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CORPORATE & FINANCIAL
WEEKLY DIGEST

January 4, 2013

SEC/CORPORATE

CII Submits Rule 10b5-1 Rulemaking Petition to the SEC

On November 28 the Council of Institutional Investors (CII), an association of public, corporate and union pension funds and other employee benefit plans, submitted a letter to Securities and Exchange Commission Chairman Elisse Walter requesting that the SEC consider pursuing interpretive guidance or amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 that would require Rule 10b5-1 plans to adopt protocols and guidelines as follows:

1. Companies and company insiders should only be permitted to adopt Rule 10b5-1 plans during open “trading windows;”
2. Companies and company insiders should be prohibited from adopting multiple, overlapping Rule 10b5-1 plans;
3. Such plans should be subject to a mandatory delay, preferably of three months or more, between the adoption of a Rule 10b5-1 plan and the execution of the first trade pursuant to such plan; and
4. Companies and company insiders should not be allowed to make “frequent” modifications or cancellations of Rule 10b5-1 plans.

A Rule 10b5-1 plan permits the company or company insider that establishes the plan to trade the company’s stock pursuant to pre-set directions through an independent broker having no access to inside information even through periods when a “trading window” is closed or other material undisclosed information is present or pending.

The CII’s request was stimulated by a recent *Wall Street Journal* article indicating that some executives at public companies may have utilized Rule 10b5-1 plans to take advantage of pending inside information that could affect the price of the stock of their company. The CII letter indicates that these practices are “inconsistent with the spirit, if not the letter, of Rule 10b5-1.”

Read more.

ISS Publishes Updated FAQs for its Proxy Voting Policies

On December 20, Institutional Shareholder Services (ISS) published updated FAQs regarding its proxy voting policies and procedures. The updated FAQs address, among other things, ISS’ policies for evaluating executive compensation, including ISS’ methodology for assessing pay for performance, its view that hedging and pledging of stock by executives and directors constitute problematic pay practices and its policies related to advisory votes on so-called “golden parachute” payments.

Pay for Performance Analysis

The updated FAQs identify several factors that ISS considers as part of its qualitative analysis of pay for performance. The factors include the ratio of performance to time-based equity awards; overall ratio of performance-based compensation; the completeness of disclosure and rigor of performance goals; the company's peer group benchmarking process (e.g., whether it includes the presence of outsized peers or above-median benchmarking); actual results of financial/operational metrics, such as growth in revenue, profit, cash flow, etc., both absolute and relative to peers; special circumstances related to, for example, a new CEO in the prior fiscal year or anomalous equity grant practices; realizable pay compared to grant pay; and any other factors ISS deems relevant. The new FAQs also clarify that, in formulating vote recommendations, ISS' quantitative pay for performance analysis serves as an initial screen that determines the relative depth of ISS' qualitative analysis of pay for performance alignment. The new FAQs also address ISS' use and calculation of realizable pay (including suggested disclosure with respect to realizable pay) in connection with its pay for performance analysis.

For 2013, ISS modified its policies for determining "peer" groups of companies used in its pay for performance analysis. The updated FAQs, among other things, identify some of the characteristics of the projected 2013 peer groups relative to prior peer groups in terms of Global Industry Classification Standard (GICS) classification precision, similarity with the subject company's selected peers and the sizes of the peer companies relative to the subject company.

Hedging and Pledging of Stock

The new FAQs clarify ISS' view that hedging and significant pledging of company stock by an executive or director constitute problematic pay practices. Specifically, ISS noted that, in its view, strategies designed to offset or reduce the risk of price fluctuations for stock held by executives or directors sever the alignment of the executive or director's interests with shareholders' interests intended by equity-based compensation. ISS further noted that "any amount of hedging will be considered a problematic practice warranting a negative vote recommendation against appropriate board members."

Say on Golden Parachute Compensation

The new FAQs provide insight into ISS' views on severance payable to executives following a change in control (i.e. "golden parachute" compensation), including an explanation of how ISS determines whether specified golden parachute payouts are "excessive." The new FAQs indicate that, in evaluating disclosed payouts related to a change in control in connection with advisory votes on golden parachute compensation, ISS may consider a variety of factors, including the value of the payout on an absolute basis (e.g., relative to an executive's annual compensation) or one or total payouts relative to the transaction's equity value. ISS noted that there are no bright line thresholds for these considerations, since they are made in conjunction with other factors in ISS' review.

