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CORPORATE & FINANCIAL
WEEKLY DIGEST

August 24, 2012

Due to the holiday, *Corporate and Financial Weekly Digest* will not be published on August 31. The next issue will be distributed on September 7.

SEC/CORPORATE

SEC Abandons Money-Market Fund Reform

On August 22, Securities and Exchange Commission Chairman Mary Shapiro stated that three of the five SEC commissioners have told her that they will not support a staff proposal to reform the structure of money-market funds. As a result, Chairman Shapiro stated that after two and a half years of study by the SEC, it is now time "for other policy makers . . . to address the systemic risks posed by money-market funds."

Chairman Shapiro stated that in her view the exemptive rules that allow a money-market fund to maintain a stable $1.00 net asset value (NAV), rather than having to mark-to-market as is required by all other mutual funds, create systemic risks to US financial markets because money-market funds have insufficient ability to absorb losses above a certain amount without "breaking the buck" and, if that were to occur, there would be massive withdrawals from money-market funds which could create or further exacerbate a financial crisis. She stated that the proposal being considered by the staff of the SEC would have provided two alternatives to address these perceived structural issues: a floating NAV using a mark-to-market valuation or the creation of a "capital buffer" to absorb day-to-day variations in the value of money-market fund holdings.

In light of the SEC's inability to adopt either of these structural reforms, Shapiro stated that "other policy makers now have clarity that the SEC will not act to issue a money-market fund proposal and can take this into account in deciding what steps should be taken to address this issue."

Read more.

SEC Adopts Final Rules Regarding Conflict Minerals Disclosure

On August 22, the Securities and Exchange Commission adopted a final rule implementing disclosure and reporting requirements regarding the use by issuers of conflict minerals from the Democratic Republic of the Congo (DRC) and adjoining countries (collectively, the Covered Countries) added as Section 13(p) to the Securities Exchange Act of 1934 (Exchange Act) by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. "Conflict minerals" are tantalum, tin, gold, tungsten, their derivatives, or any other minerals or their derivatives determined by the US Secretary of State to be financing conflict in the Covered Countries.

The final rule applies to issuers who file reports with the SEC under Sections 13(a) or 15(d) of the Exchange Act and for which conflict minerals are "necessary to the functionality or production of a product to be manufactured by the company" or "contracted to be manufactured." If an issuer determines it does not utilize conflict minerals or their derivatives in any production or manufacturing process (which includes components used in assembling a product as well as products manufactured for the issuer under contract), the rule would not require the issuer to

take any action or make any disclosures with respect to conflict minerals. The final rule applies to domestic companies, foreign private issuers and smaller reporting companies. Conflict minerals disclosures will be filed on new Form SD, rather than in an issuer's Annual Report on Form 10-K.

Issuers that use conflict minerals will be required to determine, after a reasonable country of origin inquiry, whether their conflict minerals originated in the Covered Countries. Such inquiry must be performed in good faith and reasonably designed to determine if any of the issuer's conflict minerals either (1) originated in the Covered Countries or (2) are from scrap or recycled sources. If the issuer determines that either (1) it knows that its conflict minerals did not originate in the Covered Countries or are from recycled or scrap sources, or (2) it has no reason to believe that the conflict minerals may have originated in the Covered Countries or may not be from scrap or recycled sources, the issuer must disclose on Form SD the determination and describe both the process and results of the reasonable country of origin inquiry it used in reaching this determination. The issuer would also be required to make this disclosure available on its website, disclose in its Form SD the Internet address where this disclosure is posted, and maintain records demonstrating that its conflict minerals did not originate in the Covered Countries.

If the issuer either (1) knows or has reason to believe that its conflict minerals may have originated in the Covered Countries, or (2) knows or has reason to believe that its conflict minerals may not actually be from recycled or scrap sources, then the issuer must perform a due diligence inquiry on the source and chain of custody of its conflict minerals and file a Conflict Minerals Report as an exhibit to its Form SD. In a change from the proposed rules, the due diligence inquiry performed regarding the conflict minerals must conform to a nationally or internationally recognized due diligence framework.

