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SEC/CORPORATE

SEC Chair Directs Staff to Review Commission Rule Excluding Conflicting Proxy Proposals

On January 16, Securities and Exchange Commission Chair Mary Jo White announced that she has directed the SEC's staff (Staff) to review Rule 14a-8(i)(9) promulgated under the Securities Exchange Act of 1934, which allows an issuer to exclude a shareholder proposal that "directly conflicts" with one of the issuer's own proposals. Chair White's directive is a result of uncertainty created by the Staff's no-action letter issued to Whole Foods Market, Inc., which is described in detail in the *Corporate and Financial Weekly Digest* edition of December 12, 2014.

Following the Staff's release of the Whole Foods' no-action letter, other issuers requested similar no-action relief regarding exclusion of "proxy access" shareholder proposals from their proxy statements on the basis that such issuers planned to offer competing proposals. Commenters noted that the Staff's position articulated in the Whole Foods' no-action letter could allow issuers to avoid virtually any shareholder proposal by putting forth a competing proposal, including a proposal that is much less favorable to shareholders.

In connection with Chair White's announcement, on January 16, the Staff (1) retracted its prior no-action position with respect to the Whole Foods shareholder proposal, now expressing no view as to whether Whole Foods could properly exclude the shareholder proposal in question under Rule 14a-8(i)(9), and (2) announced that, in light of Chair White's directive, it would not express any view on the application of Rule 14a-8(i)(9) in the 2015 proxy season. As a result, if an issuer excludes a proposal based on Rule 14a-8(i)(9), it will have no assurance that it will not be subject to an SEC enforcement action as a result of such exclusion. In any event, if the proponent of the proposal pursues litigation against the issuer, the final determination of whether the proposal may be excluded pursuant to Rule 14a-8(i)(9) will ultimately be made by a US federal court.

Chair White's statement is available here.

The Staff's retraction letter is available here.

BROKER-DEALER

SEC Comments on FINRA's Proposed Rule Amendment to Increase Pricing Disclosure

On January 20, the Securities and Exchange Commission commented on the Financial Industry Regulatory Authority's proposed amendment to FINRA Rule 2232 regarding transparency on prices in certain retail transactions in fixed-income securities.

The proposed rule amendment would require disclosure of the price of the member firm's offsetting trade with respect to retail-sized trades and the price differential when the offsetting trade occurs within the same trading day.

The SEC stated that while individual investors have access to FINRA's Trade Reporting and Compliance Engine (**TRACE**), customer confirmations are not required to include prices of securities, and it may be difficult for individual investors to determine the value of a security using publicly available information. The proposed rule would also bring transparency to FINRA member firms' practice of offsetting trades within the same day, potentially preventing such member firms from charging excessive mark-ups.

The SEC urged FINRA to retain the provision in the proposed rule requiring member firms to disclose the price paid or received by the member firm in third-party transactions, stating that it would be much less burdensome for member firms than investors to provide such information. The SEC also stated that even small price differentials should be disclosed. Finally, the SEC supported the rule proposal's broad reach, requiring pricing information disclosures for all trades, not just "riskless principal" trades, as a broader approach provides a clear standard for member firm compliance.

Click here to read the SEC comment letter.

CFTC

CFTC Grants Order of Registration to Tokyo Commodity Exchange

The Commodity Futures Trading Commission has issued an order granting the Tokyo Commodity Exchange—an exchange subject to the regulatory supervision of the Japanese Ministry of Economy, Trade and Industry and the Ministry of Agriculture, Forestry and Fisheries—registration as a foreign board of trade. The order of registration permits US market participants to directly access the Tokyo Commodity Exchange's order entry and trade matching system. To comply with the order of registration, the Tokyo Commodity Exchange must adhere to the requirements applicable to foreign boards of trade in Part 48 of the CTFC's Regulations.

The order of registration is available here.

NFA Increases Minimum Security Deposits for Forex Transactions

National Futures Association (NFA)'s Executive Committee has temporarily increased the minimum security deposits required to be collected and maintained by Forex Dealer Members (FDMs) for foreign exchange transactions involving the Swiss franc, Swedish krona or Norwegian krone. Effective until further notice, FDMs must collect and maintain a minimum security deposit of five percent of the notional value of transactions in the Swiss franc, and three percent of the notional value of transaction in the Swedish krona or Norwegian krone.

NFA's notice to members is available here.

