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Katten Muchin Rosenman LLP

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## BROKER-DEALER

### FINRA Proposes to Adopt Rules on Quotation Requirements for OTC Equity Securities

The Financial Industry Regulatory Authority, Inc. is proposing to adopt rules governing the quotation requirements applicable to over-the-counter (OTC) equity securities. The rules would establish minimum standards for quotations and require fair and non-discriminatory access to member inter-dealer quotation systems. Member inter-dealer systems would be required to adopt and provide to FINRA written (i) policies and procedures on the collection and dissemination of OTC securities quotations, (ii) standards for fair and non-discriminatory system access and (iii) descriptions of each quotation-related data product along with pricing information. FINRA is also proposing minor amendments to its existing rules on quotation reporting requirements and to delete FINRA Rule 6500 Series governing the operation of the OTC Bulletin Board Service.

Click here to read the proposed rules.

## CFTC

### CFTC Seeks Comment on ICE Clear Europe Portfolio Margining Proposal

The Commodity Futures Trading Commission has requested public comment on a petition submitted by ICE Clear Europe Limited to amend an order issued by the CFTC on May 30. Under the May order, ICE Clear Europe and its clearing members that are registered futures commission merchants (FCMs) are permitted (i) to commingle and hold in segregated funds accounts established pursuant to Section 4d(a) of the Commodity Exchange Act customer funds used to margin, secure or guarantee futures traded on ICE Futures US with customer funds used to margin, secure or guarantee interest rate, energy and financial foreign futures and options traded on ICE Futures Europe and (ii) to provide for portfolio margining of such positions. The May order is available here.

ICE Clear Europe is seeking to amend the May order to extend it to FCMs that are not clearing members but that carry contracts for customers that are cleared at ICE Clear Europe. Interested persons wishing to comment on ICE Clear Europe's petition must submit comments on or before July 21. ICE Clear Europe's petition is available here.

## DIGITAL ASSETS AND VIRTUAL CURRENCIES

### New York DFS Proposes First Comprehensive Regulatory Framework for Virtual Currency Businesses

On July 17, the New York State Department of Financial Services (DFS) released the draft "BitLicense," a proposed regulatory framework to license Virtual Currency Business Activity. The proposed regulations follow DFS hearings held in January 2014 and are intended to promote consumer protection, stability and security in the operation of virtual currency exchanges, among other virtual currency businesses. The DFS regulations would apply to digital assets such as bitcoins and litecoins, but not to digital gaming units (e.g., World of Warcraft gold) or consumer rewards programs (e.g., Starbucks stars).

DFS will accept comments on the proposed regulations for 45 days after its expected publication in the *New York State Register* edition of July 23, 2014.

A copy of the proposed regulatory framework is available here.

## LITIGATION

### District Court Clarifies Statute of Repose Timeline in Material Misstatement Case

The US District Court for the Eastern District of New York recently dismissed a class action claim, determining the reasserted claim violated the applicable statute of repose that requires all claims be brought within three years after the cause of action accrues.

In April 2010, plaintiffs filed a class action alleging the Registration Statement and Proxy disseminated by defendant in connection with a merger contained material misstatements and omissions. In September 2011, the District Court determined that plaintiffs lacked standing to bring a claim under Section 14(a) of the Securities and Exchange Act of 1934, alleging a material misstatement in the Proxy because plaintiffs were unable to vote on the merger. On May 2, 2013, plaintiffs moved to reassert the Proxy claim with a new plaintiff in the class action.

The District Court determined that the reasserted claim was time-barred because it violated the one- and three-year framework of the applicable statute of repose. Plaintiffs argued that the new claim did not violate the three-year statute of repose because the reasserted claim related back to the original complaint. The District Court disagreed, holding that Federal Rule of Civil Procedure 15(c), which governs claims relating back, applied to a statute of limitations but not to a statute of repose, and granted defendant's motion to dismiss.

*Bensinger v. Denbury Resources Inc.*, No. 10-cv-1917 (JG) (VVP) (E.D.N.Y. July 14, 2014).

