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CORPORATE & FINANCIAL
WEEKLY DIGEST

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Due to the holiday, *Corporate and Financial Weekly Digest* will not be published on July 5. The next issue will be distributed on July 12.

SEC/CORPORATE

Delaware Court of Chancery Upholds Forum Selection Provisions in Bylaws

Over the last several years, a number of companies have included in their certificates of incorporation or bylaws exclusive forum selection provisions. These provisions generally require that derivative actions and other stockholder actions relating to the internal affairs of a corporation are brought exclusively in the company's state of incorporation (very often Delaware). Such provisions have typically been adopted to address the recent increase in "multiforum litigation," in which duplicative stockholder and derivative suits are brought in multiple jurisdictions, including jurisdictions outside the corporation's jurisdiction of incorporation. Exclusive forum selection bylaws unilaterally adopted by boards of directors have come under scrutiny and have been the subject of legal challenges.

On June 25, the Delaware Court of Chancery issued an opinion in *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corporation, et al.*, C.A. No. 7220-CS, and *IClub Investment Partnership v. FedEx Corporation., et al.,* C.A. No. 7238-CS, upholding the enforceability of forum selection bylaw provisions adopted unilaterally by the boards of directors of Chevron Corporation and FedEx Corporation, two Delaware corporations. The court ruled that provisions in the bylaws of Chevron Corporation and FedEx Corporation requiring that litigation relating to the corporations' internal affairs be conducted in Delaware were valid under Delaware law.

The court rejected the plaintiffs' claims that such bylaw provisions are beyond the authority of the board of a Delaware corporation. The court noted that *8 Del. C. § 109(b)* provides that the bylaws of a corporation may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and the rights or powers of the corporation or its stockholders, and found that these bylaws "plainly relate" to such matters. The court also rejected the plaintiffs' claims that the bylaws are contractually invalid because they were unilaterally adopted by the corporations' boards of directors without stockholder approval. In the opinion, the court explained that bylaws, along with the certificate of incorporation and the Delaware General Corporation Law (DGCL), are considered "part of a flexible contract between corporations and stockholders," and that "stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."

The court did note that if a plaintiff believes a forum selection clause cannot be equitably enforced in a particular situation, the plaintiff may bring a suit in the plaintiff's preferred forum and respond to a defendant's motion to dismiss for improper venue by arguing that the application of the forum selection clause would be unreasonable. Though the court does note in its opinion that foreign courts must respect the internal affairs doctrine in a suit relating to the enforceability of bylaws and, as such, these foreign courts will first consider whether the bylaws of a Delaware corporation are valid under Delaware law, it may be difficult to predict the extent to which courts in other jurisdictions will dismiss lawsuits based upon Delaware forum selection provisions.

This decision may be appealed by the plaintiffs to the Delaware Supreme Court.

In light of this decision, boards of directors of public companies that have not yet adopted forum selection bylaws may now want to consider whether it is appropriate for them to do so.

To read the full text of the decision, click here.

CFTC

CFTC Issues No-Action Letters

The Commodity Futures Trading Commission released a series of staff letters relating to various issues arising under rules implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, including portfolio reconciliation, certain requirements for non-US persons and chief compliance officer (CCO) reports.

- **No-Action Relief Regarding Terms that May Be Excluded from Portfolio Reconciliation**

  CFTC Regulation 23.502 requires swap dealers (SDs) and major swap participants (MSPs) to reconcile their swap portfolios with one another and provide non-SD or non-MSP counterparties with regular opportunities for portfolio reconciliation. The CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) has issued a no-action letter that identifies 11 data fields that may be excluded from such portfolio reconciliation exercises.

  CFTC Letter No. 13-31 is available here.

- **No-Action Relief Affecting Non-US Associated Persons**

  The CFTC issued a letter relating to the fingerprinting requirement under CFTC Regulation 3.12. In CFTC Letter No. 13-29, the DSIO granted no-action relief to any CFTC registrant that does not submit fingerprint cards for its non-US associated persons. In order to obtain such relief, a registrant must submit, in lieu of a fingerprint card, a Form 8-R for each non-US associated person with a signed certification that a reasonable criminal history background check was conducted and no matters were revealed constituting a disqualification under Sections 8a(2) or 8a(3) of the Commodity Exchange Act.

  CFTC Letter No. 13-29 is available here.

