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BROKER DEALER

SEC Requests Comments on FINRA's Amendments to Proposed New Rule Regarding Communications with the Public

The Securities and Exchange Commission has issued Release No. 34-65663 (the Release) requesting comment on the Financial Industry Regulatory Authority's proposed amendments to its proposed rule change regarding communications with the public. In July, FINRA proposed new FINRA Rule 2210 (the Rule) regarding communications with the public. FINRA proposed that the Rule replace the current six communication categories with three new categories: institutional communication, retail communication, and correspondence, and that the rule prescribe approval, review, record-keeping, filing, and content requirements to such communications. A summary of the proposal can be found in the July 22, 2011 edition of *Corporate and Financial Weekly Digest*.

In response to concerns raised by the public in comment letters to the SEC, FINRA filed a partial amendment to the proposal. In the amended filing, FINRA: i) clarified that retail communications excepted from the definition of research report must be approved by a principal of the firm if the communication makes any financial or investment recommendation; ii) eliminated certain required filings for retail communications; iii) required certain disclosures in comparative illustrations; iv) changed the category of associated persons whose financial interest in the issuer would have to be disclosed if making a recommendation in a retail communication; v) revised the disclosure standards for public appearances by associated persons that include securities recommendations; and vi) excluded from the content standards certain documentation that has already been filed with the SEC.

The SEC is soliciting comments to the proposal, as amended. Comments are due 30 days after publication in the Federal Register.

Click here to read FINRA's Initial Rule Filing SR-FINRA-2011-035.
Click here to read FINRA's Amendments to its Rule Filing SR-FINRA-2011-035.
Click here to read Release No. 34-65663.

SEC Approves Amendments to FINRA Rule 9251 to Explicitly Protect from Discovery Documents That Federal Law Prohibits FINRA from Disclosing

The Financial Industry Regulatory Authority has issued Regulatory Notice 11-50 regarding amendments to FINRA Rule 9251 (the Rule). The Rule describes the types of documents that FINRA's Enforcement and Market Regulation Departments must produce to respondents during the discovery phase of a FINRA proceeding. The Rule explicitly protects certain types of documents from production (e.g., documents protected by attorney-client privilege or attorney work-product). As a result of the approved amendments, the Rule also protects documents that federal law prohibits FINRA from disclosing. The Rule removes FINRA's previous requirement to seek a good cause determination from a hearing officer to allow FINRA to withhold such documents. The Rule also prohibits a hearing officer from ordering Enforcement or Market Regulation to either produce or reveal information about the existence of a document to a respondent if federal law prohibits such disclosure. The amendment, however, contains a procedural safeguard allowing a hearing officer to review a document to determine whether federal law prohibits its disclosure by Enforcement or Market Regulation.

Click here to read Regulatory Notice 11-50.

LITIGATION

District Court Grants Motion to Dismiss Fraud Claim Against Corporate Officers

The U.S. District Court for the Eastern District of Pennsylvania granted a motion to dismiss a fraud claim against two corporate officers in a case arising out of a failed business relationship between two companies that sell products used in fundraising efforts.

Cherry Bros., LLC (Cherrydale) filed a two count complaint alleging breach of contract and fraud against Club's Choice; Richard McHugh, the President of Club's Choice; and Glen McHugh, its Vice President. Cherrydale alleged that the parties entered into verbal and written agreements by which they would sell each other's products and provide each other with certain services. The McHughs moved to dismiss the fraud count arguing that the plaintiffs failed to plead facts sufficient to support a fraud claim as required by Rule 9(b) of the Federal Rules of Civil Procedure and that Cherrydale had also failed to plead facts to support a claim to pierce the corporate veil.

Cherrydale argued that it did not seek to pierce the corporate veil, but rather had a viable claim against the individual defendants because the complaint described how the McHughs individually engaged in fraudulent conduct. In support of its fraud claim, Cherrydale alleged that the McHughs made materially false representations and directed their employees to do the same. The court disagreed and ruled that Cherrydale's complaint did not satisfy the heightened pleading requirements of Rule 9(b), pointing out that the complaint omitted at least one key particular with respect to each of the alleged misrepresentations, such as who made the statements, when they were made or to whom the statements were directed. The court also held that several of Cherrydale's allegations were so intertwined with the contractual relationship between the parties that they could only be considered on the breach of contract claim and not in support of any tort claims against the individual defendants.

