Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

March 29, 2013

BROKER DEALER

Proposed Change to FINRA Rule Regarding Release of Disciplinary Complaints, Decisions and Other Information

The Financial Industry Regulatory Authority filed a proposed rule change to amend Rule 8313, which governs the release of disciplinary and other information by FINRA to the public. Among other things, amended Rule 8313 would establish general standards for the release of disciplinary information to the public to provide greater information regarding FINRA's disciplinary actions, clarify the scope of information subject to Rule 8313 and eliminate provisions that do not address the release of information to the public. For example, with respect to disciplinary complaints and decisions, the proposed rule would eliminate the publicity thresholds and adopt general standards for release to the public. This would allow FINRA to make available information that is available in BrokerCheck, but is not eligible for publication under current publicity thresholds. In addition, under the proposed rule FINRA would release unredacted copies of statutory disqualification decisions, notifications and notices (subject to limited exceptions). Furthermore, to clarify the scope of Rule 8313 the proposed rule change would delete or move provisions that do not address publication standards. For example, the proposed rule change would amend certain rules in the Rule 9000 Series (Code of Procedure) and add a provision to Rule 9268 (Decision of Hearing Panel or Extended Hearing Panel) regarding the effective dates of sanctions.

The Securities and Exchange Commission is accepting comments on the proposed rule change. Comments should refer to File Number SR-FINRA-2013-018 and must be submitted to the SEC by April 15, 2013.

The notice of filing is available here.

SEC Approves on an Accelerated Basis FINRA Rule Change Relating to Margin Requirements for Credit Default Swaps

The Securities and Exchange Commission has approved a Financial Industry Regulatory Authority proposed change to amend FINRA Rule 4240, which implements an interim pilot program with respect to margin requirements related to credit default swaps (CDS). The proposed rule change provides that, in lieu of the margin methodology requirements set forth in the rule, a member firm may margin CDS on a portfolio margin basis. However, the member firm must notify FINRA in advance in writing of its intent to operate under the portfolio margin program. The proposed rule change also clarifies that, in addition to requiring initial margin, a member firm must collect daily variation margin from each customer or broker-dealer counterparty. In addition, the proposed rule change amends the reference to "largest maximum possible loss" by providing a reference point for the computation of such loss.

The SEC is accepting comments on the proposed rule change. Comments should refer to File Number SR-FINRA-2013-017 and must be submitted to the SEC by April 4, 2013.

The notice of filing and order granting approval is available here.

FINRA Proposed Rule Change to Extend Temporary Limit on Application of FINRA Rules to Security-Based Swaps

On July 1, 2011, the Securities and Exchange Commission granted temporary exemptions under the Securities Exchange Act of 1934 in connection with the pending revision of the definition of "security" to encompass security-based swaps. As a result, the Financial Industry Regulatory Authority adopted Rule 0180, which (with certain exceptions) temporarily limits the application of FINRA rules with respect to security-based swaps. The SEC has issued an order extending the expiration date of the temporary exemptions until February 11, 2014. Thus, FINRA has filed the proposed rule change in order to align the expiration date of Rule 0180 with the new expiration date of the SEC's temporary exemptions.

The SEC is accepting comments on the proposed rule change. Comments should refer to File Number SR-FINRA-2013-019 and must be submitted to the SEC on or before 21 days from publication in the *Federal Register*.

The notice of proposed rule change is available here.

NASDAQ Files to Change Order Processing Algorithm, Permit Registration of Market Makers and Amend Order Types on PSX

In 2010, NASDAQ OMX PHLX LLC (PHLX) launched NASDAQ OMX PSX (PSX) as a platform for trading NMS stocks using a price/size execution model. Now PHLX has filed a proposed rule change to adopt a price/time model for PSX. PHLX is amending PSX rules to replace the price/size execution model with a price/display/time priority algorithm that is substantively identical to corresponding rules in effect at the NASDAQ Stock Market (NASDAQ) and NASDAQ OMX BX, Inc. (BX).

PHLX also has proposed rules to allow member organizations that are PSX participants to register and act as market makers. The proposed rules would impose quoting obligations on PSX market makers identical to those in effect at NASDAQ and BX.

Additionally, the proposed rule change: (1) introduces midpoint peg post-only orders and price to comply post orders, (2) adjusts the operation of minimum quantity orders and post-only orders and (3) eliminates minimum life orders.

The Securities and Exchange Commission is accepting comments on the proposed rule change. Comments should refer to File Number SR-Phlx-2013-24 and must be submitted to the SEC by April 16, 2013.

The notice of filing is available here; the rule filing with the text of the proposed rule change is available here.