- **No-Action Relief Concerning Annual Reports of Chief Compliance Officers**

  The DSIO issued a no-action letter that provides time-limited relief for certain SDs with respect to the requirement that their CCOs prepare and submit annual reports to the CFTC by July 1, 2013. The no-action relief applies to SDs that: (1) are not registered with the Securities and Exchange Commission or regulated by a US prudential regulator; and (2) ended their fiscal years on March 31. The relief is limited only to the first annual report required to be furnished for the fiscal year ending on March 31. The no-action letter includes a limited list of subjects that any such SD must include in its annual report and limits the time period covered by the certification that a CCO must execute with respect to the annual report.

  CFTC Letter No. 13-32 is available here.

Portfolio Reconciliation and Swap Trading Relationship Documentation Requirements for SDs and MSPs

Provisionally registered swap dealers (SDs) and major swap participants (MSPs) are required by the National Futures Association (NFA) to submit portfolio reconciliation and swap trading relationship documentation policies and procedures that have been adopted by the SD or MSP pursuant to Commodity Futures Trading Commission Regulations 23.502 and 23.504. Required submissions must be made to the NFA's Registration Documentation Submission System (RDSS) through the appropriate filing codes no later than 6:00 p.m. EST on July 1, 2013. Additional information may be found on the compliance page for SDs and MSPs on the NFA's website. At this time, SDs and MSPs relying on the Final Exemptive Order Regarding Compliance With Certain Swap Regulations are not required to submit policies and procedures that would otherwise be required by CFTC Regulations 23.502 and 23.504 with respect to trades with non-US counterparties.

The NFA notice to members is available here. The NFA compliance page is available here.

LITIGATION

Second Circuit Affirms Dismissal of Madoff Trustee's Common Law Claims

The US Court of Appeals for the Second Circuit affirmed the district court's dismissal of common law claims brought by Irving H. Picard (Trustee), trustee for Bernard L. Madoff Investment Securities (BLMIS), against several banks. The Second Circuit found that the Trustee was barred by the doctrine of *in pari delicto* and lacked standing to bring claims on behalf of customers of BLMIS.

Under New York law, the doctrine of *in pari delicto* bars one wrongdoer from recovering against another. The Second Circuit found that the doctrine applied to the Trustee, who stands in the shoes of BLMIS, and barred him from asserting claims against defendants for wrongdoing in which Madoff participated.

The court also found that the Trustee lacked standing to bring claims on behalf of BLMIS's customers. In arguing that his status as a Securities Investor Protection Act (SIPA) trustee gave him standing to assert claims on behalf of BLMIS's customers, the Trustee relied heavily on a Second Circuit case overruled by the Supreme Court. The Second Circuit clarified that the case has no precedential effect and rejected the Trustee's additional standing arguments based on the text of SIPA and principles of common law bailment.

Picard v. JP Morgan Chase & Co. (In re Bernard L. Madoff Investment Securities), Nos. 11-5044, 11-5051, 11-5175, 11-5207 (2d Cir. June 20, 2013).

District Court Dismisses Class Action Suit Under FTCA Against SEC

The US District Court for the Middle District of Louisiana granted the United States' motion to dismiss a putative class action law suit against the Securities Exchange Commission. Plaintiffs brought the suit under the Federal Tort Claims Act (FTCA) on behalf of victims who lost their investments in the Stanford International Bank, Ltd. (SIBL) Ponzi scheme.

Plaintiffs alleged that the SEC failed to investigate the SIBL scheme and thereby contributed to plaintiffs' loss. The United States moved to dismiss for lack of subject matter jurisdiction, arguing that the SEC's actions fell within the "discretionary function" exception to the FTCA. Pursuant to the FTCA, a plaintiff can sue a government agency or employee who commits negligent or wrongful acts where the suit would otherwise be barred by sovereign immunity. The "discretionary function" exception removes from the ambit of the FTCA situations in which agencies or employees exercise discretionary authority.

The District Court found that the SEC has discretion over when and how to conduct its investigations, including the investigation of SIBL. Plaintiffs argued that even if the decision regarding the investigation was discretionary, the SEC abused its discretion when it stated, among other things, that the SIBL investigation had been referred to the National Association of Securities Dealers and the Texas State Securities Board when, in fact, it had not been. The court rejected this argument, finding that the FTCA clearly provides that the discretionary function exception applies even if the discretion involved is abused.

Anderson v. United States of America, Civil Action No. 12-398-SDD-RLB (M.D. La. June 21, 2013).

