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CFTC

CFTC Issues Interpretive Letter Regarding Cleared Swaps Customer Collateral

The Division of Clearing and Risk (DCR) of the Commodity Futures Trading Commission issued an interpretive letter regarding cleared swaps customer collateral requirements under Part 22 of the CFTC's rules. The DCR interpretation addresses a number of issues with respect to which derivatives clearing organizations (DCOs) and clearing member futures commission merchants (FCMs) requested clarification, including: (1) limitations on the use of cleared swaps customer collateral; (2) the use of variation margin, in particular if a DCO elects to net variation margin across an FCM's cleared swaps customers; (3) comingling of cleared swaps customer collateral; (4) the processes by which an FCM may report to a DCO its customers' portfolio of rights and obligations; (5) the circumstances in which a DCO may accept cleared swaps customer collateral in excess of the DCO's initial margin requirements; and (vi) the determination of the value of cleared swaps customer collateral in the event of an FCM default.

The DCR interpretive letter is available here.

CFTC Grants Temporary No-Action Relief from Certain Recordkeeping Requirements for Swap Dealers and Major Swap Participants

The Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued temporary no-action relief to swap dealers (SDs) and major swap participants (MSPs) from certain recordkeeping requirements set out in the internal business conduct requirements found in CFTC Rules 23.201, 23.202 and 23.203.

The letter provides that SDs and MSPs need not comply with the following recordkeeping requirements until April 1, 2013: (1) the requirement to record all oral communications relating to pre-execution swap trade information, including communications that ultimately lead to a related cash or forward transaction; (2) the requirement to maintain such record in a manner that is searchable by transaction and counterparty; (3) the requirement to timestamp pre-execution and execution trade information using Coordinated Universal Time; and (4) the requirement to maintain swap records at the SD's or MSP's principal place of business or other designated principal office.

The DSIO no-action letter is available here.

CFTC Delays the Compliance Date for the Cleared Swaps Collateral Rules

Taking note of the disruption caused by Hurricane Sandy, the Division of Clearing and Risk (DCR) of the Commodity Futures Trading Commission has delayed the date for compliance with the CFTC's Part 22 Rules relating to the protection of cleared swaps customer collateral to November 13. The compliance date had been November 8. The DCR no-action letter is available here.

CFTC's Global Markets Advisory Committee to Discuss Cross-Border OTC Derivatives Issues

On November 7, the Global Markets Advisory Committee of the Commodity Futures Trading Commission will host a meeting on cross-border issues relating to over-the-counter (OTC) derivatives. The Securities and Exchange Commission and regulators from Asia, Australia, Europe and North America are expected to participate in the meeting, which is open to the public and available via the Internet and conference call dial-in.

More information, including webcast and conference call-in information, is available here.

LITIGATION

Assertion of Common Interest Doctrine and Business Strategy Privilege Rejected

The Delaware Court of Chancery recently rejected a party's argument that the "common interest doctrine" and the "business strategy privilege" shielded documents from discovery.

CrossFit, Inc. (CrossFit), a distributor of fitness and training regimens, was wholly owned by an artificial entity, the marital community of Greg and Lauren Glassman. The entity was in the process of dissolution as a result of the Glassmans' divorce proceedings. Ms. Glassman committed to sell her share in CrossFit to a private equity firm, Anthos Capital, L.P. (Anthos). Mr. Glassman moved to compel the production of documents containing communications between Ms. Glassman and Anthos concerning the sale of Ms. Glassman's share. Ms. Glassman argued that the common interest and business strategy immunity doctrines shielded the documents from discovery.

The Court of Chancery rejected Ms. Glassman's arguments. It held that the common interest doctrine applies when parties with a common legal interest share privileged communications in furtherance of that legal interest. The court found that Ms. Glassman had not demonstrated that the communications with Anthos were "sufficiently legal," and not simply commercial, and thus subject to common interest doctrine. Crucially, the court held that "communications about a business deal, even when the parties are seeking to structure a deal so as to avoid the threat of litigation, will generally not be privileged under the common-interest doctrine. The doctrine only protects those communications that directly relate to the parties' legal interests, such as their potential common defense strategies."

The court also held that the business strategy immunity doctrine did not apply. Under the business strategy immunity doctrine, certain information may be protected from disclosure if the information may be used for practical business advantages rather than for proper legal purposes. In declining to apply business strategy immunity doctrine, the court found that the risk of improper business advantage was mitigated by a confidentiality order between the parties and that the risk was outweighed by the potential probative value of the communications.

Glassman v. CrossFit, Inc., et. al., Civil Action No. 7717-VCG (Del. Ch. Oct. 12, 2012).