SEC Issues FAQs Regarding Rule 15a-6 and Foreign Broker-Dealers

Pursuant to Securities and Exchange Commission Rule 15a-6 adopted under the Securities Exchange Act of 1934, certain exemptions from broker-dealer registration are available for foreign broker-dealers that engage in limited activities involving US institutional investors. The SEC's goals in adopting Rule 15a-6 were to allow these investors to access foreign markets through foreign broker-dealers while maintaining the safeguards afforded by broker-dealer registration. Since the adoption of Rule 15a-6, the SEC has provided guidance on the rule and its application in various no-action letters. In addition, the SEC issued responses to frequently asked questions (FAQs) regarding the application of Regulation AC to research activities of foreign broker-dealers, including foreign broker-dealers that rely on the registration exemption under Rule 15a-6.

On March 21, the SEC issued FAQs with respect to the operation of Rule 15a-6. Although the FAQs do not offer new interpretations, they provide useful clarifications with respect to chaperoning arrangements and other aspects of the Rule 15a-6 exemptions. The Rule 15a-6 FAQs provide clarification with respect to issues related to the "Seven Firms" and "Nine Firms" no-action letters, which addressed when a chaperoning agreement was required and how responsibilities were to be allocated between a chaperoning broker-dealer and the foreign broker-dealer. The FAQs also provide, among other things, clarification with respect to net capital requirements and recordkeeping and transaction confirmation obligations for chaperoning broker-dealers, and their obligations in connection with a foreign broker-dealer's direct distribution of research to major US institutional investors.

The FAQs are available here.

DERIVATIVES

LIBOR Discontinuation Guidance from ISDA

The British Bankers Association, which oversees the compilation of the London Interbank Offered Rate (LIBOR), has recommended the discontinuation of a number of LIBOR calculations. Some discontinuations will eliminate all LIBOR calculations for particular currencies. The discontinuations for major currencies (which will take effect in May of this year) relate to less liquid LIBOR maturities (e.g., five- and seven-month LIBOR, but not six-month LIBOR). In all cases, however, the discontinuations raise the possibility that a loan or swap contract that uses one of the discontinued maturities could be adversely affected by the change.

The International Swaps and Derivatives Association, Inc. (ISDA) formed a working group to recommend a response to the discontinuations and has now published a Guidance Note describing the relevant issues. ISDA has also published a model amendment that can be used by market participants to modify relevant documents to substitute the use of an interpolated LIBOR for any discontinued LIBOR in a major currency. Market participants are under no obligation to follow the ISDA Guidance or use the ISDA amendment, but the existence of those two documents will, at a minimum, assist in orderly discussion of the discontinuation problem where it arises.

The ISDA documents can be found here.

New ISDA Protocol for Swap Documentation

On March 22, the International Swaps and Derivatives Association (ISDA) published a new protocol (March 2013 Protocol) as part of its ongoing Dodd-Frank Documentation Initiative, which has the goal of assisting market participants in complying with rules for swaps promulgated by the Commodity Futures Trading Commission under the authority of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The March 2013 Protocol provides swap market participants with an efficient means to supplement their swap agreements to comply with requirements of three new CFTC rules:

- Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (Sept. 11, 2012);
- End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42559 (July 19, 2012); and
- Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74284 (Dec. 13, 2012).

The bulk of the March 2013 Protocol deals with specific matters arising from the rules for Swap Trading Relationship Documentation (STRD). For instance, it allows for protocol adherents to incorporate 2002 ISDA master agreements into their dealings in order to meet the requirement that parties have STRD in place before or contemporaneously with entering into any swap.

The March 2013 Protocol has the same architecture as the ISDA protocol published in August 2012, consisting of 1) a protocol agreement, 2) a questionnaire and 3) a supplement. A party adheres to the March 2013 Protocol by paying a $500 fee, submitting an adherence letter and exchanging (electronically or otherwise) questionnaires and supplements with counterparties.

The March 2013 Protocol is now open for adherence and the relevant documents (plus an official set of Frequently Asked Questions) can be found here.

ISDA anticipates that the “ISDA Amend” electronic platform for exchanging Protocol documents will be updated in May to cover the March 2013 Protocol, but until then it will only cover the ISDA protocol published in August 2012. The ISDA Amend site can be found here.

April 10 Deadline for Swap End User Legal Entity Identifier Requirement

Every swap end user (i.e., any party to an outstanding derivative contract who is not a swap dealer or major swap participant) should be aware that April 10, 2013 is the deadline for obtaining a "CFTC Interim Compliant Identifier" number (or CICI) in connection with its swap activities. The requirement arises under Commodity Futures Trading Commission Rule 45.6(f), which specifies that every "swap counterparty" must use a legal entity identifier (LEI) in all recordkeeping. The global regime for LEIs is not yet in place, so the CFTC arranged for the issuance of CICIs as an interim measure until definitive LEIs are available. The rule is already applicable to registered swap dealers and major swap participants, and the compliance date for end users is April 10, 2013. The CICI requirement applies only to entities, not to individuals.