LITIGATION

Tenth Circuit Affirms Dismissal of Securities Class Action for Failing to Plead Scienter Under the PSLRA

The US Court of Appeals for the Tenth Circuit recently affirmed the dismissal of a class action by investors in Gold Resource Corp. (GRC) alleging that the company and four of its officers violated Section 10(b) of the Securities Exchange Act and Rule 10b-5. The court held that there was insufficient evidence to draw a strong inference of scienter under the heightened pleading standard of the Private Securities Litigation Reform Act (PSLRA).

The claims against the defendants arose out of GRC's mining operations in Mexico. Plaintiffs alleged that GRC and the defendants intentionally inflated GRC's production statistics by counting provisional invoices for sales of ore as revenue. These invoices were revised when final samples of the ore were taken and, due to "significant" differences between the provisional invoices and the final sample, the actual sale price of the ore was significantly lower than the provisional invoice, forcing GRC to restate its earnings for the first two quarters of 2012. Additionally, plaintiffs alleged that the defendants knew of but "intentionally ignored" infrastructure problems that

would affect production in the second quarter of 2012. The US District Court for the District of Colorado dismissed the suit for failing to plead scienter.

The Tenth Circuit affirmed, concluding that there were other equally plausible non-fraudulent explanations for the defendants' conduct. In regard to the financial restatements, the court, emphasizing that Section 10(b) requires that the defendants' statements be made at least recklessly, not merely negligently, determined that a generally accepted accounting principles (GAAP) violation alone was not sufficient for an inference of scienter without other violations or irregularities. The court regarded the defendants' explanation, that the discrepancy in measurement taken in Mexico was not immediately known by the management and not disclosed until confirmed by an investigation, at least as plausible as plaintiffs' inference of scienter. Further, the court rejected plaintiffs' arguments regarding the infrastructure problems of the mines, emphasizing that mining difficulties were unforeseen by the defendants and an inherent risk of the industry.

In re Gold Resource Corp. Securities Litigation, No. 13-1323 (10th Cir. Jan. 16, 2015).

Federal Prosecutors Charge Canadian Trader in "Layering" Scheme

The US Attorney for the District of New Jersey recently filed criminal securities and wire fraud charges against a Canadian man, Aleksandr Milrud, alleging that he engaged in a fraudulent scheme to manipulate the stock market. The Securities and Exchange Commission filed parallel civil charges in the District of New Jersey.

"Layering," also known as "spoofing," is where a trader places orders to buy or sell securities, with no intent to execute the orders, in order to manipulate the price of the securities. While the manipulative orders are pending, the trader capitalizes on the price distortion caused by the trades and buys or sells the same securities, cancelling the manipulative trades before they are executed and profiting off the price movement created by the non-executed trades.

Milrud, the first trader to face federal criminal charges for using a layering scheme to manipulate equity markets, allegedly claimed to control 60 percent of all China-based traders engaged in layering and to have earned anywhere from $1 million to $50 million per month from the scheme. According to the criminal complaint, in January 2013, Milrud sought to open a trading account at a foreign broker-dealer to use in the layering scheme, but the broker-dealer was a cooperating witness with law enforcement. Over the course of several meetings, Milrud allegedly explained the details of his scheme to the broker-dealer, including how he hired a gaming software company to program "hotkeys" to enable traders to quickly enter and cancel trades, and used two separate trading accounts, a "dirty" one for the manipulative trades and a "clean" one for the real trades. Milrud allegedly instructed his traders to use multiple computers, IP addresses, brokerage accounts, and clearing firms for a single transaction to hide it from government regulators. According to the criminal complaint, his scheme was documented when he demonstrated it to the cooperating witness using a computer provided to the witness by the FBI.

United States v. Milrud, Mag. No. 15-7001 (D.N.J. Jan. 12, 2015); *SEC v. Milrud*, No. 2:15-cv-00237 (D.N.J. Jan. 13, 2015).

BANKING

OCC Issues New *Comptroller's Handbook* Sections Relating to Securities Compliance, Litigation and Conflicts of Interest

On January 22,the Office of the Comptroller of the Currency (OCC) issued the "Government Securities Act" booklet of the *Comptroller's Handbook*. This new booklet, part of the *Securities Compliance* series, consolidates certain guidance from the *Comptroller's Handbook for Compliance,* "Securities Activities" booklet, issued in September 1991, and the *Comptroller's Handbook* booklet "Investment Securities," issued in March 1990. The new booklet also replaces section 563, "Government Securities Act," issued in May 1998, as part of the Office of Thrift Supervision (OTS) *Examination Handbook* for the examination of federal savings associations (FSAs).

