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CORPORATE & FINANCIAL
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SEC/CORPORATE

SEC Staff Delays Move to International Accounting Standards

On December 5, the chief accountant of the Securities and Exchange Commission, James L. Kroeker, stated in a speech before the National Conference of the American Institute of Certified Public Accountants (AICPA) that the SEC's staff will need "a few additional months" to prepare a final report concerning a possible incorporation of International Financial Reporting Standards (IFRS) for U.S. issuers. Kroeker noted that he was encouraged about the potential prospects of IFRS incorporation in the United States, and stated that creating a strong and lasting framework was more important than a rapid timeframe for adoption and implementation.

On February 24, 2010, the SEC issued a statement that it believed that a single set of high-quality globally accepted accounting standards would benefit U.S. investors. In this statement, the SEC encouraged the convergence of U.S. Generally Accepted Accounting Principles (U.S. GAAP) and IFRS in order to narrow the differences between the two sets of standards. The SEC also directed its staff to execute a "work plan" to aid the SEC in its evaluation of the impact that the use of IFRS by U.S. companies would have on the U.S. securities market and to position the SEC to make a determination in 2011 regarding incorporating IFRS into the financial reporting system for U.S. issuers.

However, as Kroeker noted in his speech, the Financial Accounting Standards Board and the International Accounting Standards Board have revised their original goal of eliminating major differences between IFRS and U.S. GAAP by mid-2011. These boards have now agreed that a number of projects designed to eliminate such differences would be delayed to allow for a sharper focus on a smaller number of key projects related to revenue recognition, leasing and financial instruments.

Kroger mentioned in his speech that he believed that the SEC's final framework should:

- Demonstrate a high level of support for U.S. commitment to continued development and use of global consistent high quality accounting standards;
- Provide both in fact and in substantive operation clear U.S. authority over standards applicable in the U.S. capital markets;
- Provide for and facilitate a strong U.S. voice in the process of establishing global accounting standards;
- Be responsive to the economic and other impacts of change;
- Consider whether to retain U.S. GAAP as the basis for U.S. financial reporting, thereby mitigating the costs and complexity of introducing a new set of standards under regulatory regimes, contractual documents, and U.S. laws under which compliance with U.S. GAAP is often specifically contemplated.

Click here for the full text of Kroeker's remarks, which were made at the 2011 AICPA National Conference on Current SEC and PCAOB Developments. Click here for the SEC release from February 24, 2010 titled "Commission Statement in Support of Convergence and Global Accounting Standards."

DERIVATIVES

ISDA Collateral Developments

The International Swaps and Derivatives Association is responsible for a trio of recent developments with respect to the collateralization of derivative transactions using ISDA Credit Support Annexes.

The most important new development is the publication of a set of documentation templates (the "Sample Tri-party IA Provisions") that enable parties to modify a standard ISDA Credit Support Annex (ISDA-speak for Security Agreement) to allow for the segregation of "Independent Amounts" (ISDA-speak for initial margin) with an independent custodian. Such segregation will be required in many trading relationships relating to uncleared swaps once the new margin rules required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) come in effect next year. However, segregation has already become a common issue in master agreement negotiations, so this new standard wording will be a valuable resource for ISDA negotiators. These templates do not, however, eliminate the need to negotiate an agreement with the chosen custodian. The templates are accompanied by a memorandum that explains how they can be used. The templates and memorandum can be found here.

On November 30, the ISDA Collateral Steering Committee published the *2011 Best Practices for the OTC Derivatives Collateral Process*. This is an update of a document originally published in 2010 and incorporates a number of new developments reflecting evolving standards for the mitigation of risk in the collateral management priocess for over-the-counter derivatives. These Best Practices do not, however, attempt to address the issues that may arise out of the final Dodd-Frank Act rulemakings concerning margin requirements for swap transactions. The *Best Practices* can be found here.