The Conflict Minerals Report is required to contain different information depending on the results of this diligence inquiry and must be posted on the issuer's website. If, after the due diligence inquiry, the issuer is able to determine that the minerals in its products did not finance or benefit armed groups, it can classify its products as "DRC conflict free." Such an issuer must obtain a private sector audit of its Conflict Minerals Report from an independent auditing firm, and in its Conflict Minerals Report must (1) certify that it obtained such audit, (2) identify the auditor and (3) include the audit report of such auditor. If an issuer determines that its products are not "DRC conflict free," then such issuer must also include in its Conflict Minerals Report (in addition to the audit requirements described above) (a) a list of the products either manufactured or contracted to be manufactured by such issuer that have been determined not to be "DRC conflict free," (b) information regarding the facilities used to process the conflict minerals contained in such listed products, (c) the country of origin of the conflict minerals contained in such listed products, and (d) a description of what efforts were undertaken by the issuer to determine the mine or location of origin of its conflict minerals with the greatest possible specificity.

The final rule also added an additional potential classification, "DRC conflict undeterminable." For a two-year period beginning after the initial implementation of the rule (four years for "smaller reporting companies"), if an issuer is unable to determine whether or not the conflict minerals in its products originated in the Covered Countries or benefited armed groups in the Covered Countries, it can classify such products as "DRC conflict undeterminable." As a result of this classification, the issuer must provide the following information in its Conflict Minerals Report: (1) a list of the products that it has classified as "DRC conflict undeterminable," (2) information regarding the facilities used to process the conflict minerals contained in such products, (3) the country of origin of the conflict minerals contained in such products, if known, (4) a description of what efforts were undertaken by the issuer to determine the mine or location of origin of its conflict minerals with the greatest possible specificity, and (5) a description of the steps it has taken or will take, if any, to improve its due diligence process and mitigate the risk that its necessary conflict minerals may benefit armed groups. No private sector audit is required for a Conflict Minerals Report that deals solely with products classified as "DRC conflict undeterminable."

Under the final rule, the conflict minerals disclosure will cover each calendar year period, regardless of the issuer's fiscal year end, and disclosure covering the previous calendar year period will be due on May 31 of each year. For issuers required to file Form SD, the first such form must be filed by May 31, 2014, for calendar year 2013.

Click here to view the adopting release for the rule (Release No. 34-67716). The final rule and compliance considerations will be discussed further in an upcoming Katten *Client Advisory*.

SEC Adopts Final Resource Extraction Rules

On August 22, the Securities and Exchange Commission adopted final rules to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which added Section 13(q) to the Securities Exchange Act of 1934. The new rules will require SEC registrants that are engaged in the development of oil, natural gas or minerals (resource extraction issuers) to report payments made to foreign governments, including sub-national governments, or to the US federal government of taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends and infrastructure improvements on a new Form SD. A payment may be excluded if it (or any series of related payments) is less than $100,000 during the most recent fiscal year of the issuer. Disclosable payments include payments made by a subsidiary or other entity controlled by the issuer. The payments required to be disclosed include, for each “project,” payments in connection with exploration, extracting, processing, export or the acquisition of a license for any such activity.

Detailed information is required about such payments, including the type and total amounts for each product, amounts paid to each government, the currency used, the government entity that received payments and the project of the resource extraction issuer to which the payments relate.

A resource extraction issuer would be required to comply with the new rules for fiscal years ending after September 30, 2013. For a calendar year issuer, the first such report would be required to be “filed” (not “furnished”) on the SEC’s EDGAR system (and thus publicly accessible) by May 30, 2014, and may include a partial report for payments made from September 30, 2013 to December 31, 2013.

Chairman Shapiro recused herself from the vote on the new rules and Commissioner Gallagher, in a lengthy dissent, stated that the SEC “just isn’t the right tool for this type of social policy exercise” and further argued that requiring disclosure on a company-by-company basis will create a huge competitive disadvantage for US registrants, pointing out that national oil companies in Russia, China, Iran and Venezuela will not be required to publicly disclose their cost structures and financial arrangements with host country governments. In his view the congressional mandate contained in the Dodd-Frank Act does not require that resource extraction issuer information provided to the SEC be released publicly in the form provided; he advocated that the social policy objectives of Congress could be accomplished if the SEC aggregated the information and publicly released it on a country-by-country basis rather than a company-by-company basis.

Read more.

DERIVATIVES

ISDA Dodd-Frank Protocol Opened for Adherence

The International Swaps and Derivatives Association has published its August 2012 DF Protocol. The Protocol is intended to provide swap market participants with an efficient means to amend their swap agreements to comply with requirements of the wide array of new Commodity Futures Trading Commission rules relating to swaps that will come into effect starting on October 12 under the authority of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Protocol consists of 1) a protocol agreement, 2) a questionnaire, 3) a supplement consisting of several optional schedules, and 4) an optional terms agreement to create new documentation relationships. A party adheres to the Protocol by paying a $500 fee, submitting an adherence letter and exchanging (electronically or otherwise) questionnaires, supplements and/or terms agreements with its counterparties.

