Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
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BROKER DEALER

SEC Extends Interim Final Temporary Rule for Broker-Dealers Engaging in a Retail Forex Business

As reported in *Corporate & Financial Weekly Digest* edition of July 15, 2011, the Securities and Exchange Commission adopted interim final temporary Rule 15b12-1T to allow a registered broker-dealer to engage in a retail forex business until July 16, 2012.

In 2012, the SEC extended the Rule to July 16, 2013. The SEC has now extended the Rule to July 16, 2016.

Click here for the Rule.

FINRA Announces Targeted Examination Letter Regarding High-Frequency Trading

The Financial Industry Regulatory Authority (FINRA) announced the issuance of a targeted examination letter in connection with high-frequency trading. FINRA's Trading and Market Making Surveillance group is conducting a review of various firms' controls and processes in connection with the development and use of trading algorithms. The examination letter asks detailed questions about how firms deploy, use and monitor algorithms.

Click here for the examination letter.

CFTC

CFTC Issues Interpretive Guidance Regarding Certain Cross-Border Transactions

On July 12, the Commodity Futures Trading Commission adopted interpretive guidance and a policy statement regarding the cross-border application of the swap provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and an exemptive order that provides conditional relief for certain market participants. The interpretation and policy statement provide guidance on (i) the definition of US person (which now includes offshore collective investment vehicles that are managed in the United States); (ii) the *de minimis* calculation used to determine swap dealer (SD) and major swap participant (MSP) status for a non-US person (including the treatment of swaps with guaranteed and conduit offshore affiliates of US persons); and (iii) the manner in which entity-level and transaction-level requirements apply to non-US persons registered as US SDs and MSPs (including more detail about the process for obtaining determinations of when substituted compliance may apply). The exemptive order allows market participants to continue to apply the US person definition and SD and MSP calculations provided in the CFTC's January 7, 2013 exemptive order for 75 days after the interpretive guidance and policy statement is published in the *Federal Register* and also provides temporary relief from certain transaction-level and entity-level reporting requirements for non-US SDs and MSPs and foreign branches of US SDs and MSPs located in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland. Additional details will be provided in a forthcoming Katten Client Advisory.

The interpretive guidance and policy statement is available here.

The exemptive order is available here.

CFTC Seeks Public Comment on Wash Trade Advisory

On July 15, the Commodity Futures Trading Commission published a request for public comment on a Market Regulation Advisory Notice related to wash trades that was proposed on July 9 by the Chicago Mercantile Exchange, Chicago Board of Trade, New York Mercantile Exchange, Commodity Exchange, Inc. and Kansas City Board of Trade. The proposed advisory notice would: (i) define wash trade; (ii) define same beneficial ownership and common beneficial ownership; (iii) clarify that unintentional self-trades that occur on more than an incidental basis may be deemed to be wash trades; and (iv) clarify that orders generated in good faith by independent traders or independent algorithms that unintentionally and coincidentally match will not be deemed wash trades. Comments should be submitted to the CFTC on or before August 14, 2013.

The proposed advisory notice is available here.

More information is available here.

LITIGATION

Florida Federal Court Orders $137 Million Forfeiture for Investment Fraud and Money Laundering Scheme

The US District Court for the Middle District of Florida recently ordered one participant in a sophisticated investment fraud and money laundering scheme to forfeit $137 million in assets including cash, real property, aircraft and vessels.

From approximately 2004 through 2008, United Kingdom citizen Simon Andrew Odoni and others stole the identities of dormant, publicly traded companies to create fraudulent shell entities that appeared legitimate but were, in fact, worthless. Then, relying on high-pressure misleading tactics, they induced victims to invest over $127 million, which was wired to bank accounts in Florida. Odoni and his confederates reaped another $10 million through a separate currency trading scheme.

A related case led to the May 2012 conviction of Roger Lee Shoss and Nicollette Loisel, two Texas lawyers who helped to hijack the dormant companies' identities. The co-conspirators then issued worthless stock in the dormant companies that appeared to be publicly traded.

The United States, the United Kingdom, Canada and Spain collaborated on the investigation. Susan McCormick, special agent in charge of Homeland Security Investigations, Tampa, urged investors to "beware of similar scams – they know no borders."

United States v. Odoni, Case No. 08-cr-172-T-35EAJ (M.D. Fla. July 11, 2013).

Ninth Circuit Affirms Radical Bunny LLC Managers' Securities Violations

The US Court of Appeals for the Ninth Circuit upheld summary judgment in favor of the Securities and Exchange Commission, finding that managers of unregistered broker-dealer Radical Bunny LLC (Radical Bunny) failed to raise triable issues of material fact as to whether they sold "securities" or acted with scienter in making various false statements to investors.

The SEC alleged that, from approximately 2004 through 2008, Radical Bunny's managers (collectively, Defendants) obtained over $189 million from nearly 900 accounts by offering "participations" in loans from Radical Bunny to Mortgage Ltd., a mortgage lender. Defendants purportedly represented that the investments were secured and collateralized because investors would be named as beneficiaries in the deeds of trust on the underlying real properties, but, in fact, they were not so named.

In April 2011, the US District Court for the District of Arizona granted summary judgment to the SEC, holding that Defendants had engaged in the unregistered offer and sale of securities, and had committed securities fraud by making false statements to investors about the nature of their investments. Each of the Defendants was subject to a permanent injunction, disgorgement including prejudgment interest and a civil penalty of $120,000.

On appeal, the Ninth Circuit affirmed. Although Defendants argued that they were not selling "securities," the court noted that "a reasonable investor would have viewed the offering as involving an initial investment of money with the expectation of profit." Further, because only the Defendants could exercise any control over the loans, and no regulatory scheme reduced the risk inherent in such investments, the court found the *Howey* test of a "security" to be met. The court also rejected Defendants' other claims related to their alleged misrepresentations.

U.S. Sec. & Exch. Comm'n v. Radical Bunny LLC et al., Case No. 11-16275 (9th Cir. 2013).

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