Early in November, ISDA announced the start of the final phase of an initiative to create a "Standard Credit Support Annex" that will enable the parties to a master swap agreement to deliver cash collateral in multiple currencies (instead of just one designated currency). Because of some important risk issues that are still being addressed, ISDA has not yet published a draft of the proposed new provision, but expects to do so in early 2012. This initiative is expected to be more relevant to swaps dealers than to swaps end users. Information about the Standard CSA project can be found here.

CFTC

CFTC Adopts Final Rule on Investment of Customer Funds

The Commodity Futures Trading Commission has adopted amendments to CFTC Rules 1.25 and 30.7 that would narrow the scope of permissible investments for customer funds held by futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) in the customer segregated account maintained under section 4d(a)(2) of the Commodity Exchange Act or the foreign futures and foreign options secured amount account maintained in accordance with CFTC Rule 30.7. Among the key investment categories that will no longer be permitted under the amended rule are (i) foreign sovereign debt obligations, (ii) commercial paper and corporate notes or bonds (other than certain instruments that are fully guaranteed by the U.S. government pursuant to the Temporary Liquidity Guarantee Program (TLGP)), and (iii) inter-affiliate resale and repurchase transactions and certain internal transactions (i.e., “internal repos”).

The prohibition on internal transactions does not affect all such transactions. The CFTC confirms in the Federal Register release that an FCM that is also registered as a broker-dealer may purchase permitted securities from its securities arm. Such transactions “are acceptable and are unaffected by elimination of in-house transactions.” Moreover, a dually-registered FCM/broker-dealer receiving collateral from a customer that is not an acceptable margin deposit at a DCO or foreign board of trade may exchange that collateral for acceptable collateral held by the FCM/broker-dealer to the extent necessary to meet margin requirements.

Under the revised rules (and subject to the concentration limits set out therein, as further described below), FCMs and DCOs may continue to invest customer funds and Part 30 “secured amount funds” in (i) U.S. government securities, (ii) state and municipal securities, (iii) obligations of any U.S. government corporation or enterprise sponsored by the U.S. government (including debt issued by Fannie Mae and/or Freddie Mac, but only so long as the applicable entity is operating under the conservatorship or receivership of the Federal Housing Finance Authority with capital support from the U.S.), (iv) certificates of deposit, (v) commercial paper and corporate notes or bonds fully guaranteed as to principal and interest by the U.S. under the TLGP, and (vi) interests in money market mutual funds (MMMFs), as well as (vii) purchase and repurchase transactions with non-affiliated banks, broker-dealers, or government securities brokers or dealers that involve assets of the type described in (i) through (vi) above.

The amended rules also revise both certain issuer- and asset-based concentration limits on certain of the permitted instruments described above, as well as counterparty concentration limits for reverse repurchase transactions. These include asset-based concentration limits (as a percentage of the total assets held in segregation by the FCM or DCO) of:

- 50% for U.S. agency obligations;
- 25% each for (i) commercial paper, (ii) permitted corporate notes and bonds and (iii) certificates of deposit; and
- 10% for state and municipal securities.

With respect to MMMFs, (A) investments in MMMFs that have less than $1 billion in assets and/or which are managed by a management company with less than $25 billion in MMMF assets under management are subject to a 10% asset-based concentration limit, and (B) aggregate investments in all MMMFs in excess of these standards are subject to an asset-based concentration limit of 50%. MMMFs that invest exclusively in U.S. government securities, however, are not subject to a concentration limit.

The amended rule also imposes issuer-based concentration limits on MMMF investments of 25% in a single family of MMMFs and 10% in an individual MMMF (again excluding MMMFs that invest exclusively in U.S. government securities, which are not subject to these concentration limits and are excluded for purposes of calculating these limits). Finally, reverse repurchase transactions (i.e., transactions where the FCM or DCO purchases securities, subject to an agreement to resell) with a single counterparty cannot exceed 25% of the FCM or DCO's total assets held in segregation.

The final rules become effective 60 days after publication in the Federal Register. FCMs and DCOs will have 180 days after the effective date to come into compliance, however. A copy of the final rules is available here.