A detailed explanation of the requirement can be found here.

A CICI can be obtained for $200 from the CICI Utility website run by DTCC.

If a third party previously obtained a CICI for an end user, the end user must still go to the CICI website by April 10 to "certify" the CICI. In every case, an end user is responsible for maintaining its own CICI after it is issued, including by re-certifying it at required intervals. A CFTC press release on this point can be found here.

CFTC

NFA Issues Reminder of FCM Responsibility for Review of Guaranteed IB Promotional Materials

In response to an increase in the volume of promotional material being submitted by guaranteed introducing brokers (GIBs) to the National Futures Association (NFA) through its Pre-review Program (a free service offered by the NFA to review promotional material prior to its distribution), the NFA has issued a notice reminding NFA members of the requirements of NFA Compliance Rule 2-9 (Rule 2-9). Rule 2-9 requires all promotional material of a GIB to first be reviewed by the supervisory personnel of such GIB's guarantor futures commission merchant (FCM) before submitting such promotional material to the Pre-review Program. Going forward, all submissions of promotional material by a GIB to the Pre-review Program will be required to include an attestation by supervisory personnel of the guarantor FCM that the material was reviewed and approved in accordance with the requirements of Rule 2-9. Because the NFA's review under the Pre-review Program is only with respect to compliance with Rule 2-9, such review does not provide a "safe harbor" to the submitting member with respect to other NFA rules.

The NFA's notice to members may be found here.

LITIGATION

Texas District Court Deems Arbitration Agreement Enforceable

The US District Court for the Southern District of Texas recently held that a dispute between a group of employers and a former employee should be submitted to arbitration, finding that the arbitration agreement was valid and not "illusory" as the plaintiff had argued. Alleging that, during his brief employment as a refinery worker, he and other employees were not properly compensated for overtime work, the plaintiff brought causes of action for violations of the Fair Labor Standards Act, as well as equitable claims for *quantum meruit* and unjust enrichment. Defendants moved to dismiss the action and to compel arbitration on the grounds that the dispute was covered by a binding arbitration agreement and that the plaintiff should be compelled to arbitrate individually rather than as part of a class action. The plaintiff contended that the arbitration agreement was "illusory" because it allowed the defendant employer to unilaterally amend or terminate the agreement retroactively. In rejecting this argument, the court cited the Texas Supreme Court's decision, *In re Haliburton Co.*, which involved a similar challenge by an employee to an arbitration agreement containing almost identical language. The court concluded that like the arbitration agreement in *Haliburton*, the agreement before it contained provisions that precluded the defendant employer from retroactively modifying or eliminating its arbitration policy, thus making it valid rather than "illusory." The court further concluded that the question of whether the plaintiff could arbitrate on a collective or class action basis was for the arbitrator to decide.

Gonzales et al. v. Brand Energy & Infrastructure Services, Inc., No. H-12-1718 (S.D. Tex. March 20, 2013).

New York District Court Bars Discovery of SEC's Requests for Extension Under Dodd-Frank

The US District Court for the Eastern District of New York recently ruled that Securities and Exchange Commission enforcement actions cannot be dismissed on grounds that the SEC failed to comply with Section 929U of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act, which requires the agency to file an action within 180 days of notifying the target of the pendency of an investigation or to obtain an extension of time if the matter is "sufficiently complex." The defendants sought discovery related to the SEC's multiple requests for extensions of time pursuant to Section 929U, including noticing the depositions of the SEC's litigation counsel and its custodian of documents, as well as requesting the production of internal SEC documents. The SEC moved to quash these discovery requests and the court held that evidence concerning the SEC's compliance with Section 929U was not discoverable because the section did not create a jurisdictional bar to enforcement actions. Accordingly, the discovery sought by defendants was not relevant to a claim or defense in the enforcement action. The court also noted that the defendants already had sworn statements from government counsel regarding the process used to obtain the extensions at issue in the case and that further discovery would be unnecessary and wasteful.

SEC v. NIR Group LLC, No. 11-cv-4723 (E.D.N.Y. March 24, 2013).

BANKING

CFPB Finalizes ATM Disclosure Rule Changes

On March 21, the Bureau of Consumer Financial Protection finalized a rule implementing the ATM placard legislation that was signed into law last December. In December 2012, Congress passed and the President signed legislation amending the Electronic Funds Transfer Act (EFTA) to eliminate a requirement that a fee notice be posted on or at automated teller machines, leaving in place the requirement for a specific fee disclosure to appear on the screen of that machine or on paper issued from the machine. ATM operators will now only have to provide the on-screen or paper disclosure, which includes the amount of the fee to be charged and is provided before the consumer is committed to the transaction. This final rule amends Regulation E to conform to the EFTA amendment. The legislation protects banks from frivolous lawsuits by repealing the outdated, duplicative requirement that a placard must be attached to ATMs stating that a fee may be charged. The final rule will be effective immediately.