The protocol is now open for adherence and the relevant documents (plus an official set of frequently asked questions) can be found here.

ISDA has partnered with Markit to create the "ISDA Amend" electronic platform for exchanging Protocol documents, which can be found here.

CFTC

CFTC Approves Conforming Rules on Registration of Intermediaries

On August 17, the Commodity Futures Trading Commission approved rule amendments to conform its existing intermediary registration rules to changes made to the Commodity Exchange Act (CEA) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). The conforming amendments add references to swap dealers, major swap participants and swap execution facilities; clarify certain definitions; and eliminate outdated cross-references in several CFTC regulations.

The amended rules include technical changes that will permit legal entities, in addition to individuals, to register as floor traders. This change will effectively permit certain proprietary trading firms to conduct transactions on a swap execution facility without being registered as swap dealers, because trades entered into by a person or entity acting in its capacity as a floor trader are not considered for purposes of determining whether that person has exceeded the *de minimis* threshold.

The final rule is available here.

CFTC Interim Compliant Identifier Website Is Launched by DTCC and SWIFT

On August 21, the Commodity Futures Trading Commission, Depository Trust & Clearing Corporation and SWIFT announced the launch of a website that allows market participants to register for CFTC Interim Compliant Identifiers (CICIs). CICIs are interim legal entity identifiers that will be used to comply with the CFTC's swap data reporting requirements. Swap counterparties and other market participants who are required to utilize CICIs may now obtain the identifiers through the following website: www.ciciutility.org.

More information is available here.

FIA Presents NFA Registration Webinar

On August 21, the Law and Compliance Division of the Futures Industry Association announced that it will host a webinar to help swap dealers and major swap participants understand the Commodity Futures Trading Commission registration process. The 90-minute webinar will be held on Wednesday, September 5 at 2:00 p.m. Eastern time, will feature representatives from the National Futures Association and will provide an in-depth discussion of the registration process, including firm and individual registration filings, the Commodity Exchange Act Section 4s submission and review process, and issues related to statutory disqualifications.

To obtain more information and register for the webinar click here.

NFA Proposes Amendment Requiring View-Only Access to Customer Accounts

On August 21, the National Futures Association proposed a rule requiring every member futures commission merchant (FCM) to provide its designated self-regulatory organization (DSRO) with view-only Internet access to account information for each of the FCM's customer segregated funds and secured amount accounts. To remain an acceptable depository under the proposed rule, a bank or trust company must allow the FCM to provide its DSRO with view-only Internet access to customer segregated funds or secured amount accounts held at the bank or trust company.

The proposed rule is available here.

CME Group Applies to Create London-Based Derivatives Exchange

On August 20, CME Group announced that it is in the process of applying to the United Kingdom's Financial Services Authority (FSA) to create a London-based derivatives exchange. Pending FSA approval, CME Europe Ltd. will offer foreign exchange futures products. CME Globex will be used as the electronic trading platform for CME Europe Ltd., which is expected to launch mid-2013.

More information is available here.

LITIGATION

Private Placement Transaction Involving Foreign Company Was Not Within the Extraterritorial Reach of US Securities Law

The US District Court for the Southern District of New York last week denied securities fraud claims against a Chinese law firm, Deheng Law Firm (Deheng), and a partner of that firm because of a lack of jurisdiction over the investment transaction that was at the center of the dispute. Plaintiffs were investors who had purchased shares of a Chinese company through a private placement investment in Aamaxen Transport Group (Aamaxen), a Delaware corporation. Deheng represented the investors and the Chinese company and had structured the transaction. The investors alleged that Deheng defrauded the group by falsely representing the structure and failing to reveal that a Chinese individual (and husband of a Deheng partner) had control over the invested funds, which allowed him access to later embezzle those funds.

The district court relied on the recent 2010 Supreme Court case, *Morrison v. National Australia Bank*, to resolve the defendants' jurisdictional defense. *Morrison* had rejected the "conduct" and "effects" test previously applied to determine whether a securities transaction was subject to US securities law and instead required a court to conduct a "transactional test" that asked whether (1) the complained-of fraud was in connection with the purchase or sale of a security listed on an American stock exchange or (2) the purchase or sale occurred in the United States.