CFTC Issues Proposed Rule on Process for Making a Swap Available to Trade

If a swap execution facility (SEF) or designated contract market (DCM) makes a "swap available to trade," all other SEFs and DCMs listing or offering that swap or an economically equivalent swap must also make those swaps available to trade for purposes of the trade execution requirements of section 2(h)(8) of the CEA. The Commodity Futures Trading Commission has now proposed a rule setting forth the process by which SEFs and DCMs may make a swap "available to trade."

The proposed rule would require SEFs and DCMs to submit any determination that a swap is available to trade to the CFTC, either for approval or pursuant to a self-certified rule. In connection with any such submission, SEFs and DCMs would be required to consider (as appropriate) the following factors with respect to any such swap: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs and DCMs or of bilateral transactions; (3) trading volume SEFs and DCMs, or of bilateral transactions; (4) number and type of market participants; (5) bid/ask spreads; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF or DCM's trading system or platform will support trading in the swap; or (8) any other factor that the DCM or SEF may consider relevant. The CFTC proposal also requires SEFs and DCMs to conduct an annual review and assessment of each swap that such SEF or DCM has made available to trade to determine whether or not each swap should continue to be available to trade, and to submit such reports to the CFTC.

The proposed rule is open for public comment for 30 days from publication in the Federal Register. A copy of the proposed rule is available here.

CFTC Adopts Final Rule on Registration on Foreign Boards of Trade

The Commodity Futures Trading Commission has adopted final rules (which are substantially similar to the proposed rules) that replace the existing system of staff-issued no-action letters with a registration system for foreign boards of trade (FBOTs) seeking to provide their members or other participants located in the U.S. with direct access to the FBOT's electronic order entry and trade matching system. The standards and procedures for registration (as well as an appendix containing two application forms—one for the FBOT and one for the clearing organization—and describing the information required to be submitted as part of an application) are set out in a new Part 48 of the CFTC's regulations.

Consistent with current practice, a registered FBOT would be able to grant direct access to: identified members and other participants that trade for their proprietary accounts; future commission merchants that submit orders on behalf of U.S. customers; and commodity pool operators and commodity trading advisors, or entities exempt from registration, that submit orders on behalf of U.S. pools or for accounts of U.S. customers for which they have discretionary authority.

The criteria that FBOTs will need to satisfy in order to become registered include possessing the attributes of an established, organized exchange, adhering to appropriate rules prohibiting abusive trading practices, and enforcing appropriate rules to maintain market and financial integrity. The CFTC will also evaluate whether the FBOT's home regulatory authority oversees the FBOT in a manner that is comparable to the manner in which the CFTC oversees DCMs (specifically, whether the FBOT's regulator supports and enforces regulatory objective that are substantially equivalent to those supported and enforced by the CFTC—e.g., prevention of market manipulation and customer and market abuse).

In addition, an FBOT will be required to satisfy seven general registration categories (the same categories currently used by the CFTC in determining whether to grant no-action relief):

1) Membership criteria;
2) Trading system;
3) Terms and conditions of contracts;
4) Settlement and clearing;
5) Regulatory regime governing the FBOT;
6) The FBOT's and the clearing organization's rules and rule enforcement; and
7) Information sharing.

Upon approval of an FBOT application, the CFTC will issue an Order of Registration to the applicant. Further, the final rules require FBOTs to comply with the applicable conditions of registration set forth in the final rules (e.g., conditions applicable to the listing of swaps and information sharing) and any additional conditions that the CFTC may impose.

The final rules become effective 60 days after publication in the Federal Register. FBOTs that are operating pursuant to existing no-action relief must submit a limited application for registration within 180 days of the effective date of this final rule. A copy of the final rules may be found here.

CFTC Issues Interpretation of Dodd-Frank Anti-Fraud Authority

Amendments made to the Commodity Exchange Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) require that an agreement, contract or transaction in any commodity that is entered into with, or offered to, a non-eligible contract participant or non-eligible commercial entity on a leveraged, margined, or financed basis must be conducted on a regulated exchange and be subject to the Commodity Futures Trading Commission's anti-fraud authority, unless actual delivery of the commodity is made within 28 days. The CFTC has issued an interpretation of the term "actual delivery" containing guidance on how the CFTC will construe this requirement.