The FAQs also include guidance with respect to ISS' consideration of problematic change-in-control severance features in its evaluation of say on golden parachute proposals. Beginning in 2013, ISS will consider existing problematic features (as opposed to new problematic features, as was ISS' policy for 2012) such as excise tax gross-up provisions and single and modified single payout triggers in determining a vote recommendation on such proposals. In general, legacy excise tax gross-up provisions will be considered in the context of the amount of actual tax gross-ups reported as part of the company's disclosure with respect to the say on golden parachute proposal. Legacy single/modified single triggers also may be considered in the context of the total change-in-control payout and whether they result in unjustifiable payouts in the absence of an executive's termination without cause in connection with the change in control.

To view all of ISS' new FAQs regarding executive compensation, click here.

To view all of ISS' U.S. Proxy Voting Policies and Procedures Frequently Asked Questions on Compensation, click here.

On December 20, ISS also published updated FAQs regarding its 2013 U.S. Proxy Voting Policies and Procedures for matters other than compensation-related questions, which can be viewed by clicking here.

CFTC

CFTC Issues Final Order on Cross-Border Swaps

The Commodity Futures Trading Commission has issued a final exemptive order regarding the cross-border application of certain swaps provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pursuant to the final order, the CFTC adopted or modified many of the provisions set forth in previous CFTC proposals and staff letters, including the definition of "US person," calculation of the *de minimis* threshold for non-US persons, compliance with certain entity-level swap requirements for non-US swap dealers (SDs) and major swap participants (MSPs), and compliance with certain transaction-level swap requirements for non-US SDs, non-US MSPs and foreign branches of US SDs and MSPs. The exemptions conferred by the final order expire on July 12, 2013.

For purposes of the final order, the definition of "US person" is similar to the definition set forth in CFTC Letter No. 12-22 with a few notable changes, including (i) the inclusion of any entity, including an entity not organized under the laws of the United States, with its principal place of business in the United States; (ii) the treatment of certain pension plans for foreign employees; (iii) the treatment of estates and trusts; and (iv) the treatment of joint accounts. The CFTC will not consider foreign entities with a principal place of business in the United States to be US persons until April 1, 2013, whereas all other changes to the definition of US person became effective on December 31, 2012.

The final order also provides relief to non-US persons from including certain swap dealing transactions in their *de minimis* calculations. A non-US person does not need to include in its *de minimis* calculation swap transactions where the counterparty is either a non-US person or a foreign branch of a US person that is registered, or intends to register, as an SD. Similarly, a non-US person is not required to aggregate the swap transactions of certain affiliates in determining whether it exceeds the *de minimis* threshold.

Non-US SDs and MSPs are also temporarily exempt from certain entity-level requirements, and non-US SDs and MSPs and foreign branches of US SDs and MSPs are exempt from certain transaction-level requirements for swap transactions with non-US counterparties.

The final exemptive order is available here; CFTC Letter No. 12-22 is available here.

CFTC Issues No-Action Letters

Staff of the Commodity Futures Trading Commission released a series of letters relating to a variety of regulatory changes, including the extraterritorial application of certain CFTC requirements, registration relief, swap reporting requirements and calculation of the *de minimis* threshold.

- **Extraterritoriality.** In CFTC Letters Nos. 12-61 and 12-71, the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) granted no-action relief to certain US banks that are wholly owned by foreign entities. Pursuant to the letters, certain foreign-owned US banks are not required to consider the swap dealing activities of their foreign affiliates or the US branches of such affiliates in determining whether the foreign-owned US bank meets the SD *de minimis* exemption requirements, subject to certain conditions. Because the relief is not self-executing, the foreign-owned US bank must file a claim with the CFTC. CFTC Letter No. 12-61 is available here; CFTC Letter No. 12-71 is available here.

  Pursuant to CFTC Letter No. 12-63, the CFTC's Division of Clearing and Risk (DCR) granted no-action relief to the Singapore Exchange Derivatives Clearing Limited (SGX-DC) from the requirement to register as a derivatives clearing organization (DCO). SGX-DC's clearing members were also granted relief from futures commission merchant (FCM) registration, subject to certain conditions. Such relief is available until the earlier of December 31, 2013, or the date on which SGX-DC registers as a DCO. CFTC Letter No. 12-63 is available here.

