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DUE TO THE HOLIDAY, *CORPORATE AND FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON JULY 4. THE NEXT ISSUE WILL BE DISTRIBUTED ON JULY 11.

SEC/CORPORATE

Delaware Fee-Shifting Legislation Delayed

In the face of opposition from business organizations, the Delaware legislature has deferred consideration, likely until the beginning of 2015, of proposed legislation (discussed in the *Corporate and Financial Weekly Digest* edition of May 30, 2014) that would effectively overturn the application to stock corporations of the decision in *ATP Tour v. Deutscher Tennis Bund* (which decision was covered in the *Corporate and Financial Weekly Digest* edition of May 16, 2014). The Delaware legislature requested that the Delaware State Bar Association, including its Corporation Law Section, continue its examination of the proposed legislation. In *ATP Tour v. Deutscher Tennis Bund,* the Delaware Supreme Court held fee-shifting bylaws of a Delaware non-stock corporation to be facially valid. As reported, the proposed legislation was approved by the Delaware State Bar Association (which included a proposed effective date of August 1, 2014) and was widely expected to be enacted.

BROKER DEALER

SEC Orders Securities Exchanges and FINRA to Develop Tick Size Pilot Plan

The Securities and Exchange Commission has issued an order directing certain national securities exchanges and the Financial Industry Regulatory Authority, Inc. to jointly develop and file with the SEC a national market system plan to implement a 12-month pilot program aimed at widening minimum quoting and trading increments (i.e., tick sizes) for certain small capitalization stocks. More specifically, the pilot program will target stocks with a market capitalization of $5 billion or less, an average daily trading volume of one million shares or less and a share price of $2 per share or more. The program will consist of a control group and three test groups, each comprised of 300 securities. Securities in the control group are tested at the current tick size increment of $0.01 per share and trade only at increments currently permitted. Securities in the first two test groups will be quoted in $0.05 minimum increments; however, the increments in which the applicable securities trade will vary. The third test group will, among other things, be subject to a "trade-at" requirement, which is aimed at preventing price matching by a trading center that does not display the best bid or offer. Notably, the SEC is using the third test group's trade-at requirement to determine if quoting and trading at wider increments in the absence of a trade-at requirement will cause trading volume to migrate to "dark venues," or venues that do not provide public pre-trade price transparency.

The SEC's order requires that all data collected be transmitted to the SEC and made available to the public. A plan detailing the pilot program is due to the SEC by August 25, at which time the SEC will publish the plan for public comment and determine whether to approve it.

The SEC Order (Release No. 34-72460) can be found here.

CFTC

CFTC Extends Relief to FCMs from Certain Commingling Requirements

On June 25, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) extended to October 31 the relief previously granted in CFTC No-Action Letters Nos. 14-02 and 14-45.

The earlier letters provided time-limited relief with respect to compliance with certain conditions contained in a CFTC interpretation of Regulations 1.20, 22.2 and 30.7, which prohibit the commingling of customer segregated funds, cleared swaps customer collateral and customer secured amount funds. The CFTC had stated that the prohibition on the commingling of customer funds would not prevent a customer from meeting margin calls for multiple customer account origins with a single payment, provided, among other conditions, a futures commission merchant (FCM) initially receives the margin payment into the customer segregated funds account. The DSIO relief permits an FCM to accept a customer's margin payments in any regulated customer funds account, as directed by the customer. An FCM relying on this relief is required to hold sufficient funds in its segregated funds, cleared swaps customer collateral and secured amount accounts to meet the net liquidating equities of all customers in each respective account origin at all times.

CFTC Letter No. 14-88 is available here.

