CORPORATE & FINANCIAL WEEKLY DIGEST

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BROKER DEALER

SEC Reopens Comment Period for Proposed Amendments to Broker-Dealer Financial Responsibility and Related Rules

On March 9, 2007, the Securities and Exchange Commission proposed amendments to its net capital, customer protection, books and records and notification rules for broker-dealers. The firm previously summarized these proposed amendments in the March 16, 2007 edition of the *Corporate & Financial Weekly Digest*.

The SEC did not act on the rule amendments, but it is now reopening the public comment period for the proposed amendments. Comments should be received on or before June 8, 2012.

To view the notice regarding the reopening of comment period, click here.

NASDAQ Proposes to Institute an Excess Order Fee

The NASDAQ Stock Market (NASDAQ) has proposed to adopt an excess order fee commencing on June 1. This fee is intended to reduce the number of non-actionable orders submitted to the NASDAQ market, and thus promote greater order interaction, increase the quality of NASDAQ market data and prevent potentially abusive trading practices.

NASDAQ will base the excess order fee on an order entry ratio. In general, the order entry ratio will be the ratio between (i) entered orders, weighted by the distance of the order from the national best bid or offer, and (ii) orders that execute in whole or in part. The excess order fee will be imposed on market participant identifiers with an order entry ratio of more than 100. The order entry ratio will be calculated, and the excess order fee will be imposed, on a monthly basis.

To view the notice of filing of the proposed rule change, click here. To view Exhibit 5 for the language of proposed rule change, click here.

CFTC

Second Amendment to Effective Date for Swap Regulation

On May 10, the Commodity Futures Trading Commission issued a notice of a proposed second amendment that extends the CFTC's prior grant of temporary relief from certain swap-related provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The proposed amendment includes four changes. First, the definitions of the terms "swap dealer," "major swap participant," and "eligible contract participant" are excluded from the proposed order, because they were defined on April 18. Second, the CFTC proposes to extend the effective date for swap regulation from July 16 to

December 31 or until the CFTC's rules and regulations go into effect. The amended order also provides that agricultural swaps may be cleared in the same manner as any other swap without the need for additional guidance from the CFTC. Finally, the relief for exempt commercial markets (ECM) and exempt boards of trade (EBOT) previously granted by the Commission will expire on the effective date of the designated contract market (DCM) or swap execution facility (SEF) rules, whichever is later, unless the ECM or EBOT files a DCM or SEF application on or before the effective date of the DCM or SEF final rules, in which case the relief will remain in place during the pendency of the application.

The proposal will be published in the *Federal Register* for a 14 day comment period.

Click here for more information.

CFTC Issues Draft of 2012 Rulemaking Schedule

On May 10, Commodity Futures Trading Commission Commissioner Scott O'Malia released a draft of the CFTC's 2012 rulemaking schedule. The schedule contains a list of the earliest potential dates (ranging from May through the Fall) for consideration of a variety of CFTC rules including several remaining Dodd-Frank Wall Street Reform and Consumer Protection Act rules. For example, the product definitions and end-user exemption rules are slated for consideration as early as June; Core Principle 9 for designated contract markets and core principle rules for swap execution facilities may be considered as early as July; and the Volcker Rule and registered entity governance and conflicts of interest requirements may be considered as early as the Fall.

The full CFTC rulemaking schedule is available here.

LITIGATION

Financial Statements and Settlement Negotiations of Cooperating Witnesses in SEC Action Not Discoverable by Defendants

The U.S. District Court for the Southern District of New York last week denied defendants Rajat Gupta and Raj Rajaratnam's motion to compel documents concerning settlement negotiations between the Securities and Exchange Commission and various cooperating witnesses. The defendants argued that settlement negotiations were relevant to prove that the cooperators had an incentive to lie. Financial statements provided by the cooperators to the SEC, which demonstrated the cooperators' ability to pay any fines or penalties imposed by the SEC, would also speak to bias. The court rejected the motion, relying heavily on the SEC's willingness to produce the settlement agreements themselves. These agreements, rather than the negotiations surrounding them, were sufficient for the defendants to argue that the cooperating witnesses were biased; the cooperators had not made any "Wells" submissions or any other statements that would include fact admissions, and negotiations were more likely to reflect lawyer arguing and "puffery" rather than substantive evidence related to bias. Further, the court held that the financial statements would only be made available to the defendants if they were able to make a threshold showing that the witness lied to the SEC to procure a better deal.

Securities and Exchange Commission v. Gupta, No. 11 Civ. 7566 (JSR) (S.D.N.Y. May 1, 2012).

State Claims Related to Renewal of FEMA "Write Your Own" Floor Insurance Programs are Federally Preempted

The U.S. Court of Appeals for the Fifth Circuit last week held that any state claim related to the Federal Emergency Management Agency's (FEMA) "Write Your Own" (WYO) flood insurance program is preempted by federal law if it is based on events which took place while the insured was already covered. The plaintiff, James Grissom, purchased WYO flood insurance from Liberty Mutual, and alleged that, when he applied for renewal, Liberty Mutual failed to disclose that the plaintiff was eligible for a preferred rate policy. Liberty Mutual defended that the plaintiff's negligent misrepresentation claim was preempted by the National Flood Insurance Act, which establishes WYO insurance. WYO allows private insurers to issue flood insurance policies in their own names, underwritten by the Federal government. FEMA regulations govern the methods by which these carriers adjust and pay claims.

In prior cases, the Fifth Circuit established the rule that state law claims arising from "claims handling" by a WYO insurer are preempted, whereas "procurement-based" state law claims are not. The plaintiff argued that his claim was based on his renewal application, which should be considered "procurement-based." The court held that the plaintiff's negligent misrepresentation claim was a "claims handling" claim because the plaintiff was insured at the time of the interaction between the plaintiff and Liberty Mutual. "If the individual is already covered and in the midst of a non-lapsed insurance policy, the interactions between the insurer and insured, including renewals of insurance, are 'claims handling' subject to preemption." This bright line rule officially fixes in place the difference between preempted and non-preempted claims by requiring the court to consider the insured's status at the time the claim arose.

Grissom v. Liberty Mutual Fire Insurance Co., No. 11-60260 (5th Cir. April 30, 2012).

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