- **IB, CTA, AP and CPO Registration.** Through various letters, DSIO granted relief from registration as introducing brokers (IBs), commodity trading advisors (CTAs), associated persons (APs) or commodity pool operators (CPOs). In CFTC Letter No. 12-70, the DSIO granted relief from IB and CTA registration to SDs and SD employees that engage in support activities on behalf of an affiliated SD or an affiliate that satisfies the *de minimis* exemption, subject to certain conditions. Similarly, unregistered SD affiliates, including employees, are not required to register as IBs or CTAs for engaging in certain affiliate support activities on behalf of an affiliate SD counterparty. The DSIO also confirmed that employees of a dealer that satisfies the *de minimis* exemption are not required to register as IBs. CFTC Letter No. 12-70 is available here.

Pursuant to CFTC Letter No. 12-69, DSIO extended temporary relief previously granted in CFTC Letter No. 12-15. Persons that would otherwise be required to register as an AP of an FCM, IB, CPO or CTA solely by virtue of swaps activity or involvement with certain IntercontinentalExchange or New York Mercantile Exchange products that are in the process of transitioning from swaps to futures and options contracts are granted temporary registration relief, so long as the FCM, IB, CPO or CTA files the required registration application with National Futures Association (NFA) by March 31, 2013, and the person makes a good-faith effort to comply with the Commodity Exchange Act (CEA) and CFTC regulations relating to AP activities. Such no-action relief will terminate once NFA provides notice that the registration application has been accepted or denied. CFTC Letter No. 12-69 is available here.

In CFTC Letter No. 12-68, DSIO granted no-action relief to entities that are required to register as CPOs or CTAs as a result of the rescission of CFTC Regulation 4.13(a)(4) or the amendment to CFTC Regulation 4.5. DSIO has taken a no-action position with respect to such entities so long as the appropriate registration application was filed with NFA prior to December 31, 2012, and the entity makes a good-faith effort to comply with the CEA and CFTC regulations relating to CPO and CTA activities. Such no-action relief will terminate once NFA provides notice that the registration application has been accepted or denied. CFTC Letter No. 12-68 is available here.

CFTC Letter No. 12-67 provides no-action relief from CPO registration to the operators of funds that invest in any securitization vehicle previously described in CFTC Letter No. 12-45. CFTC Letter No. 12-67 is available here.

- **Certain Swap Reporting Requirements.** Pursuant to CFTC Letter No. 12-66, the CFTC's Division of Market Oversight (DMO) issued a no-action letter providing that CFTC staff will not recommend an enforcement action against an SD with respect to the following: (i) a delay in reporting swaps executed by branches in certain emerging markets; (ii) a delay in reporting aggregate pricing data for exotic/multi-leg swap transactions; (iii) a delay in linking the report made for post-trade allocations, compressions or novations to the unique swap identifier of the previously reported initial swap; and (iv) withholding or incorrect reporting of certain life cycle events. To avail itself of the no-action relief, an SD must meet specific criteria and comply with certain conditions set forth in the no-action letter. DMO will extend this relief until the earlier of April 30, 2013, or the resolution of the technological issues preventing timely compliance. CFTC Letter No. 12-66 is available here.

  In two other no-action letters, DMO provided temporary no-action relief from certain reporting requirements under Parts 45 and 46 of the CFTC regulations. In CFTC Letter No. 12-65, DMO granted relief to members of International Swaps and Derivatives Association, Inc. and similarly situated persons from reporting certain non-reporting counterparty information pursuant to Parts 45 and 46, so long as such information is not provided by the non-reporting counterparty and not otherwise available. Such no-action relief is available until April 10, 2013. CFTC Letter No. 12-59 grants no-action relief to reporting counterparties from swap data reporting requirements pursuant to Part 45 for certain off-facility, cleared credit default swaps, subject to certain conditions. Such relief is available until June 30, 2013. CFTC Letter No. 12-65 is available here; CFTC Letter No. 12-59 is available here.

- **Certain Swaps Not Considered in *De Minimis* Calculation.** DSIO also provided relief regarding the inclusion of certain swaps for purposes of determining whether an entity meets the *de miminis* threshold. In CFTC Letter No. 12-62, the DSIO granted relief to any person that fails to include certain compression exercise swaps in its *de minimis* calculation. CFTC Letter No. 12-62 is available here.

  DSIO separately provided temporary no-action relief in CFTC Letter No. 12-60 to floor traders from the inclusion of cleared swaps in the *de minimis* calculation. Such relief is available if, among other things, the floor trader enters into the swap using proprietary funds for its own account. The entity seeking relief must have filed a claim with the CFTC by December 31, 2012. Such no-action relief is available until July 1, 2013. CFTC Letter No. 12-60 is available here.

