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CORPORATE & FINANCIAL
WEEKLY DIGEST

February 15, 2013

BROKER DEALER

FINRA Proposes Rule Change that Would Require Reporting OTC Equity Transactions Within 10 Seconds

The Financial Industry Regulatory Authority has filed a proposed rule change requiring trades and trade cancellations in over-the counter (OTC) transactions in National Market System stocks and OTC equity securities (as defined in FINRA Rule 6420) that take place during normal market hours to be reported "as soon as practicable," but no later than 10 seconds following execution or cancellation. Currently, FINRA trade reporting rules require members to report such trades and same-day trade cancellations within 30 seconds. FINRA also is proposing to adopt supplementary material to clarify the "as soon as practicable" requirement. In order to allow time for necessary systems changes, the proposed implementation date is between 120 and 180 days following the date of approval by the Securities and Exchange Commission. The SEC is accepting comments on FINRA's proposed rule change on or before March 5, 2013. All submissions should refer to File No. SR–FINRA–2013–013.

Click here for the FINRA rule filing.

FINRA Offers Changes to Proposed Rules Governing Markups, Commissions and Fees

In February 2011, the Financial Industry Regulatory Authority initially sought comment on proposed rules governing markups, commissions and fees. The initial proposal sought to eliminate the 5% rule for markups and markdowns. In response to the comments received, FINRA has offered several changes to the proposed rules. Among other things, the changes include retention of the 5% rule for markups and markdowns, modification of the relevant factors used to determine the reasonableness of markups and commissions, elimination of the requirement to provide commission schedules for equity securities transactions to retail customers and extension of the proposed markup rules to transactions in certain government securities. FINRA requests comment on the revised proposal. Comments must be received by April 1, 2013.

Click here for the FINRA notice.

CFTC

CFTC Permits Cantor Clearinghouse to Clear Certain Foreign Exchange Options

On February 11, the Commodity Futures Trading Commission issued an amended order that allows Cantor Clearinghouse, L.P. (Cantor), a registered derivatives clearing organization, to clear: (i) foreign exchange spot index binary flex options contracts (FXSI contracts) that are financially settled based on foreign currency pairs of major money center currencies; and (ii) thereafter, additional binary options contracts that are fully margined, have risk profiles similar to the FXSI contracts, and for which there is an underlying commodity. Cantor is permitted to act as a derivatives clearing organization only for contracts traded on the Cantor Futures Exchange, L.P.

For more information, click here.

LITIGATION

Seventh Circuit Addresses FLSA Class Certification Standards

The US Court of Appeals for the Seventh Circuit has held that the same standards governing Rule 23 class certification claims apply to wage-and-hour "collective action" claims brought under the Fair Labor Standards Act (FLSA).

Plaintiffs brought claims seeking to represent both a Rule 23 class and an FLSA class against a defendant satellite company, claiming the defendant had failed to properly compensate its technicians. The District Court decertified the classes, finding that there were too many individual questions of fact related to the damages each employee suffered.

The Seventh Circuit affirmed the decertification. Of particular importance, the Seventh Circuit held that the standards governing Rule 23 certification should be applied to wage-and-hour claims under the FLSA. Traditionally, according to the court, the only difference between the classes has been that a Rule 23 class is "opt-out," while a FLSA class is "opt-in." The court held that this was not "a good reason to have different standards for the certification of the two different types of action," and therefore treated both as a single class. The Seventh Circuit's ruling may pose additional obstacles for plaintiffs bringing wage-and-hour class actions if they must meet each of Rule 23's requirements for certification. *Espenscheid v. DirectSat USA, LLC*, No. 12-1943 (7th Cir. Feb. 4, 2013).

Fourth Circuit Refuses to Pierce the Corporate Veil in Oil Spill Case

The US Court of Appeals for the Fourth Circuit has refused to enforce a judgment against an entity with ties to the judgment debtor, finding that the judgment creditor had not adequately pled an alter ego claim.

Plaintiff Vitol SA secured a $9 million judgment against Capri Marine Ltd. on the grounds that Capri breached certain warranties of seaworthiness, which resulted in an oil spill. Vitol had been unable to collect on the judgment, and filed suit in Federal Court against Spartacus Navigation Corp and Primerose Shipping Co. (together, S&P) to collect on the judgment, claiming that S&P were alter egos of Capri.

