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CORPORATE & FINANCIAL
WEEKLY DIGEST

July 24, 2015 Volume X, Issue 28

CFTC

CFTC Extends Designation of DTCC-SWIFT as Provider of Legal Entity Identifiers

On July 20, the Commodity Futures Trading Commission issued an order extending the designation of the Depository Trust and Clearing Corporation and Society for Worldwide Interbank Financial Telecommunications joint venture (DTCC-SWIFT) as the provider of legal entity identifiers (LEIs) on an interim basis until the CFTC transitions to a global LEI system. The order permits registered entities and swap counterparties subject to the CFTC's jurisdiction to comply with the swap data recordkeeping and reporting obligations under Parts 45 and 46 of the CFTC's regulations by using LEIs issued by DTCC-SWIFT or any other pre-local operating unit (pre-LOU) that has been endorsed by the Regulatory Oversight Committee (ROC) of the global LEI system as globally acceptable.

The CFTC initially designated DTCC-SWIFT as a provider of LEIs for a two-year term by order dated July 23, 2012. The terms of the order were amended on June 7, 2013, and the order was extended for a one-year period on July 22, 2014. The latest order extends DTCC-SWIFT's designation for an additional one-year term.

The CFTC's order extending DTCC-SWIFT's designation is available here. The list of globally acceptable pre-LOUs, including the website address for each such pre-LOU, is available here.

FinCEN Issues Advisory on FATF-Identified Jurisdictions With AML/CFT Deficiencies

On July 20, the Financial Crimes Enforcement Network (FinCEN) issued an advisory announcing that the Financial Action Task Force (FATF) has updated its list of jurisdictions with anti-money laundering and counter-terrorist financing (AML/CFT) deficiencies. In connection with this update, the National Futures Association (NFA) issued a notice reminding futures commission merchants and introducing brokers to review the FinCEN advisory and update their anti-money laundering programs with the most current information on FATF-identified jurisdictions with AML/CFT deficiencies.

NFA's notice is available here. FinCEN's advisory is available here.

CFTC Staff Exempts Certain CTAs From Filing Form CTA-PR

On July 21, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) granted exemptive relief to certain commodity trading advisors (CTAs) from the requirement in CFTC Regulation 4.27(c) to file a Form CTA-PR annually. The relief extends to CTAs that are registered with the CFTC but do not direct any trading of commodity interest accounts. For purposes of this relief, the term "direct" means an agreement whereby a person is authorized to effect transactions for a client's commodity interest account without such client's specific authorization.

CFTC letter 15-47 is available here.

LITIGATION

Claiming Tipper Received No Benefit, Defendant Invokes *Newman* in Seeking to Dismiss Insider Trading Allegations

A defendant in an insider trading case who allegedly profited from his inside knowledge recently filed a motion to dismiss in the US District Court for the District of Rhode Island to drop him from a Securities and Exchange Commission suit. The defendant tippee, Kenneth Rampino, claimed that following the recent holding in *U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014), the SEC unsuccessfully satisfied the requirement that it show the alleged tipper benefited in exchange for his alleged tip to Mr. Rampino, or that Mr. Rampino knew of any such benefit.

The SEC's complaint claims that the insider, Anthony Andrade, tipped Mr. Rampino with material, non-public information concerning the potential acquisition of Bancorp RI, the company at which Andrade was on the board of directors. According to the SEC, Mr. Rampino knew that Mr. Andrade had no legitimate business purpose in providing him with that information and that Mr. Rampino was breaching his fiduciary duty. The SEC further alleges that during the course of their 20-year friendship, Mr. Rampino and Mr. Andrade exchanged things of value for the other's personal benefit. As examples, the SEC cites potential free legal advice provided by Mr. Rampino to Mr. Andrade and home improvement services provided by Mr. Andrade to Mr. Rampino. Under these facts, the SEC brought claims against the pair that they had violated Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934.

In fighting these allegations, Mr. Rampino claims that the SEC complaint does not include any allegations that Mr. Andrade received a personal benefit in exchange for the tip or that Mr. Rampino knew or should have known that Mr. Andrade received such a benefit, requirements under the *Newman* standard. The US Supreme Court case of *Dirks v. S.E.C.*, 463 U.S. 646 (1983) establishes the standard in insider trading cases as "whether the insider personally will benefit, directly or indirectly from his disclosure. Absent some personal gain, there has been no breach of duty." *Newman* further established that the government must prove that the tippee, here Mr. Andrade, must know that the insider tipped for his or her personal benefit. This is yet another case among many attacking the government's insider trading allegations based on *Newman*, cited as one of the most significant developments in insider trading law in a generation.