NFA Issues Guidance on Bylaw 1101 Compliance for Pending Introducing Brokers

On December 27, National Futures Association issued guidance for NFA members carrying accounts, accepting orders or handling transactions from an introducing broker (IB) whose NFA membership is pending in reliance upon no-action relief granted by the Commodity Futures Trading Commission. On October 11, CFTC staff granted no-action relief for market participants that become obligated to register as IBs solely based on their activity in IntercontinentalExchange and New York Mercantile Exchange products that are in the process of transitioning from swaps to futures and options contracts. To be eligible for the CFTC staff's no-action relief, the market participant must have completed and filed a registration application with NFA on or before December 31.

Pursuant to NFA's guidance, a member carrying an account, accepting an order or handling a transaction from these pending IB members will be considered in compliance with NFA Bylaw 1101 if the member obtains a written representation from the pending IB indicating that it meets the conditions set forth in the applicable CFTC no-action letter. The NFA member's relief from Bylaw 1101 requirements will expire on the date that the IB becomes an approved NFA member or five days after the pending IB member receives notice that it may be disqualified from registration under the Commodity Exchange Act.

NFA Notice I-12-37 is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Extends Sunset Date for Temporary Rule Regarding Principal Trades with Certain Advisory Clients

The Securities and Exchange Commission has extended the sunset date of Rule 206(3)-3T under the Investment Advisers Act of 1940 (the Act) from December 31, 2012, to December 31, 2014. Rule 206(3)-3T is a temporary rule that provides certain investment advisers with alternative means to meet the requirements of Section 206(3) of the Act regarding acting in a principal capacity in transactions with certain advisory clients. The SEC adopted this extension because it believes that the issues raised by principal trading should be considered as part of a broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Under Section 206(3), an investment adviser entering into a principal transaction with an advisory client is required to satisfy certain disclosure and consent requirements on a transaction-by-transaction basis. Due to difficulties regarding compliance with the trade-by-trade requirements of Section 206(3), in 2007 the SEC adopted Rule 206(3)-3T to provide investment advisers who are also registered with the SEC as broker-dealers an alternative means to comply with the requirements of Section 206(3).

Rule 206(3)-3T requires that the investment adviser also be registered as a broker-dealer and that each account for which the investment adviser relies on this rule be a non-discretionary brokerage account. Rule 206(3)-3T also requires that the investment adviser, with respect to the accounts, (i) provide written prospective disclosure regarding the conflicts arising from principal trades; (ii) obtain written, revocable consent from the client prospectively authorizing the investment adviser to enter into principal transactions; (iii) make certain disclosures, either orally or in writing, and obtaining the client's consent before each principal transaction; (iv) send to the client confirmation statements disclosing the capacity in which the investment adviser has acted and disclosing that the investment adviser informed the client that it may act in a principal capacity and that the client authorized the transaction; and (v) deliver to the client an annual report itemizing the principal transactions.

Click here to read the SEC's Adopting Release Extending Rule 206(3)-3T.

LITIGATION

Fourth Circuit Affirms Dismissal of Antitrust Claims Against Data Transfer Provider

The US Court of Appeals for the Fourth Circuit affirmed the holding of the lower court, which granted GXS, Inc.'s motion to dismiss plaintiff Loren Data Corporation's antitrust claims against GXS. Both parties provide electronic data interchange services, which involves the transfer and exchange of business data from one computer system to another. Over the last ten years, Loren Data repeatedly sought a “peer interconnect” data transfer arrangement from GXS (in which each network provider would bear its own cost for data transfers). GXS refused Loren Data’s requests, leading the latter to allege that such refusal constituted a violation of Sections 1 and 2 of the Sherman Antitrust Act. To state a claim under Section 1 of the Sherman Act, a plaintiff must show that a defendant entered into a “contract, combination, or conspiracy” that caused an unreasonable restraint of trade. The Fourth Circuit affirmed the lower court’s dismissal of the Section 1 claim because Loren Data had not adequately pled such a conspiracy or restraint of trade, but only that GXS was unwilling to contract with Loren Data based on Loren Data’s terms. To plead a Section 2 claim, a plaintiff must allege that a defendant has willfully acquired or maintained monopoly power in a relevant market. Loren Data’s Section 2 claims against GXS failed because Loren Data failed to demonstrate that GXS had a specific intent to monopolize. Instead, Loren Data’s allegations established that GXS regularly granted peer interconnects to other network providers, which the court found to be “entirely inconsistent with an intent to monopolize.”