Plaintiff identified a variety of links between Capri and S&P, including, among others, that Primerose was started with funds from Capri's parent company, Starlady Marine; the vessels of Starlady and Primerose had similar coloration; Primerose and Starlady shared offices, phone numbers, and other office facilities; the owner of Primerose extended a line of credit to Starlady's parent company; and Starlady paid off a loan held by one of Primerose's subsidiaries. The Fourth Circuit found that these allegations showed only a strong business relationship between Capri and S&P, and together failed to state a claim to pierce the corporate veil, an action which is taken "only under extraordinary circumstances." *Vitol v. Primerose Shipping Co*., No. 11-1900 (4th Cir. Feb. 8, 2013).

EU DEVELOPMENTS

European Commission Announcement Concerning EMIR Regulatory Technical Standards

On February 8, the European Commission issued an announcement concerning the draft regulatory technical standards (RTS) made under the European Market Infrastructure Regulation (the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (Regulation 648/2012)) issued in December 2012 (as reported in *Corporate and Financial Weekly Digest* of December 21, 2012). The announcement followed the withdrawal of a motion before the European Parliament by the Economic and Monetary Affairs Committee (ECON) to reject the RTS.

The European Commission stated that it understood ECON's reasons for proposing the rejection of the RTS. It will address them by ensuring that when it adopts its decisions on mandatory clearing for specific classes of OTC derivatives, the clearing obligation for non-financial firms will be phased in over an appropriate period of time. This will allow non-financial firms sufficient time to adapt to the new requirements.

Read more.

ESMA Issues AIFM Remuneration Guidelines

On February 11, the European Securities and Markets Authority (ESMA) published final guidelines (Guidelines) on remuneration of alternative investment fund managers (AIFMs). The Guidelines follow from, and add detail to, the remuneration provisions contained in Annex II of the EU Alternative Investment Fund Managers Directive (2011/61/EU). The Guidelines will apply to managers of alternative investment funds (AIFs). AIFs include hedge funds, private equity funds and real estate funds. Non-EU AIFMs which market AIFs to EU investors under the Alternative Investment Fund Managers Directive's marketing passport will also be subject to the guidelines after a transitional period.

ESMA summarized the Guidelines as requiring AIFMs to introduce sound and prudent remuneration policies and organizational structures designed to avoid conflicts of interest that may lead to excessive risk taking.

The Guidelines apply to "identified staff whose professional activities might have material impact on the AIF's risk profile." Identified staff include executive and non-executive board members, senior management, control functions (including risk management, compliance internal audit and similar functions) and risk takers (any staff member who can "exert material influence" on the risk profile of an AIFM or the AIF it manages). Also included is any employee whose total remuneration is in the same bracket as the staff identified in the previous sentence.

For the purpose of the Guidelines, remuneration consists of:

i. all forms of payments or benefits paid by the AIFM,
ii. any amount paid by the AIF itself, including carried interest, and
iii. any transfer of units or shares in the AIF,

in each case paid or given in exchange for professional services rendered by the identified staff of the AIFM.

The board or other governing body of each AIFM is required to ensure that sound and prudent remuneration policies/structures are in place and are not circumvented.

The Guidelines will apply beginning July 22, 2013, subject to the AIFMD's transitional provisions.

Read more.

European Financial Transaction Tax Proposal

On February 14, the European Commission released draft text for a proposed financial transaction tax directive. If the text is implemented into law a financial transaction tax (FTT) will be payable to the tax authorities in Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia, Slovakia and any other European Union Member State that chooses in due course to participate (Participating States).

The proposal for a directive seeks to apply the FTT to financial transactions carried out by financial institutions that are party to the financial transaction, either for their own account or for the account of other persons, or acting in the name of a party to the transaction. The FTT applies to transactions where a party is deemed to be established in a Participating State (the residence principle) and also where financial instrument traded in the transaction is issued in a Participating State (the issuance principle).

The rate of taxation is not to be lower than 0.1% of the taxable amount for financial transactions that are not related to derivative contracts and 0.01% of the taxable amount for financial transactions that are related to derivative contracts. Any Participating States which currently impose a tax on financial transactions are prevented under Article 15 of the FTT from maintaining such a tax or from introducing a new financial transactions tax.

More information is available here and here.

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