Read more.

Flood Insurance Changes

On March 29, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and the Farm Credit Administration (the Agencies) issued interagency guidance to inform financial institutions about revisions to the Flood Disaster Protection Act of 1973 (FDPA), which was amended by the Biggert-Waters Flood Insurance Reform Act of 2012 (BWFI Act).

The following provisions of the BWFI Act became effective upon enactment:

- Amendments to the forced placement provisions of the FDPA.
- The increase to $2,000 of the maximum civil money penalty for an FDPA violation and the elimination of the annual penalty cap.

The following provisions of the BWFI Act are not effective until regulations are issued:

- The requirement that lenders accept private flood insurance policies if the coverage satisfies the standards specified in the BWFI Act.
- The requirement that lenders disclose to borrowers certain information regarding the National Flood Insurance Program.

- The requirement that certain lenders and servicers establish escrow accounts for flood insurance premiums and fees for any loan outstanding or entered into after July 6, 2014, that is secured by residential improved real estate or a mobile home. This provision includes an exemption for certain institutions with less than $1 billion in assets.

Finally, the BWFI Act will change some of the flood insurance Q&As that the Agencies released previously. See the Interagency Statement for more details.

EXECUTIVE COMPENSATION AND ERISA

Departments Release Waiting Period Regulations for Group Health Plans

On March 18, the Departments of Health and Human Services, Labor and Treasury (the Departments) issued joint proposed regulations on the Patient Protection and Affordable Care Act's prohibition of waiting periods of longer than 90 days for group health plans.

For plan years beginning on or after January 1, 2014, the proposed regulations provide that group health plans and insurers are prohibited from applying a waiting period of longer than 90 calendar days for employees and their dependents who are otherwise eligible to participate in a plan. The proposed regulations were issued as a follow-up to Department of Labor Technical Releases 2012-01 and 2012-02, which define a waiting period as the period of time that must pass before coverage for an employee or dependent who is otherwise eligible for coverage under the plan terms can become effective.

Of special note in the proposed regulations is the Departments' combined position that there is no *de minimis* exception equating the 90-day period with a three-month period. The proposed regulations provide that the waiting period is to be based on 90 calendar days, which include weekends and holidays. Therefore, plans that impose a three-month waiting period will need to be amended prior to the start of the 2014 plan year.

In addition, the proposed regulations make it clear that imposing a 90-day waiting period where coverage begins on the first day of the month following the expiration of such waiting period is no longer permissible, as the total waiting time for employees and dependents would exceed 90 calendar days. Plans containing such provisions would need to be amended prior to the start of the 2014 plan year. To avoid potential mid-month plan entry dates for employees and their dependents, a plan may wish to impose a shorter waiting period (such as 60 days), and allow entry on the first day of the calendar month following such shorter waiting period (provided that the total wait time does not exceed 90 calendar days).

While a plan will need to make coverage available to employees and their dependents within 90 days, the proposed regulations do not penalize plans if an employee or dependent delays the election to participate in the plan beyond such 90-day period.

Finally, group health plans and insurers are still able to condition eligibility on factors other than the passage of time (such as whether an employee meets specific sales goals or reaches specified commission levels) if the condition is not imposed to circumvent the 90-day rule. The proposed regulations also have outlined special rules that apply to variable-hour employees when a specified number of hours of service per period is a plan eligibility condition.

A copy of the proposed regulations can be found here.

A copy of DOL Technical Release 2012-01 can be found here.

A copy of DOL Technical Release 2012-02 can be found 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
Arthur W. Hahn	312.902.5241	arthur.hahn@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
Gregory E. Xethalis	212.940.8587	gregory.xethalis@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	312.902.5334	krassimira.zourkova@kattenlaw.com

LITIGATION

Michael S. Gordon	212.940.6666	michael.gordon@kattenlaw.com
Jason F. Clouser	212.940.6309	jason.clouser@kattenlaw.com

BANKING

Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com

EXECUTIVE COMPENSATION AND ERISA

Russell E. Greenblatt	312.902.5222	russell.greenblatt@kattenlaw.com
Christopher K. Buch	312.902.5509	christopher.buch@kattenlaw.com

* Click here to access the *Corporate and Financial Weekly Digest* archive.

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

©2013 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

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

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London: Katten Muchin Rosenman UK LLP.