SEC Chair Attempts to Reassure Compliance Officers That They Will Not Be Targeted

Demonstrating the effect recent enforcement efforts have had on the industry, in remarks given in Washington, DC at a Compliance Outreach Program for broker-dealers, Securities and Exchange Commission Chairman Mary Jo White tried to assure compliance officers that the SEC does not intend to use its enforcement program to target compliance professionals.

However, despite this attempted assuaging, Ms. White took the opportunity to caution the collected compliance officers that their occupation "does not provide immunity from liability." Instead, she stated that SEC enforcement actions should not "be seen by conscientious and diligent compliance professionals as a threat . . . we do not bring cases based on second guessing compliance officers' good faith judgments, but rather when their actions or inactions cross a clear line that deserve sanction."

Ms. White is only the most recent SEC official to weigh in on the Commission's enforcement actions brought against chief compliance officers, and that she felt compelled to make her remarks may reflect an attempt to bridge conflicting comments made by two other commissioners. In June, Commissioner Daniel Gallagher issued a public statement to expand upon his vote against two settled SEC enforcement actions that involved alleged violations of the Investment Advisers Act of 1940 by chief compliance officers. He noted that he had "long called on the Commission to tread carefully when bringing enforcement actions against compliance personnel." He urged exercising restraint and discretion beginning at the investigation stage.

In a statement titled "The Role of Chief Compliance Officers Must Be Supported," issued by Commissioner Luis Aguilar two weeks later, Mr. Aguilar responded to Mr. Gallagher to rebut the presumption that the SEC was taking too harsh of an enforcement stance against chief compliance officers. Mr. Aguilar emphasized that the facts of the cases in which the SEC issued an enforcement action against a chief compliance officer demonstrated "egregious misconduct." He ended by stating, "the Commission works to support [chief compliance officers] who strive to do their jobs competently, diligently, and in good faith—and these [chief compliance officers] should have nothing to fear from the SEC." Ms. White attempted to parrot these sentiments, but pairing them with statements about compliance officers' lack of immunity may have had the opposite effect.

BANKING

Federal Reserve Issues Final Rule Requiring GSIBs to Bolster Capital

The Federal Reserve Board on July 20 approved a final rule requiring the largest, most systemically important US bank holding companies to further strengthen their capital positions. Under the rule, a firm that is identified as a global systemically important bank (GSIB) holding company will have to hold additional capital "to increase its resiliency in light of the greater threat it poses to the financial stability of the United States."

The final rule establishes the criteria for identifying a GSIB and the methods that those firms will use to calculate a risk-based capital surcharge, which is calibrated to each firm's overall systemic risk. Eight US firms are currently expected to be identified as GSIBs under the final rule. "A key purpose of the capital surcharge is to require the firms themselves to bear the costs that their failure would impose on others," Federal Reserve Board Chair Janet L. Yellen said. "In practice, this final rule will confront these firms with a choice: they must either hold substantially more capital, reducing the likelihood that they will fail, or else they must shrink their systemic footprint, reducing the harm that their failure would do to our financial system. Either outcome would enhance financial stability."

Like the proposal issued in December 2014, the final rule requires GSIBs to calculate their surcharges under two methods and use the higher of the two surcharges. The first method is based on the framework agreed to by the Basel Committee on Banking Supervision and considers a GSIB's size, interconnectedness, cross-jurisdictional activity, substitutability and complexity. The second method uses similar inputs, "but is calibrated to result in significantly higher surcharges and replaces substitutability with a measure of the firm's reliance on short-term wholesale funding. As seen during the crisis, reliance on this type of funding left firms vulnerable to runs and fire.

The surcharges will be phased in in equal portions over the next four years, beginning on January 1, 2016, and becoming fully effective on January 1, 2019.

The final rule is available here.