NFA Proposes Interpretive Notice Prohibiting the Use of Credit Cards to Fund Retail Forex or Futures Trading Accounts

National Futures Association (NFA) has proposed an Interpretive Notice that would prohibit NFA members from allowing customers to fund their retail forex or futures trading accounts with credit cards. NFA believes that the easy access to borrowed funds provided by credit cards make them an inappropriate funding tool for futures contracts and retail forex products. The proposed Interpretive Notice makes clear that NFA is not prohibiting electronic funding mechanisms that are tied to existing funds in a customer's bank account, such as payments made through a debit card or an electronic funds transfer. To accept electronic funding methods, NFA members must be able to distinguish credit cards from permissible electronic funding sources and reject credit cards as a source of funds.

More information is available here.

LITIGATION

Supreme Court Decides *Halliburton Co. v. Erica P. John Fund, Inc.*

On June 23, the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.* held that a securities class action defendant may introduce evidence at the class certification stage to rebut the presumption that an alleged misrepresentation impacted a company's share price. In so holding, the Court declined to overturn its decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In *Basic*, the Court ruled that investors who purchase or sell stock at the market price are presumed to have relied on a company's misrepresentation, with the understanding that the stock price reflects all public, material information. To rebut this presumption, a defendant could show that the alleged misrepresentation did not actually affect the stock 's price. The Court granted *certiorari* from a US Court of Appeals for the Fifth Circuit decision holding that the defendant could not, at the class certification stage, introduce evidence that an alleged misrepresentation did not impact the company's share price. The Court declined to overturn its decision in *Basic*, but held that defendants should be able to rebut the presumption at the class certification stage that an alleged misrepresentation did not affect the stock price by introducing evidence of lack of price impact. Because defendants were already permitted to introduce price impact evidence at the merits stage, the Court ruled that defendants should not be precluded from introducing such evidence earlier in the litigation.

Halliburton Co. et al. v. Erica P. John Fund, Inc. No. 13-317 (2014).

Texas Supreme Court Denies Minority Shareholder's Oppression Claims

On June 20, the Texas Supreme Court ruled that courts are not authorized to order closely held corporations to buy out a minority shareholder's interests under state law, and that no common-law cause of action exists for minority shareholder oppression claims. Ann Caldwell Rupe, a minority shareholder in Rupe Investment Corporation (RIC), a closely held corporation, alleged that other shareholders on the board of directors acted oppressively and breached their fiduciary duties by refusing to buy back her shares for fair value or discuss the company with prospective outside buyers. The trial court granted Rupe $7.3 million for her shares, and the Court of Appeals for the Fifth District of Texas at Dallas upheld the buy-out order. The Texas Supreme Court reversed, holding that the shareholders' refusal to meet with Rupe's potential buyers was not "oppressive," and that even if the actions were indeed oppressive, the statute does not authorize courts to order a corporation to buy out a minority shareholder's interests. The court also declined to recognize a common-law cause of action for "minority shareholder oppression." The court remanded to the court of appeals because its judgment was based on the oppression claim and did not address Rupe's claim for breach of fiduciary duty.

Ritchie v. Rupe, No. 11-0447 (Tex. Sup. Ct. June 20, 2014).

BANKING

FFIEC Debuts Web Page on Cybersecurity

On June 24, the Federal Financial Institutions Examination Council (FFIEC) launched a Web page on cybersecurity. The press release stated that the

> FFIEC members are taking a number of steps to raise awareness of cybersecurity risks at financial institutions and the need to identify, assess, and mitigate [cybersecurity] risks in light of the increasing volume and sophistication of cyber threats that pose risks to all industries in our society. The FFIEC Web page provides links to joint statements, webinars, and other information that may help financial institutions when thinking about the issue of cybersecurity.

FFIEC members and some state regulators are also conducting a pilot program at more than 500 community institutions, "which will be completed during regularly scheduled examinations." Information from the pilot effort "will assist regulators in assessing how community financial institutions manage cybersecurity and their preparedness to mitigate increasing cyber risks."

Regulators "are particularly focusing on risk management and oversight, threat intelligence and collaboration, cybersecurity controls, service provider and vendor risk management, and cyber incident management and resilience. Another aim of the pilot is to help regulators make risk-informed decisions to enhance the effectiveness of supervisory programs, guidance, and examiner training."

Read more.

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