Second Circuit Holds That Argentinean National Bank Is Not Alter Ego of Argentina

The US Court of Appeals for the Second Circuit recently affirmed a decision from the United States District Court for the Southern District of New York, holding that Banco de la Nación Argentina (BNA) was not Argentina's alter ego and, therefore, that BNA's assets could not satisfy the judgment that plaintiffs obtained against Argentina relating to the country's default on its sovereign debt.

Plaintiffs sought to satisfy their judgment against Argentina from BNA's assets. The District Court granted BNA's motion for summary judgment, finding that BNA was an "agency or instrumentality of a foreign state" as defined by the Foreign Sovereign Immunities Act (FSIA), and also denied plaintiffs' motion for jurisdictional discovery. Plaintiffs argued that BNA was subject to the "alter ego" exception of the FSIA, asserting that BNA "is so extensively controlled by [Argentina] that a relationship of principal and agent is created."

The Second Circuit upheld the District Court's ruling. The Second Circuit considered four allegations concerning BNA's potential "alter ego" relationship with Argentina: (1) Argentina appointed and removed BNA's directors, (2)

BNA made favorable loans to individuals and corporations that were in Argentina's political interests, (3) BNA made loans to Argentina in violation of its governing charter, and (4) BNA's financial records were not transparent. The Second Circuit held that the District Court had properly determined that all of these allegations, even if true, did not mean that BNA was Argentina's "alter ego," as opposed to an agency or instrumentality of a foreign state. The Second Circuit also held that because of the "comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign", plaintiffs would have to show "a reasonable basis for assuming jurisdiction" before discovery would be permitted. Because it found that plaintiffs' allegations did not create this basis, it affirmed the District Court's order.

Seijas v. Republic of Argentina, No. 11–1714–cv, 2012 WL 5259030 (2d Cir. Oct. 25, 2012).

BANKING

Federal Reserve Sets New Pricing for Services

On October 31, the Board of Governors of the Federal Reserve System (Federal Reserve) announced new fees for services provided to depository institutions by the Federal Reserve Banks. This action is required each year pursuant to the Monetary Control Act of 1980. The fees are set to recover, over the long run, "all direct and indirect costs and imputed costs, including financing costs, taxes, and certain other expenses, as well as the return on equity (profit) that would have been earned if a private business firm provided the services." The new fees will be posted here over the next several days. Among other things, prices for the following services are generally due to increase: checks, FedACH, FedWire, FedWire Securities and FedLine Access Solutions.

Read more.

Federal Reserve Delays Implementation of Second Phase of Reserve Requirement Simplification

On October 26, the Board of Governors of the Federal Reserve System (Federal Reserve) announced a five-month delay in the implementation of the second phase of its program to simplify the administration of reserve requirements. The Federal Reserve issued a final rule on April 4, 2012, amending its Regulation D to simplify the reserve administration program in two phases. The first phase, which took effect on July 12, 2012, discontinued as-of adjustments related to deposit report revisions and eliminated clearing balance requirements. The second phase of the amendments will introduce a common two-week maintenance period and a penalty-free band around reserve balance requirements to eliminate carryover and routine penalty waivers, and was originally scheduled to take effect on January 24, 2013. The new effective date is June 27, 2013. The Federal Reserve authorized the delay

> to allow the Federal Reserve to further develop and test the automated systems necessary to support the common two week maintenance period, the penalty-free band, and the elimination of carry-over and routine penalty waivers. Further development and testing are necessary to ensure the effective operation of the automated systems. This delay will also facilitate a smooth transition for affected institutions by allowing them more time to develop their internal systems and prepare for implementation of these revisions. Moreover, the delay will not prejudice or create additional burden for affected institutions or Federal Reserve Banks.

Read more.

OCC Comptroller Curry Delivers Risk Management Remarks

On October 29, Comptroller Thomas Curry of the Office of the Comptroller of the Currency (OCC) delivered remarks at the Risk Management Association's Annual Risk Management Conference in Dallas, Texas, providing insight into the OCC's perspective on emerging risks to the US banking system.

In describing channels from which the OCC collects information on emerging risks relative to commercial banks and thrifts, Curry noted that useful information is obtained from industry meetings, field examiner reports and OCC employees responsible for monitoring markets and macro trends.

With respect to the OCC's current areas of concern relative to risk management, Curry identified the following issues: (1) earnings challenges in an environment of slow growth and volatile financial markets; (2) mortgage lending, including home equity lines of credit; and (3) the "search for greater profitability in an uncertain environment." With respect to this final issue, Curry also noted that the desire for profitability will sometimes cause institutions to engage in activities that provide a "short-term boost" at the expense of safety and soundness.