Federal Reserve Proposes Changes to Capital Planning and Stress Testing Regulations

The Federal Reserve Board on July 19 proposed a rule to modify its capital planning and stress testing regulations. The proposed changes would take effect for the 2016 capital plan and stress testing cycles. For all banking organizations, the proposal would remove the tier 1 common capital ratio requirement. For large bank holding companies, the proposal would modify the stress test capital action assumptions. For banking organizations subject to the advanced approaches, the proposal would delay the incorporation of the supplementary leverage ratio for one year and indefinitely defer the use of the advanced approaches risk-based capital framework in the capital plan and stress test rules. For bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion, and savings and loan holding companies with total consolidated assets of more than $10 billion, the proposal would eliminate the fixed assumptions regarding dividend payments for company-run stress tests and delay the application of stress testing for these savings and loan holding companies for one year. The proposal also would make technical amendments to the capital plan and stress test rules to incorporate changes related to other rulemakings. Comments must be received on or before September 24.

To read the proposed rule, click here.

Federal Reserve Changes Name Check Process

As part of its responsibilities as the primary federal banking regulator for bank holding companies, savings and loan holding companies and state-chartered banks that are members of the Federal Reserve System (referred to as "supervised financial institutions"), the Federal Reserve reviews applications and notices (collectively, "applications") that may include changes to the ownership and/or the composition of the board of directors or executive management of a supervised financial institution. For many of these applications, the Federal Reserve's review includes an assessment of whether certain proposed shareholders and policymakers have the competence, experience, integrity, character and financial resources to effectively lead a supervised financial institution in a safe and sound manner. Under certain circumstances, the Federal Reserve also requests from other regulatory and investigative agencies background information about an individual or company involved in a proposal; this is commonly referred to as the "name check" process.

Under the previous process, name checks generally were conducted on all proposed officers and directors and/or new principal shareholders of a supervised financial institution involved in an application under consideration by the Federal Reserve. Exceptions were made for individuals considered "known to banking" and proposed outside directors with limited or no ownership interests (i.e., less than 5 percent) in the supervised financial institution. Where the specific facts and circumstances warrant, name checks were conducted on an entire board or ownership group. For example, in proposals that involved numerous organizers (each with limited or no ownership in the relevant supervised financial institution) and no clear top policymakers, name checks generally were conducted for the entire group of organizers.

The Federal Reserve is implementing several changes to the name check process. The Federal Reserve generally will conduct name checks only on an individual that, upon consummation of an application, will become a principal shareholder or one of the top two policymakers of the supervised financial institution. In addition, the Federal Reserve will no longer take into consideration whether an individual is "known to banking" when determining whether a name check must be conducted. Rather, unless the facts and circumstances suggest otherwise, a completed name check will remain current for a period of five years, and individuals and companies with current name checks generally will not be rechecked, unless circumstances indicate to the Reserve Bank or board staff that a name check is appropriate. In addition to the above changes, the Federal Reserve will obtain credit bureau reports in certain limited situations to supplement and corroborate financial information provided in application filings or from other sources. The use of such "credit checks" will align the Federal Reserve's practice with that of other federal banking agencies. These credit checks will be conducted on an ad hoc basis when the facts and circumstance indicate that the information provided in the credit report could be helpful to the Federal Reserve in its comprehensive assessment of individuals under review.

For more information, click here.

EU DEVELOPMENTS

ESMA Updates Q&A on the AIFMD

On July 21, the European Securities and Markets Authority (ESMA) published an updated questions and answers ("Updated Q&A") on the application on the Alternative Investment Fund Managers Directive (AIFMD). The Updated Q&A includes new information on reporting to national competent authorities and the calculation of the total value of assets under management (AUM), as discussed below.

The Updated Q&A provides guidance on how alternative investment fund managers (AIFMs) should convert the total value of AUM into Euro. An AIFM should first use the rounded values of the alternative investment funds (AIFs) it manages in the base currency of the AIF. These rounded values should then be divided by the value of one Euro into the base currency of the AIFs. Additionally, the Updated Q&A clarifies that the total value of AUM at the level of the AIFM at the reporting date will not be the sum of the values of AUM of the AIFs reported for that reporting period. This is because AIFMs should not report any information of AIFs for the reporting period during which the AIFs were created, but should include such AIFs in the total value of AUM of the AIFM for that reporting period. Additionally, the Updated Q&A states that short non-derivative positions should be included in the total value of AUM.

Regarding reporting, the Updated Q&A provides clarification that a non-EU AIFM is required to report to the applicable national competent authority of a member state not only the AIFs marketed in that member state as required under Article 42 of the AIFMD, but also—applying Article 24(5) of the AIFMD—the non-EU master AIFs not marketed in the European Union that have either EU feeder AIFs or non-EU feeder AIFs marketed in the European Union.

A copy of the Updated Q&A on the application of the AIFMD can be found here.

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