis instead of as a whole, a derivatives clearing organization may reject an individual leg due to its risk exceeding its credit limit even though the net risk of the package may not exceed the limit. Accordingly, the Divisions will not recommend enforcement action against a SEF or DCM that permits a Rejected Transaction to be resubmitted for clearing on the same terms and conditions other than the time of execution if the Rejected Transaction was not accepted for clearing due to the sequencing of submission of the legs of a package transaction. Such resubmission must be made within 60 minutes, and SEFs and DCMs that desire to rely on this latter relief must satisfy a number of other conditions as well, including a requirement that their rules provide that if the resubmitted trade is also rejected, it is void *ab initio* without a second opportunity to submit a new trade.

The no-action relief to SEFs and DCMs regarding the CFTC's straight-through processing requirements expires on September 30.

CFTC Letter No. 14-62 is available here.

CFTC Letter No. 14-12 is available here.

LITIGATION

District Court Sustains Attachment and Garnishment Writs Under Equitable Powers

The US District Court for the Southern District of New York recently held that it was within the court's equitable power to sustain a writ of garnishment and a writ of attachment in a securities case.

On March 13, 2014, the Securities and Exchange Commission filed suit against Defendant John Babikian. The SEC accused Babikian of securities fraud relating to an alleged "pump and dump" scheme in which Babikian bought shares in a penny stock, sent an email to 700,000 people touting the pick, and then sold off his entire position. The District Court signed a Temporary Restraining Order and two prejudgment writs: one garnishing proceeds from the sale of securities and another attaching properties owned by Babikian. The SEC later moved for a preliminary injunction to preserve all relief granted by the District Court. Babikian claimed that the garnishment and attachment were inappropriate because the Federal Debt Collection Procedure Act (FDCPA) did not authorize the relief. In contrast, the SEC argued that the FDCPA authorizes garnishment and attachment as prejudgment remedies for cases that assert claims for a debt, and contended that the relief sought – penalties and disgorgement – was a claim for a debt in which the FDCPA would apply.

The District Court acknowledged that there was a lack of authority on this issue, but without deciding whether the FDCPA authorized prejudgment remedies against Babikian before he owed a debt to the United States, the District Court sustained the writs on equitable grounds. Noting that Section 22(a) of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934 "confer general powers upon the district courts that are invoked by a showing of a securities law violation," the District Court held that the prejudgment remedies were reasonable to preserve the status quo, and authorized by equitable principles.

Securities and Exchange Commission v. Babikian, No. 14 Civ. 1740 (PAC) (S.D.N.Y. Apr. 21, 2014).

Eleventh Circuit Vacates Dismissal of Breach of Contract Claim

The US Court of Appeals for the Eleventh Circuit found that the US District Court for the Southern District of Florida abused its discretion by dismissing an action for *forum non conveniens* without evaluating the significance of the contract's forum-selection clause.

In 2002, a representative of the Government of Belize (Government) entered into an agreement with a Belizean company, International Telecommunications, Ltd., to lease telephonic hardware equipment. The Master Lease Agreement contained a forum selection clause in which the Government "irrevocably submits to the exclusive jurisdiction of any of the federal and state courts of the State of Florida" in any action related to the agreement.

The District Court dismissed the action, in part on *forum non conveniens* grounds, and the Eleventh Circuit reversed. The court held that controlling Supreme Court case law required the District Court to consider the application of the forum-selection clause in the agreement. The court of appeals remanded to the District Court to determine whether the forum-selection clause was enforceable in this case.

GDG Acquisitions, LLC v. Government of Belize, No. 13-11616 (11th Cir. Apr. 22, 2014).

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