

CORPORATE & FINANCIAL

WEEKLY DIGEST

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CFTC

Futures Exchanges Propose Rules Requiring Consent to Jurisdiction

The Chicago Mercantile Exchange (CME), Chicago Board of Trade (CBOT), New York Mercantile Exchange (NYMEX), ICE Futures U.S. and NYSE Liffe U.S. have adopted rules requiring that market participants consent to the jurisdiction of the exchange in question. Under the proposed rules, market participants must agree to be bound by rules of the applicable exchange, including those related to cooperation and participation in the exchange's investigative and disciplinary process. The rules have been promulgated pursuant to Commodity Futures Trading Commission Regulation 38.151, which becomes effective on August 20 and requires that a designated contract market must require all market participants to consent to its jurisdiction before accessing its market. The CME, CBOT, NYMEX and ICE Futures U.S. rules are pending CFTC approval; the NYSE Liffe U.S. rule was self-certified by the exchange.

More information on the CME, CBOT and NYMEX rule is available [here](#).

More information on the ICE Futures U.S. rule is available [here](#).

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LITIGATION

Securities Fraud Claim Survives Despite Post-Fraud Stock Recovery

The U.S. Court of Appeals for the Second Circuit recently considered whether a stock's share price recovery soon after the fraud became known defeats an inference of economic loss in a securities fraud suit at the pleading stage.

Acticon AG (Acticon), lead plaintiff in a consolidated putative class action suit against China North East Petroleum Holdings Limited (NEP), brought this suit under the Securities Exchange Act of 1934 and SEC Rule 10b-5, alleging that NEP misled investors about its reported earnings, oil reserves and internal controls. Acticon further alleged that NEP revealed this information through a series of corrective disclosures and that in the trading days after each disclosure was made, NEP's stock price dropped. NEP argued that these allegations were not sufficient to allege economic loss because Acticon could have sold its holdings on days the stock price had recovered and avoided a loss. The District Court held that because Acticon had foregone multiple opportunities to sell its shares at a profit, it had not suffered an economic loss and dismissed the action.

The Second Circuit reversed the District Court's decision and found that the fact that the price of the stock recovered soon after it had dropped did not negate an inference of economic loss at the pleading stage. The Court reasoned that at this early stage in the litigation, because it did not know whether the price rebounds represented gains unrelated to the fraud, the Court could not determine whether it was proper to offset the price

recovery against Acticon's losses in calculating the economic loss. Accordingly, the Second Circuit found that the recovery of the stock price did not negate the inference that the lead plaintiff had suffered an economic loss.

Rosado v. China North East Petroleum Holdings Ltd. et al., No. 11-4544-cv (2d Cir. Aug. 1, 2012).

Failure to Make Pre-Suit Demand Bars a Derivative Suit

The U.S. District Court for the District of Massachusetts recently dismissed a derivative action where plaintiffs did not make a pre-suit demand on defendant's board and failed to adequately plead that demand would have been futile.

Defendant Smith & Wesson Holding Corporation's former director of international sales was indicted for violating the Foreign Corrupt Practices Act of 1977 (FCPA). Plaintiffs Frank Holt and other shareholders of Smith & Wesson brought a derivative action against members of the board for failing to have effective FCPA controls and oversight, thereby breaching their duty of care. Plaintiffs failed to make a pre-suit demand on the Smith & Wesson board and argued that demand would have been futile because the Smith & Wesson board was not disinterested. Plaintiffs further argued that the requirement to show demand futility may be relaxed where evidence of liability is gross, as they alleged. Defendant argued that demand was required and moved to dismiss plaintiffs' complaint.

The District Court first found that the doctrine of issue preclusion entitled defendant to dismissal where, in another derivative action against Smith & Wesson, a different court found that demand on the Smith & Wesson board was not futile. The District Court further held that the pleadings fell far short of the necessary threshold to excuse demand, which requires plaintiffs to plead particularized facts creating a reasonable doubt that the board could have exercised disinterested business judgment when the complaint was filed.

Holt v. Golden, C.A. No. 11-cv-30200 (D. Mass. July 25, 2012).

BANKING

Basel III Comment Period Extended

On August 8, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (the "Banking Agencies") announced an extension to the comment period with respect to three notices of proposed rulemaking (originally released on June 7) that would revise and replace current capital rules in accordance with requirements in Basel III and the Dodd-Frank Act. According to the release by the Banking Agencies, comments will now be accepted until October 22. The extension was provided to allow interested persons more time to understand the proposals and prepare comments.

For more information, click [here](#).

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