For more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Supreme Court Allows Favorable Employer Stock Ruling to Stand

The US Supreme Court recently declined to review the "stock drop" cases decided late last year by the US Court of Appeals for the Second Circuit involving Citigroup and McGraw-Hill. *Patrick L. Gearren, et al. v. The McGraw-Hill Companies, Inc., et al.*, No. 11-1550 and *Stephen Gray, et al. v. Citigroup Inc., et al.*, No. 11-1531. This allows to stand two decisions which are very favorable to the defense of fiduciaries of certain retirement plans that invest in company stock.

In those Second Circuit decisions, the court affirmed the dismissal of participants' claims of breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, as amended (ERISA), involving the company stock fund option in a 401(k) plan. Each case involved a motion to dismiss based upon a presumption that the fiduciaries acted properly in maintaining the company stock fund absent an allegation that the company was in dire financial straits raising doubts about its viability and/or solvency.

The court there also affirmed the District Court's dismissal of plaintiff's claims alleging that the employer and other plan fiduciaries breached their duty of loyalty by failing to provide complete and accurate information about the employer to the plan participants. This is because plan fiduciaries have no duty to provide plan participants with nonpublic information that might pertain to the future performance of plan investment options.

It is noteworthy that earlier this year the US Court of Appeals for the Sixth Circuit, in *Pfeil v. State Street Bank and Trust Company*, held that the presumption that the fiduciary has acted properly with respect to company stock held in a 401(k) plan applies only for a motion for summary judgment, not for a motion to dismiss. This is clearly contrary to the holding of the Second and Fifth Circuits (but consistent with the Third, Seventh and Tenth Circuits), prompting many to believe that the Supreme Court might review the Second Circuit decision in order to resolve the conflict as to at what stage of the legal proceedings the presumption is to be applied. By declining to hear the cases, the Supreme Court leaves a split among the Circuits; this encourages plaintiffs to forum shop to those Circuits where the presumption does not apply until a motion for summary judgment is introduced after discovery and the defendants incur substantial expense.

UK DEVELOPMENTS

FSA Announces Interim Short Sale Reporting Channel

On October 31, the UK Financial Services Authority (FSA) published on its short selling webpage forms for notification of net short positions in UK issuers required to be disclosed to the FSA under the EU Short Selling Regulation (EU236/2012). The FSA had previously stated that it was developing a web-based solution notification of disclosable net short positions in UK shares. It is not clear how soon this will be available. For the present, notifications are to be made to the FSA by email using the forms available from the FSA short selling webpage.

EU DEVELOPMENTS

ESMA Approves Spanish and Greek Short Sales Bans

On November 1, the European Securities and Markets Authority (ESMA) published its opinion approving the three-month emergency short selling prohibition proposed by the Spanish regulator (the CNMV) under the EU Short Selling Regulation (EU236/2012) with effect from November 1. The Spanish ban is a continuation of the prohibition originally imposed by the CNMV on July 23, 2012, under Spanish law (as reported in the July 27, 2012, edition of *Corporate and Financial Weekly Digest*).

ESMA also announced that it had approved a similar Greek short sale ban imposed by the Greek regulator (the HCMC) as a continuation of the prohibition imposed by the HCMC on July 24, 2012, under Greek law.

SPAIN

Read the ESMA opinion on the on the emergency measure by the Spanish CNMV under the Short Selling Regulation here.

GREECE

Read the ESMA opinion on the emergency measure by the Greek HCMC under the Short Selling Regulation here.

For more information, contact:

FINANCIAL SERVICES

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey, Jr.	212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Maureen C. Guilfoile	312.902.5425	maureen.guilfoile@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Joseph Iskowitz	212.940.6351	joseph.iskowitz@kattenlaw.com
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	212.940.6304	kathleen.moriarty@jkattenlaw.com
Raymond Mouhadeb	212.940.6762	raymond.mouhadeb@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	212.940.6447	peter.shea@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	212.940.8584	robert.weiss@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com

LITIGATION

Bruce M. Sabados	212.940.6369	bruce.sabados@kattenlaw.com
Joseph E. Gallo	212.940.6549	joseph.gallo@kattenlaw.com

BANKING		
Christina Grigorian	202.625.3541	christina.grigorian@kattenlaw.com
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Gregory K. Brown	312.902.5404	gregory.brown@kattenlaw.com
UK AND EU DEVELOPMENTS		
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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CENTURY CITY CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND ORANGE COUNTY SHANGHAI WASHINGTON, DC

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