On January 16, the OCC issued the "Litigation and Other Legal Matters" booklet of the *Comptroller's Handbook*. This revised booklet replaces the booklet of the same title issued in February 2000. The revised booklet provides guidance to examiners assessing a bank's litigation exposures, associated risks and risk management practices.

On January 14, the OCC issued the "Conflicts of Interest" booklet of the *Comptroller's Handbook*. This booklet replaces a booklet of the same title issued in June 2000. This booklet, which has been revised to include the supervision of FSAs, provides updated guidance for examiners on risks and expected controls over conflicts of interest that may arise in asset management activities. This booklet also explains the risks inherent in such conflicts and provides frameworks for managing those risks.

Read the "Government Securities Act" booklet here, the "Litigation and Other Legal Matters" booklet here and the "Conflicts of Interest" booklet here.

CFPB Finalizes Minor Changes to "Know Before You Owe" Mortgage Rules

On January 20, the Consumer Financial Protection Bureau (CFPB) finalized two minor modifications to the "Know Before You Owe" mortgage disclosure rules. The changes, which were proposed in October 2014, address when consumers will receive updated disclosures after locking in an interest rate, and how consumers receive information regarding certain construction loans.

Read more.

ANTITRUST

HSR Act Thresholds to Rise on February 20

On January 21, the Federal Trade Commission published new notification and filing fee thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The revised thresholds will apply to all mergers and acquisitions that close on or after February 20.

Revised Notification Thresholds

Under the revised notification thresholds, no transaction will be reportable unless it will result in the acquiring person holding voting securities, assets or non-corporate interests of the acquired person valued above $76.3 million.

Where the value of the voting securities, assets or non-corporate interests being acquired is between $76.3 million but below $305.1 million, the Size-of-Person test will also need to be met for the transaction to be reportable. Generally, under the revised thresholds, the Size-of-Person test requires that either the acquiring or acquired person has annual net sales or total assets equal to or exceeding $15.3 million, *and* the other person has annual net sales or total assets equal to or exceeding $152.5 million.

Where the transaction value is $305.1 million or more, the Size-of-Person test need not be satisfied for an HSR filing to be required.

Revised Filing Fee Thresholds

The fees that must accompany HSR filings are also being revised. The new fee structure will be:

- $45,000 for transactions valued above $76.3 million and below $152.5 million;
- $125,000 for transactions valued at or above $152.5 million and below $762.7 million; and
- $280,000 for transactions valued at or above $762.7 million.

EU DEVELOPMENTS

ESMA and Hong Kong SFC Agree MoU for Covered CCP Supervision

On January 16, the European Securities and Markets Authority (ESMA) and the Securities and Futures Commission (SFC) of Hong Kong agreed on a Memorandum of Understanding (MoU) regarding regulatory cooperation and arrangements for ESMA's continued monitoring of the on-going compliance with the recognition conditions established in Article 25 of the European Markets Infrastructure Regulation (EMIR) for central counterparties (CCPs).

Any CCP outside of the European Union that wishes to provide clearing services to clearing members or trading venues established in the European Union must become recognized by ESMA as a Covered CCP. For the recognition process to commence, ESMA must have first made an equivalence determination for the non-EU jurisdiction, i.e. that the relevant non-EU jurisdiction has an equivalent legal and supervisory framework to that of EMIR. ESMA made an equivalence determination for Hong Kong on October 30, 2014. Details of the ESMA equivalence determination were reported in the *Corporate and Financial Weekly Digest* edition of October 31, 2014 ("European Commission Adopts First Equivalence Decisions for Non-EU CCPs"), which can be found here.

Article 25 of EMIR requires that a cooperation arrangement be put in place between ESMA and the applicable non-EU regulator and that ESMA be given sufficient tools to monitor the Covered CCP's on-going compliance with the recognition conditions. The MoU states that ESMA does not expect to conduct any on-site visits of the Covered CCP unless an exceptional circumstance should arise. Additionally, the MoU provides that domestic banking secrecy or blocking regulation will not prevent ESMA from continually monitoring the Covered CCP.

The MoU is effective as of December 19, 2014. A copy of the MoU can be found here.

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