Loren Data Corp. v. GXS, Inc., No. 11-2602 (Dec. 26, 2012).

District of Colorado Dismisses, in Part, Securities Fraud Claims in Ponzi Scheme Suit

The US District Court for the District of Colorado considered several motions to dismiss a class-action suit filed by plaintiff Touchtone Group, LLC to recover damages resulting from a Ponzi scheme devised by Mantria Corporation. Defendants filed motions to dismiss for, among other things, failure to state a claim for violations of the Securities Exchange Act of 1934 (the Exchange Act). The court granted defendants’ motion, in part, finding that Touchstone had failed to adequately plead violations of Sections 10(b) and 20(a) of the Exchange Act against defendant Granoff, who served as controller of Mantria. In dismissing these securities claims against Granoff, the court considered whether false statements actually had been “made” by him. In the recent Supreme Court case of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), the Court held that an individual “makes” a false statement when he or she possesses “ultimate authority over the statement, including its content and whether and how to communicate it.” *Janus*, 131 S. Ct. at 2302. The court, however, found that *Janus* did not address statements that are published collectively by a group of equally authoritative individuals within an organization. As a result, the court held that Touchstone sufficiently had alleged that two other defendants—the interim Chief Financial Officer and Chief Legal Officer of Mantria—had “made” false statements, but that Granoff, who reported to the CFO and did not have “ultimate authority,” could not be the maker of such statements.

Touchtone Group, LLC v. Rink et al., Civil Action No. 11-cv-02971WYD-KMT (Dec. 21, 2012).

BANKING

HMDA’s Regulation C Exemption Limits Increased by CFPB

The Consumer Financial Protection Bureau (CFPB) on December 28 issued a final rule adjusting the asset-size exemption threshold for banks, savings associations and credit unions under Regulation C, which implements the Home Mortgage Disclosure Act (HMDA).

Based on the adjustments announced, the asset-size exemption for banks, savings associations and credit unions will increase to $42 million. As a result, those institutions with assets of $42 million or less as of December 31, 2012, are exempt from collecting HMDA data in 2013. An institution’s exemption from collecting data in 2013 does not affect its responsibility to report the data it may have been required to collect in 2012.

Read more.

CFPB Proposes Revisions to Remittance Rule

The Consumer Financial Protection Bureau (CFPB or Bureau) on December 21 issued proposed revisions to a rule that creates certain protections for consumers who transfer money internationally. The proposed revisions, according to the Bureau, “are narrow in focus and intended to preserve the new consumer protections while facilitating compliance with the rule.” The Bureau also announced that it is delaying the implementation of the rule until 90 days after it issues a revised final rule.

Under the final rule, remittance transfer providers will be required to disclose certain fees and taxes, as well as the exchange rate that will apply to the transfer. The rule also provides consumers with error resolution and cancellation rights.

The proposed changes:

1. would provide increased flexibility and guidance with respect to the disclosure of taxes imposed by a foreign country's central government as well as fees imposed by a recipient's institution for receiving a remittance transfer in an account.

2. would require disclosure of foreign taxes imposed by a country's central government, but would eliminate the requirement to disclose taxes imposed by foreign regional, provincial, state or other local governments.

3. when the provider can demonstrate that the consumer provided an incorrect account number and certain other conditions are satisfied, would require the provider to attempt to recover the funds but would not require the provider to bear the cost of funds that cannot be recovered.

Though the rule was scheduled to take effect on February 7, 2013, the Bureau "is proposing a temporary delay of that date to accommodate the changes in today's proposal." Comments on the temporary delay will close 15 days after the proposed rule is published in the *Federal Register*. Comments on the remainder of the proposal will close 30 days after publication in the *Federal Register*.

Read more.

OCC Provides Guidance on Swap "Push-Out" Transition Periods

Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits the provision of federal assistance to an insured depository institution that is a swap dealer unless the swap activities of that institution are limited to those permitted by section 716. Accordingly, many banks that have active swap businesses are facing the prospect of having to "push out" their non-permitted swap activities to affiliated entities when section 716 goes into effect on July 16, 2013. On January 3, the Office of the Comptroller of the Currency issued guidance as to how an insured Federal depository institution can apply for a transition period of up to two years before it must comply with section 716. The OCC says in the guidance that it is "prepared to consider favorably [such] requests" because it believes that "that implementation of section 716 without transition periods would cause unwanted adverse consequences." Under the guidance, covered institutions have until January 31 to file requests for transition periods with the OCC.

A copy of the guidance can be found here.

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