BANKING

Federal Reserve Proposes to Collect Additional Data Every Day on Fed Funds, Eurodollars and CDs from Larger Banks

The Federal Reserve proposes to implement the mandatory Report of Selected Money Market Rates (FR 2420). The FR 2420 would be a transaction-based report that collects liability data on federal funds, Eurodollar transactions and certificates of deposits (CDs) each and every day from domestically chartered commercial banks and thrifts that have $26 billion or more in total assets and from US branches and agencies of foreign banks with total third-party assets of $900 million or more.

FR 2420 would collect data for three liability types including federal funds, Eurodollars and CDs, specifically the amount of each transaction on the report date, the maturity of the transaction and the interest rate for each transaction. In addition, as CDs may have floating rates, several additional items are being requested to better understand their interest rate structure. The Federal Reserve explained that "[t]he federal funds transaction data would be the only source of high-frequency data used in the analysis of current market conditions." Presumably, this data would be of academic use, and perhaps additionally in a crisis scenario.

Commercial banks and thrifts with $26 billion or more in total assets on the September 30 Call Report each year would be required to submit the FR 2420 daily for the following year. "This threshold would currently capture the 50 largest depository institutions which would provide sufficient coverage to have a statistically representative sample. U.S. branches and agencies of foreign banks would be required to report daily, if third-party assets are $900 million or more on the September 30 FFIEC 002. This threshold would currently capture the 105 largest U.S. branches and agencies of foreign banks."

The proposal is available here.

Federal Reserve to Vote on Final Capital Rules

On June 27 the Board of Governors of the Federal Reserve System (Federal Reserve) announced that it will vote this Tuesday on the final version of rules that will require financial institutions to achieve higher levels of high-quality capital. No details of the final regulation were immediately available at this writing. All segments of the banking industry, from the largest of the large to the very smallest banks, have a keen interest in seeing to what extent the earlier version of the rules will be relaxed or maintained. Neither the Office of the Comptroller of the Currency, which regulates national banks and federal savings banks, nor the Federal Deposit Insurance Corporation, which regulates state-chartered, non-member banks, has set a date for their consideration of the rules, which are not expected to be fully phased in until January 2019. Generally, the Federal Reserve has jurisdiction over bank and financial holding companies, as well as state-chartered member banks.

EXECUTIVE COMPENSATION AND ERISA

Defense of Marriage Act Ruling Has Multiple Effects on Benefit Plans

On June 26, the US Supreme Court ruled in *United States v. Windsor* that Section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional. The Supreme Court ruled that DOMA's federal exclusion of state-recognized same-sex marriages was unconstitutional under the Constitution's Equal Protection Clause. As a result of the Supreme Court's ruling, many questions remain unanswered.

One of the items that is clear after the ruling is that in states that recognize same-sex marriages, qualified joint and survivor annuity and qualified pre-retirement survivor annuity rights under traditional defined benefit plans will be extended to same-sex spouses. In addition, under all qualified retirement plans, spousal notification and consent requirements, qualified domestic relations orders and minimum required distributions will apply to same-sex spouses in the same way that such rules previously applied to opposite sex spouses.

Among the many questions that remain unanswered by the Court's ruling is what happens to an individual who was married in a state that recognizes same-sex marriage, but moves to a state that does not recognize same-sex marriage? Also unanswered is whether the decision has any retroactive effect and how related tax issues will be resolved.

In light of the decision, it is imperative for employers and plan administrators to review the terms of their plan documents and policies to make sure that the plan or policy is properly administered post *Windsor*. Plans that provide benefits to a participant's "spouse" will now automatically provide such benefits to a participant's same-sex spouse in states where same-sex marriage is recognized. For employers in states that recognize same-sex marriage that already provide health benefits to same-sex spouses, the additional income tax that the employers were previously required to impute to the employee no longer must be imputed—the benefit can be provided in the same manner as it is provided to employees with opposite-sex spouses.

Over the coming weeks and months, further guidance may be issued with respect to the issues highlighted above, as well as the many issues that are bound to arise as a result of the decision.

A copy of the decision is available here.

UK DEVELOPMENTS

FCA Publishes Final AIFMD Rules

On June 28, 2013, the Financial Conduct Authority (FCA) published its Policy Statement setting out its rules for implementing the Alternative Investment Fund Managers Directive (AIFMD). The Policy Statement also provides the FCA's response to two consultations on the Financial Services Authority's implementation of the AIFMD (Consultation Papers 12/32 and 13/9).

The new rules will take effect on July 22, 2013.

Read more.

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