Cherry Bros., LLC v. Choice Products USA, LLC, 2011 WL 5130079 (E.D. Pa. Oct. 28, 2011).

Fourth Circuit Holds That Contractual Language Does Not Compel Court to Grant Equitable Relief

The U.S. Court of Appeals for the Fourth Circuit recently affirmed the denial of a preliminary injunction motion by Bethesda Softworks, LLC (Bethesda), finding that the district court did not abuse its discretion by looking to factors outside of the agreement between the parties in ruling on the motion.

Bethesda sought to enjoin Interplay Entertainment Corp. (Interplay) from infringing copyrights related to a video game series. Bethesda argued that it was not required to demonstrate irreparable harm independently because the Asset Purchase Agreement (APA) entered into by the parties provided that a breach of the APA would "result in irreparable injury" entitling Bethesda to equitable relief. The district court denied the motion, holding that Bethesda had not established that it would be irreparably harmed. On appeal, Bethesda argued, among other things, that the district court abused its discretion by not granting the motion for equitable relief based on the clause in the APA.

The Fourth Circuit affirmed the denial of the motion, concluding that the district court had not abused its discretion by looking beyond the APA. In doing so, the Fourth Circuit pointed out that contractual provisions do not alone control whether or not a court may grant equitable relief. The Fourth Circuit thus affirmed the denial of the motion for a preliminary injunction based upon the district court's determination that Bethesda failed to establish irreparable harm.

Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp., 2011 WL 5084587 (4th Cir. October 26, 2011).

EXECUTIVE COMPENSATION AND ERISA

IRS Establishes a Voluntary Classification Settlement Program for Employers Who Have Misclassified Workers

On September 21, the Internal Revenue Service announced the launch of the Voluntary Classification Settlement Program (VCSP), a new voluntary and low cost program to allow employers to reclassify as employees for future tax periods workers who had been misclassified as independent contractors.

In order to encourage the proper classification of workers, the program is closed to taxpayers currently under audit for misclassification where the audit is being carried out by the IRS, the Department of Labor, or a state agency.

The taxpayer must meet certain requirements to participate in VCSP. The requirements are that the taxpayer must have (i) consistently treated workers as nonemployees; (ii) filed Form 1099s for those workers for the previous three years; and (iii) the employer must agree to prospectively treat the reclassified workers as employees for future tax periods. The qualifying employer must then apply to participate and, if accepted, enter into a closing agreement with the IRS.

A participating employer must then pay ten (10) percent of the employment tax liability that would have been due on compensation paid to the worker for the most recent tax year under the reduced rates of Section 3509 of the Internal Revenue Code. The employer will be released from any interest and penalties on liability and will not be subject to audit for the reclassified workers. The taxpayer must also agree to extend the statute of limitations on assessment of employment taxes for three years for the first through third calendar years beginning on the date the workers have been reclassified as employees under the closing agreement.

Interested employers should submit an application to the IRS, which must include the name of the authorized representative with a valid Form 2848 (Power of Attorney). Employers should note that the IRS is under no obligation to accept the application for VCSP.

The IRS announcement can be accessed here.

BANKING

FinCEN Announces Prepaid Access Webinar

The Financial Crimes Enforcement Network (FinCEN) has announced that it will hold an informational webinar on Wednesday, November 9, from 3:00 to 4:00 p.m. EST that will highlight the new regulatory requirements of the Prepaid Access Final Rule, its intent and purpose, and the regulatory expectations.

On July 29, FinCEN published, "Definitions and Other Regulations Relating to Prepaid Access" (76 FR 45403) (the Prepaid Access Final Rule) in the Federal Register. The Prepaid Access Final Rule (the Rule) establishes a more comprehensive approach for regulating prepaid access and requires providers and sellers of prepaid access to (i) file suspicious activity reports (SARs), (ii) collect and retain customer and transactional information and (iii) maintain an anti-money laundering program. The Rule imposes Bank Secrecy Act requirements on providers and sellers of prepaid access that are more commensurate with other types of Money Services Business (MSBs). Additionally, the Rule provides the flexibility to address innovations as they develop. The Rule also requires providers of prepaid access (but not sellers) to register with FinCEN as MSBs.

For more information about the webinar, click here.

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* Click here to access the *Corporate and Financial Weekly Digest* archive.

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