The CFTC interpretation, which is subject to public comment, indicates that the CFTC will determine whether actual delivery has occurred using a functional approach and examining how the agreement, contract, or transaction is marketed, managed, and performed (instead of relying solely on the language used in the agreement, contract, or transaction). Relevant factors include ownership, possession, title, and physical location of the commodity purchased or sold (both before and after execution of the agreement, contract, or transaction); the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and the manner in which the purchase or sale is recorded and completed.

The CFTC will accept public comments for 60 days from the date of publication in the Federal Register. The CFTC has indicated that it will take "appropriate action" if public comments demonstrate a need to modify the interpretation. A copy of the interpretation may be found here.

CFTC Division of Market Oversight Guidebook for Part 20 Reports

The Commodity Futures Trading Commission's Division of Market Oversight has issued a guidebook containing additional guidance and detailed instructions for submitting large swap trader reports required by new Part 20 of the CFTC's rules. Clearing organizations and clearing members were required to begin reporting on cleared swaps on November 21, 2011, and are required to begin reporting on uncleared swaps on January 20, 2012. Fully compliant month-end open interest reports must be collected beginning in September 2011 through February 2012 and submitted to the CFTC by March 20, 2012.

The Guidebook for Part 20 Reports is available here.

Public Meeting of the Technology Advisory Committee

The Commodity Futures Trading Commission's Technology Advisory Committee will hold a public meeting on December 13, to address: (1) emerging issues in relation to swap execution facilities; (2) high frequency traders and their market impact; and (3) interim recommendations from the subcommittee on data standardization regarding universal product and legal entity identifiers, standardization of machine-readable legal contracts, and data storage and retrieval.

Written statements in connection with the meeting should be submitted by December 12. The Federal Register release providing further information regarding the meeting may be found here.

BROKER DEALER

FINRA Adopts Best Execution and Interpositioning Rule Changes

As previously reported in the October 21, 2011 edition of *Corporate & Financial Weekly Digest*, the Financial Industry Regulatory Authority (FINRA) had previously proposed to adopt NASD Rule 2320 (Best Execution and Interpositioning) and Interpretive Material 2320 (Interpretive Guidance with Respect to Best Execution Requirements) as FINRA Rule 5310 in the consolidated FINRA rulebook. On December 5, 2011, the Securities and Exchange Commission (SEC) issued an order granting approval of the proposed rule change. FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice that will be published no later than 90 days following SEC approval. The implementation date will be no later than 90 days following publication of the Regulatory Notice announcing SEC approval.

LITIGATION

Seventh Circuit Gives Guidance on McCaskill-Bond Amendment to Federal Aviation Act

The McCaskill-Bond Amendment to the Federal Aviation Act provides that a merger of air carriers requires the new entity to merge the seniority lists of the two carriers' employees. Republic Airways acquired Midwest Airlines, and thereafter the Teamsters Union, which represented the flight attendants at Republic's older carriers, refused to integrate the seniority lists for flight attendants and placed Midwest's flight attendants at the bottom of the seniority roster. A group of Midwest flight attendants challenged the action, asserting that it violated the amendment. The Teamsters argued that, at the time of acquisition, Midwest was on the verge of bankruptcy, that Republic abandoned Midwest's regulatory certificate, and therefore Midwest was not an "air carrier" for the purpose of the amendment. The U.S. District Court for the Eastern District of Wisconsin characterized the transaction as merely Republic's acquisition of some of Midwest's assets, but not the acquisition of an air carrier for the purposes of the amendment, thus holding that integration of seniority lists was not required.

The U.S. Court of Appeals for the Seventh Circuit reversed. First, it found that the transaction "involved" transferring ownership of an air carrier, despite the fact that the merger took place between two parent (holding) companies. Second, the result of the merger was a single air carrier, as operations and schedules were integrated, Republic began to fly Midwest's routes with its own planes, and abandoned Midwest's certificate to operate as an independent air carrier itself. Finally, regardless of whether Midwest was experiencing financial difficulty, Republic acquired more than 50% of Midwest – it in fact acquired 100%. These facts satisfied the requirements of the amendment. The Seventh Circuit contrasted the facts with the United and Continental Airlines merger, where those airlines continue to operate as separate businesses, and are therefore not subject to the McCaskill-Bond requirement to combine seniority lists.