The court held that, although the securities at issue were shares in US-based Aamaxen, since plaintiffs had purchased their shares through a private placement transaction, the mere fact that shares of Aamaxen were quoted on the over-the-counter bulletin board was not sufficient to establish jurisdiction under *Morrison*. The court also held that the plaintiffs had failed to satisfy the alternative *Morrison* test because they had not alleged that the Aamaxen stock transaction occurred in the United States. The complaint failed to allege where the purchase agreement was negotiated or signed, thus the court could not determine the location of the purchase. Finally, the court rejected plaintiffs' argument that an Aamaxen public SEC filing was sufficient contact with the US to sustain their Section 10(b) claim. *Morrison*, the court held, strictly prohibited extending Section 10(b) claims to cases where the US was the location of the fraud, but not the location of the transaction. The court dismissed the complaint, but without prejudice to allow plaintiffs the opportunity to cure their jurisdictional pleading deficiencies. *Pope Investments II, LLC v. Deheng Law Firm*, No. 10 Civ. 6608(LLS) (S.D.N.Y. Aug. 15, 2012).

Attorney's Participation in a Presentation to Potential Real Estate Investors Did Not Create a Duty Actionable Under Section 10(b) of the Exchange Act

The US Court of Appeals for the Seventh Circuit last week denied federal securities and related state law claims by a group of investors, which were brought against attorneys for statements made during a presentation regarding a potential real estate investment. The defendant attorney spoke only briefly during the presentation to the investors and discussed his firm's role in structuring the real estate venture and the liability protections offered by use of a limited liability company (LLC) for the investment. After the investment venture failed, the investors sued the lawyer, his firm and another partner at that firm, claiming that the lawyer failed to disclose his inexperience with business and securities law, and did not correct the representation that the lawyer was "working for" the investors when in fact he was only the attorney for the LLC.

The Seventh Circuit affirmed summary judgment in favor of the defendants, rejecting the investors' theory that they had reasonably relied on the lawyer's misrepresentation through material omissions. The court held that the lawyer's allegedly fraudulent omissions were only actionable where the attorney had a duty of disclosure to the investors. The court held that no reasonable investor could have believed that the lawyer or his firm would be involved with the investment beyond formation of the investment entities because the lawyer's brief presentation only addressed the formation of the LLC, the investors had limited or no further interaction with counsel after the presentation, and the law firm did no further work on the investment after the investment entities were formed. As a result, no attorney-client relationship existed between the lawyer and the individual investors, and the lawyer had no duty of disclosure to the investors. Thus, the investors' claims for securities fraud and legal malpractice could not stand in the absence of any duty. Related state law fraud and civil conspiracy claims were similarly rejected. *Rosenbaum v. White*, No. 11-3224 (7th Cir. Aug. 16, 2012).

EXECUTIVE COMPENSATION AND ERISA

Employers Must Treat Health Plan Rebates Appropriately

One of the many provisions of the Patient Protection and Affordable Care Act, also referred to as the Healthcare Reform Legislation, provides that health insurers must spend a certain portion of the premiums they receive on clinical services and health care quality-improving activities. If an insurer spends less on such services and activities than the pre-established level, the difference must be refunded to the insurer's policyholders in the form of rebates. The first such rebates were recently issued to policyholders nationwide.

In connection with such rebates, an issue arises if the policyholder is an employer and the policy was obtained to cover employees under the company's group health plan. For example, an employer may wonder if it is entitled to keep the rebate. The answer to this question depends in large part on the health plan's governing documents. If the plan's governing documents clearly address the treatment of such rebates and allow them to be retained by the employer, then guidance recently issued by the US Department of Labor (the DOL) indicates that the plan's provisions can be followed. However, where the plan is silent on such issues—as is often the case when insurance is purchased for employees and the employer relies on the insurance contract as the plan document—the DOL has found that the fiduciary requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA), may dictate the steps that should be followed to ensure that the rebate is treated appropriately. DOL Technical Release 2011-04 discusses many situations that may arise in respect of rebates received in connection with a plan. According to the DOL, issues to consider include the extent to which premiums are paid by the employer or the employee, the amount of the rebate and the administrative and financial hurdles that will need to be addressed in taking any particular course of action. In the end, the safest thing for employers to do may be to pass along the rebate to employees (in the form of a premium holiday or a taxable payment). However, sharing with employees may not be appropriate in every case. For example, sharing may not be required in cases where the net amount to be received by each employee would be exceeded by the associated administrative costs.

In the end, employers should consider how it will address future rebates. In addition, if there is a desire to possibly keep such rebates (rather than share with employees), plan documents should be updated prior to the beginning of the next plan year.

DOL Technical Release 2011-04 can be found here.