### Ninth Circuit Defines Vicarious Liability Standard Under the TCPA

The US Court of Appeals for the Ninth Circuit recently affirmed a US District Court for the Central District of California decision dismissing a Telephone Consumer Protection Act (TCPA) claim. The Ninth Circuit agreed with the District Court's conclusion but clarified the TCPA vicarious liability standard.

Plaintiff brought a TCPA action after receiving a text message as part of a promotion conducted by the Chicago Area Taco Bell Local Owners Advertising Association, a corporation comprised of Taco Bell restaurant operators in the Chicago area. One of the members of the Association is Taco Bell Corp., which represents approximately 160 restaurants. In 2005, the Association's advertising agency hired ipsh!net, Inc. which then sent the promotional text in violation of the TCPA. Under the TCPA, an entity can be directly liable or vicariously liable. The District Court determined that Taco Bell Corp. was not directly liable because it did not actually send the text. The District Court also held that Taco Bell Corp. was not vicariously liable because, under agency law, it had no right to control the manner and means of Ipsh's text campaign.

The Ninth Circuit affirmed, but also held that principles of apparent authority and ratification may also provide a basis for vicarious liability under the TCPA. The Ninth Circuit noted that Taco Bell Corp. was not liable under either theory because plaintiff did not reasonably rely on any apparent authority, nor did Taco Bell Corp. ratify the text message.

*Thomas v. Taco Bell Corp.*, No. 12-56458 (9th Cir. July 2, 2014).

## BANKING

### FDIC Proposes Changes to Assessments Rule

On July 15, the Federal Deposit Insurance Corporation (FDIC) proposed (1) to revise the ratios and ratio thresholds for capital evaluations used in its risk-based deposit insurance assessment system (the FDIC stated this was done "to conform to the prompt corrective action capital ratios and ratio thresholds adopted by the FDIC, the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency"); (2) to revise the assessment base calculation for custodial banks to conform to the asset risk weights adopted by the FDIC, the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency; and (3) to require all highly complex institutions to measure counterparty exposure for deposit insurance assessment purposes using the Basel III standardized approach credit equivalent amount for derivatives and the Basel III standardized approach exposure amount for other securities financing transactions, such as repo-style transactions, margin loans and similar transactions, as adopted by the federal banking agencies. These changes are intended to accommodate recent changes to the federal banking agencies' capital rules that are referenced in portions of the assessments regulation.

For most small banks (generally those with $10 billion or less in assets), the capital evaluation system currently in effect may be summarized as follows:

| Capital Evaluations | Total Risk-Based Ratio | Tier 1 Risk-Based Ratio | Tier 1 Leverage Ratio |
|---|---|---|---|
| **Well Capitalized** | ≥ 10% | ≥ 6% | ≥ 5% |
| **Adequately Capitalized** | ≥ 8% | ≥ 4% | ≥ 4% |
| **Undercapitalized** | Does not qualify as either Well Capitalized or Adequately Capitalized | | |

Effective January 1, 2015, the following capital evaluation standards will be utilized if the proposal is adopted, as expected:

| Capital Evaluations | Total Risk-Based Capital Ratio | Tier 1 Risk-Based Capital Ratio | Common Equity Tier 1 Capital Ratio | Leverage Ratio |
|---|---|---|---|---|
| **Well Capitalized** | ≥ 10% | ≥ 8% | ≥ 6.5% | ≥ 5% |
| **Adequately Capitalized** | ≥ 8% | ≥ 6% | ≥ 4.5% | ≥ 4% |
| **Undercapitalized** | Does not qualify as either Well Capitalized or Adequately Capitalized | | | |
| In the current and proposed scenarios, an institution is Adequately Capitalized if it is not Well Capitalized, but satisfies each of the listed capital ratio standards for Adequately Capitalized. | | | | |

The FDIC also stated:

> [t]o the extent that the definitions of components of the ratios—such as tier 1 capital, total capital, and risk weighted assets—change in the future for [prompt corrective action] purposes, the assessment system will automatically incorporate these changes as implemented under the Basel III capital rules. Thus, for example, if the Federal banking agencies adopt a final rule redefining the denominator of the supplementary leverage ratio, as they have proposed, 79 FR 24596 (May 1, 2014), the new definition will automatically become applicable to the assessment system.

Comments are due 60 days after publication in the *Federal Register*.

Read more.

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BANKING

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