Committee of Concerned Midwest Flight Attendants for Fair and Equitable Seniority Integration v. International Brotherhood of Teamsters Airline Division, No. 10-C-379 (7th Cir. Nov. 30, 2011).

Ninth Circuit Revisits *Merck* Rules on Securities Fraud Limitations Period

The U.S. Court of Appeals for the Ninth Circuit overturned a district court's holding that a securities fraud claim was time-barred, noting that the 2010 Supreme Court case *Merck & Co. v. Reynolds* had rejected "inquiry notice" as the bright-line test for the limitations period. The plaintiff alleged that he had sold his interest in Alchemix Corporation based on misrepresentations as to ongoing negotiations between Alchemix, AFG investment group, and Western Oil Sands. Alchemix countered that, in 2002, it sent the plaintiff a letter noting that negotiations with AFG had terminated, putting the plaintiff on inquiry notice to further investigate the circumstances surrounding the negotiations. Because the limitations period is the earliest of five years or two years after the discovery of facts constituting the violation, the district court held that receipt of the letter more than two years before the suit was filed barred litigation.

The Ninth Circuit noted that while the plaintiff may have been on inquiry notice, Alchemix was unable to show how a reasonably diligent plaintiff would have discovered the specific misrepresentations merely by receipt of the letter. Because the touchstone for the limitations period is "discovery," the court vacated the dismissal.

Strategic Diversity, Inc. v. Alchemix Corporation, Nos. 10-15256, 10-16404 (9th Cir. Dec. 2, 2011).

EXECUTIVE COMPENSATION AND ERISA

New York Employers Must Comply with the Annual Notice Requirements of the Wage Theft Prevention Act by February 1

The New York Wage Theft Prevention Act (WTPA), effective on April 9, 2011, imposes more stringent pay notice and record keeping requirements on all employers. To comply with the WTPA, an employer must:

1. Provide notice to each employee at the employee's time of hire, and annually on or before February 1 of each year. The notice must include:
   - the employee's rate of pay;
   - the basis of the employee's wages (whether paid by the hour, shift, day, week, commission, etc.);
   - whether the employer will be claiming any allowances, such as meal or lodging allowances, against minimum wage and the amount of the allowance claimed;
   - the employee's regular payday;
   - the employer's name and any name under which the employer conducts business;
   - the physical address of the employer's main office or its principal place of business (if different from its mailing address); and
   - the employer's telephone number.
2. Obtain and keep the employee's signed acknowledgement for at least six years

Each notice must be given in English and the employee's primary language if the New York State Department of Labor (NYSDOL) has provided a notice template in the employee's primary language. To date, the department has issued templates in English, Spanish, Chinese and Korean. An employer can develop its own notice as long as it complies with the WTPA. All annual notices must be provided between January 1 and February 1 beginning in 2012. New York employers are encouraged to act quickly to ensure their practices comply with the WTPA. The NYSDOL's Guidelines can be found here.

BANKING

CFPB Releases Model Credit Card Disclosure Form

On December 7, the Consumer Financial Protection Bureau (CFPB) released a prototype consumer credit card agreement. The two-page form, which contains only 1100 words, is divided into three separate sections: costs, changes and additional information. The CFPB has solicited public comment on its website with respect to the prototype.

Many typical credit card disclosure terms, such as "cash advance", "balance transfer" and "default" are not defined in the prototype. Rather, the model directs the consumer to review the CFPB's Definition of Credit Card Terms to understand their meanings.

For more information, click here.

UK DEVELOPMENTS

FSA Fines Integrated Financial Arrangements Plc $5.5 million for Client Money Breaches

The Financial Services Authority (FSA) announced on December 8, that it fined Integrated Financial Arrangements Plc (Integrated) £3.5 million (approximately $5.5 million) for failings in relation to segregation of client money. Integrated operates *Transact,* one of the UK's largest wrap platforms. This is the second largest penalty imposed by the FSA for client money rule breaches.