UK DEVELOPMENTS

FSA Announces Approach to Transposing EU Short Selling Regulation

On August 16, the UK Financial Services Authority (FSA) published Issue 42 of its Market Watch Newsletter in which it set out its proposed approach to transposing the EU Short Selling Regulation (EU236/2012) (the Regulation) which comes into effect on November 1.

The EU Regulation will have direct effect under UK and other EU national laws with no general need for implementing measures in domestic legislation. However, certain FSA action is required.

The FSA confirmed that it will consult on:

- the manner in which the current UK short position disclosure regime will be superseded by the Regulation;
- application of the FSA penalties regime to breaches relating to the Regulation;
- a framework for the FSA's powers under the Regulation to suspend, prohibit or restrict short selling and other transactions following any significant price decline; and

- developing web-based solutions for the public and private notifications required to be made to the FSA as UK Competent Authority under the Regulation.

Read more.

FSA Proposes to Ban Sales of Unregulated Funds to Retail Clients

On August 22, the UK Financial Services Authority (FSA) published Consultation Paper CP12/19 *Restrictions on the Retail Distribution of Unregulated Collective Investment Schemes and Close Substitutes* in which it proposes to ban the promotion of Unregulated Collective Investment Schemes (Unregulated Schemes) and similar products to most UK retail investors.

Currently, Unregulated Schemes can be promoted to ordinary retail investors after an appropriate suitability assessment by a regulated adviser. The proposals contained in CP12/19 would prevent the marketing of Unregulated Schemes to ordinary retail customers, even in the context of investment advice. Marketing Unregulated Schemes under the proposals set out in CP12/19 would generally be restricted to sophisticated investors and high net worth individuals.

The FSA stated that CP12/19 follows extensive reviews of the sale of Unregulated Schemes undertaken by the FSA, which found that only one in every four advised sales of such funds to retail customers was suitable. In addition, a significant proportion of marketing was in breach of the restrictions in the FSA's requirements applicable to Unregulated Schemes which permit marketing only where an exemption is applicable.
The FSA stated in CP12/19:

> We have found that the majority of retail promotions and sales of unregulated collective investment schemes (UCIS) that we have reviewed fail to meet our requirements, exposing ordinary investors to significant potential for detriment. This demands action. We are proposing to intervene in the market by changing our rules to ban the promotion of UCIS and close substitutes to ordinary retail investors in the UK.

The proposals will not restrict the marketing of Unregulated Schemes to non-retail investors such as professional clients or eligible counterparties.

Responses to the consultation are requested by November 14. The FSA intends to publish a policy statement and final rules and guidance in the first quarter of 2013.

Read more.

FSA Reports on Hedge Funds and Systemic Risk

On August 21, the UK Financial Services Authority (FSA) produced its latest half-yearly report *Assessing Possible Sources of Systemic Risk from Hedge Funds*. This sets out the results of the FSA's latest (March/April 2012) performance of its two regular hedge fund surveys—the Hedge Funds As Counterparties Survey (HFACS) and the Hedge Funds Survey (HFS). The FSA conducts these surveys every six months to assist it in understanding potential sources of systemic risk in the hedge fund sector. This is the sixth HFS and the fifteenth HFACS as reported in the March 2, 2012, edition of *Corporate and Financial Weekly Digest*.

The August 21 report's conclusions include the following:

- Aggregate assets under management increased in the survey period, predominantly due to positive returns, but also helped by generally positive net subscriptions. Aggregate assets below their high-water mark have remained stable and low.

- The footprint of surveyed hedge funds is modest when measured by the value of their exposures and by turnover. Potential exceptions remain the markets in convertible bonds, commodity derivatives and interest rate derivatives.

- In aggregate, hedge funds reported that they can liquidate their assets in a shorter time frame than when most of their liabilities fall due. Almost all surveyed funds reported the ability to suspend investor

redemptions or create side pockets and over half reported that their investors had side letters. The risk of a sudden withdrawal of funding during stressed market periods is likely to remain, with an associated risk of forced asset sales.

- Counterparty credit exposures to hedge funds remain fairly concentrated among five counterparty banks. From the perspective of the banks, by tightening their financing terms they have increased their resilience to possible fund defaults.
- Leverage remains largely unchanged and modest for most hedge funds.
- For most surveyed funds, measures of portfolio concentration, including top ten positions as a percentage of gross market value and the number of open positions, has remained largely unchanged.

The FSA stated that it intends to repeat the HFS and HFACS in September/October 2012. It also intends to continue to work closely with the International Organization of Securities Commissions and other national regulators with a view to achieving a consistent and proportionate global approach to systemic risk data collection for hedge funds.

Read more.

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