On an inspection visit by the FSA in May 2010, it identified client money compliance failures stretching over a period of more than eight years from December 2001 to May 2010. The amount of client money held by Integrated during the period averaged £508 million (approximately $790 million).

Integrated did not perform any client money calculations between 2001 and 2010. As a consequence, it failed to identify or fund any shortfalls in its client money bank accounts for the whole of that period. This meant that money belonging to clients was used to cross fund other clients and resulted in clients' money being at risk if Integrated were to become insolvent. Integrated also failed to put in place adequate trust documentation for several of its client bank accounts and failed to put in place adequate risk management systems in relation to the handling of client money. Since Integrated has not become insolvent, none of its clients has suffered any actual losses as a consequence of the rules breaches identified by the FSA.

Tracey McDermott, FSA's acting director of enforcement and financial crime, said: "Integrated has committed a serious breach by failing to comply with our client money rules for a significant period of time. The FSA has repeatedly emphasized the importance of ensuring that client money is adequately protected and in the past year has taken enforcement action against firms of all sizes for breaches of its client money rules.

Integrated agreed to settle at an early stage of the FSA disciplinary proceeding and as a result it qualified for a 30% discount. Without the discount the fine would have been £5 million (1 percent of the average client money balance held over the period December 2001 to June 2010) and approximately $7.9 million.

The FSA also required Integrated to appoint a skilled person under Section 166 of the Financial Services and Markets Act 2000, to review its client money procedures. Integrated has agreed to comply with the skilled person's recommendations.

For more information, click here.

FSA Fines and Bans Hedge Fund Manager's Compliance Officer

The FSA has published the final notice it has issued to Dr. Sandradee Joseph, the former compliance officer of hedge fund manager Dynamic Decisions Capital Management Ltd (Dynamic) (a hedge fund management company).

Dr. Joseph was fined £14,000 (approximately $22,000) and banned indefinitely from performing any significant influence controlled function (including but not limited to the compliance oversight function) for failure to comply with Principle 6 of the FSA's Statement of Principle for Approved Persons (APER).

In late 2008, a senior employee of Dynamic entered into a number of transactions for the purchase and resale of a bond which was a fraudulent instrument. These transactions were designed to conceal significant losses suffered by funds managed by Dynamic in the fourth quarter of 2008.

The FSA found that between November 2008 and February 2009, Dr. Joseph failed properly to carry out her responsibilities as Dynamic's compliance officer and failed to act with due skill, care and diligence. Specifically, she failed to:

- Properly consider issues raised in a termination letter from Dynamic's former prime broker who resigned because of concerns it raised about the bond transactions and to which Dynamic did not satisfactorily respond.

- Investigate concerns about the purchase of the bond raised by Dynamic's two principal institutional investors who repeatedly requested further information about the transactions and advised that the transactions breached investment restrictions. Dr Joseph should have ensured that these concerns were urgently investigated. Instead she wrongly relied on assurances from the employee who entered into the transactions and on a mistaken belief that external lawyers had been consulted and had addressed any relevant concerns.

In an accompanying press release, Tracey McDermott, the FSA's acting director of enforcement and financial crime, commented: "Joseph took far too narrow a view of her role as a Compliance Officer. She failed to understand the importance of her role and the wider regulatory obligations it brings."

Dr. Joseph agreed to settle during the course of the FSA investigation. She therefore qualified for a 30% reduction on her financial penalty which would otherwise have been £20,000 (approximately $31,000).

For more information, click here.

EU DEVELOPMENTS

European Commission Publishes Proposals for Revised Market Abuse Directive

The European Commission has published its proposals for the revision of the Market Abuse Directive (2003/6/EC) (MAD). The proposals consist of a directly applicable Regulation to replace MAD (the proposed Regulation) and a Directive containing additional requirements for parallel criminal offences (the proposed Directive).

The proposed Regulation and the Derivative will be considered further by the European Parliament and the Council of the European Union, providing the opportunity for lobbying by industry representatives and others on issues of concern.

The proposed Regulation is broader in scope than MAD. It applies to actions relating to a broad range of derivatives and also includes various over-the-counter transactions.

The proposed definition of inside information is extended to cover information which is not publicly available, and which may be considered relevant by investors without any specific requirement for the information concerned to be price sensitive.

The expansion of the definition of inside information, and of the range of instruments covered would permit enforcement action to be brought for conduct outside of the current scope of MAD. Liability under the proposed Directive and Regulation can be mitigated if firms have effective systems in place to prevent individuals holding inside information from transmitting it to others making decisions about transactions. This formally validates and requires information barriers (so called "Chinese walls").

The proposed Regulation covers attempted market manipulation, enabling sanctions to be imposed for a failed attempt to manipulate the market. Attempted insider dealing is already covered under MAD.

The proposed Directive contains new criminal sanctions for insider dealing and market manipulation. Member states may prescribe other misconduct as a criminal offence but, at a minimum, criminal sanctions must be enacted for committing and attempting insider dealing and market manipulation.

To encourage reporting of market abuse, the proposed Directive and Regulation require member states to have appropriate safeguards for any "whistleblower" who reports potential or actual breaches.

To review the press release, click here.

In a linked development, the United Kingdom's government (the UK government) published The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011 on December 8.

When the UK government implemented MAD, it retained certain UK anti-market abuse prohibitions which went beyond the narrower prohibitions in MAD. These sections were subject to a sunset clause, pending the outcome of a review by Her Majesty's Treasury (HM Treasury) to assess whether they remained justified. The sunset provisions were extended in 2008 and again in December 2009 to allow any changes to align with the outcome of the ongoing, but delayed, European Union review of MAD. The sunset provisions are due to expire on December 31, 2011. With the publication of the proposals described above, HM Treasury has decided to extend those provisions once more until December 31, 2014, to reflect the existing policy of aligning them with the outcome of the MAD review, which is expected to take approximately three years to come into effect across member states.

For more information, click here.

European Parliament Indicates Date for EMIR Vote

The European Parliament has indicated that it will consider the proposed European Market Infrastructure Regulation (EMIR) in its plenary session to be held January 16 to 19, 2012. This vote was originally expected in July 2011. EMIR covers over-the-counter (OTC) derivatives transactions, central counterparties and trade repositories as reported in the July 8, 2011 edition of *Corporate and Financial Weekly Digest*.

For more information, click here.

Energy Markets Regulation Enacted

On December 8, the text of the Regulation on Energy Market Integrity and Transparency (Regulation 1227/2011) (REMIT) was published in the Official Journal of the European Union.

REMIT establishes a framework for monitoring wholesale energy markets intended to ensure the integrity and transparency of those markets by detecting and deterring market abuse and manipulation.

REMIT enters into force on the 20th day following its publication in the Official Journal. However, certain provisions in Article 8 (Data collection) will apply with effect from 6 months after the date on which the Commission adopts the relevant implementing acts referred to in that Article.

For more information, click here.

In a related development, on December 2, the Council of European Energy Regulators (CEER) published its final advice to the European Commission on the regulatory oversight of energy exchanges. The CEER's advice sets out recommendations to harmonize the supervision and governance of energy spot exchanges. It also makes recommendations about transparency, market surveillance, monitoring and co-operation in order to promote market integrity and effective and efficient supervision of such energy exchanges under REMIT.

To review CEER's final advice, click here.

ESMA Warns Investors About Forex Trading

On December 5, European Securities and Markets Authority (ESMA) issued an investor warning about foreign exchange (forex) trading. It warns about the risks involved in forex trading and the particular dangers of dealing with unauthorized or unregulated firms.

ESMA stated that issued the warning after an increase in unauthorized firms offering online forex transactions into certain European Union member states.

This is the first time that ESMA has issued an investor warning. To read EMSA's warning, click here.

For more information, contact:

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EXECUTIVE COMPENSATION AND ERISA

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