

CORPORATE & FINANCIAL

WEEKLY DIGEST

February 4, 2011

SEC/CORPORATE

SEC Extends Comment Period for Proposed Rules Regarding Conflict Minerals Disclosure

On January 28, the Securities and Exchange Commission extended the comment period for proposed rules to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding "conflict minerals" disclosure from January 31 to March 2. As reported in the December 17, 2010, edition of [Corporate and Financial Weekly Digest](#), the SEC issued proposed rules implementing disclosure and reporting requirements regarding the use by issuers of so-called conflict minerals from the Democratic Republic of the Congo and adjoining countries. The proposed rules are expected to apply to many more issuers than might have first been expected due to the various uses of conflict minerals and their derivatives and the broad scope of the SEC's proposed rule encompassing such minerals as are "necessary to the functionality or production of a product manufactured, or contracted to be manufactured" by a reporting company. Assuming the SEC adopts final rules in April 2011, as required by Section 1502 of the Dodd-Frank Act, a December 31 fiscal year-end issuer would first have to provide conflict minerals disclosure or a Conflict Minerals Report after the end of its December 31, 2012, fiscal year. In its release extending the comment period the SEC acknowledged that the nature of the proposed disclosure requirements "differs from the disclosures traditionally required by the Exchange Act"; they would require extensive due diligence efforts by public companies.

[Read more.](#)

BROKER DEALER

FINRA Approves Permanent Customer Option to Choose All-Public Arbitration Panel in All Cases

Effective February 1, customers in Financial Industry Regulatory Authority arbitration may choose an all-public arbitration panel in disputes in which the customer is claiming over \$100,000. For such claims, customers may still choose a majority-public panel, which provides for a panel of one chair-qualified public arbitrator, one public arbitrator and one non-public arbitrator. The amendments apply only to customer disputes; they do not apply to disputes involving only industry parties. According to the Regulatory Notice, FINRA believes giving customers the option of an all-public panel will enhance confidence in and increase the perception of fairness in the FINRA arbitration process.

Click [here](#) to read FINRA Regulatory Notice 11-05.

SEC Staff Study on Access to Information About Investment Professionals

On January 27, the Securities and Exchange Commission issued a staff study on improving investor access to information about investment advisers and broker-dealers. For more information, please see "SEC Staff Study on Access to Information About Investment Professionals" in [Investment Companies and Investment Advisers](#) below.

OTC DERIVATIVES

SEC Proposes Rules for Registration and Regulation of Security-Based Swap Execution Facilities

At its open meeting on February 2, the Securities and Exchange Commission proposed Regulation SB SEF under the Securities Exchange Act of 1934 to implement Section 763 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In addition, it proposed (1) an interpretation of the definition of "security-based swap execution facility" added as Section 3(a)(77) of the Exchange Act by the Dodd-Frank Act; (2) to amend Rule 3a-1 under the Exchange Act to exempt a registered security-based swap execution facility (SB SEF) from regulation as an "exchange"; and (3) to add Rule 15a-12 under the Exchange Act to exempt a registered SB SEF from regulation as a broker-dealer, subject to certain conditions. A security-based swap is broadly defined as a swap over (a) a single security, (b) a loan, (c) a narrow-based group or index of securities, or (d) events relating to a single issuer or issuers of securities in a narrow-based security index.

The proposal includes provisions to implement the requirement of the Dodd-Frank Act that SB SEFs comply with 14 core principles and proposes rules requiring SB SEFs to register with the SEC by filing Form SB SEF and updating such form at least annually and when the information otherwise becomes inaccurate. The proposals do not dictate the exact trading platform the SB SEF must use, but prohibit the SB SEF from limiting the number of liquidity providing participants from whom quotes could be requested, and require that the SB SEF provide a functionality that allows any participant to display executable bids and offers that may be accepted by any other participant. The proposals also require that the SB SEF must create and disseminate indicative quotes for all swaps that trade on the SB SEF to all participants.

The SEC noted that the Commodity Futures Trading Commission is proposing rules to govern swap execution facilities under Section 733 of the Dodd-Frank Act and explained that due to the difference between the markets for securities and other products, the SEC and CFTC rules differ. The SEC asked market participants to point out if there are duplicative or inconsistent requirements and if there are gaps in the regulatory regimes. The proposal also asks specifically for comment on consistency of the SEC's proposed rules with those of foreign regulators.

Comments on the proposals must be submitted by April 4.

The SEC press release and fact sheet may be found [here](#).
The proposal may be found [here](#).

CFTC

CFTC Grants New York Portfolio Clearing Registration as Derivatives Clearing Organization

The Commodity Futures Trading Commission issued an order on January 31 granting New York Portfolio Clearing, LLC (NYPC) registration as a derivatives clearing organization. NYPC plans to clear U.S. dollar-denominated interest rate futures contracts traded on NYSE Liffe U.S.

NYPC's approval order can be found [here](#).

Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues to Hold Meeting

The Joint Commodity Futures Trading Commission–Securities Exchange Commission Advisory Committee on Emerging Regulatory Issues will hold a public meeting on February 18, from 9:30 a.m. to 12:00 p.m. Eastern time at the CFTC's headquarters in Washington, D.C. The Committee will discuss matters relating to its recommendations regarding the "Flash Crash" market events of May 6, 2010, and other matters relating to the ongoing work of the committee.

Interested parties may submit written statements to either the CFTC or the SEC, and all submissions will be reviewed jointly by the two agencies.

The *Federal Register* Notice regarding the meeting, including information regarding the submission of written statements, can be found [here](#).

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Staff Study on Access to Information About Investment Professionals

On January 27, as required by Section 919B of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Securities and Exchange Commission released a study conducted by the staff of the Office of Investor Education and Advocacy recommending steps to improve investor access to information about investment advisers and broker-dealers. The staff recommends in the next 18-month period: (1) unifying the search results from BrokerCheck and IAPD (Investment Adviser Public Disclosure)—the online applications through which the public may obtain information regarding broker-dealers and investment advisers, respectively—so that each system searches the other's database and returns results from both; (2) adding a ZIP code search or other indicator of location function to BrokerCheck and IAPD to more easily permit investors to locate and compare nearby financial services providers; and (3) adding educational content to BrokerCheck and IAPD, including links and definitions of terms that may be unfamiliar to individual investors. The staff recommends that subsequent to the next 18-month period, the SEC and Financial Industry Regulatory Authority continue to analyze, including through investor testing, the feasibility and advisability of expanding BrokerCheck to include additional information currently available in CRD (Central Registration Depository)—the database developed by FINRA in consultation with the states from which the information made available through BrokerCheck is derived—including historical information, as well as the method and format of publishing that information. The staff also recommends that the SEC continue to evaluate expanding IAPD content and the method and format of publishing that content, including through investor testing.

To read the study, click [here](#).

To read the SEC's press release, click [here](#).

LITIGATION

Fraudulent Concealment Doctrine Unavailable to Plaintiffs Faced with Statute of Limitations Challenge

In an antitrust matter arising under Section 1 of the Sherman Act, the district court granted defendants' motion for summary judgment on statute of limitations grounds, despite plaintiffs' argument that the statute of limitations period should be tolled under the doctrine of fraudulent concealment. The U.S. Court of Appeals for the Third Circuit affirmed this decision, finding that a plaintiff who neglects to take reasonable measures to uncover the existence of injury is not entitled to the benefit of the fraudulent concealment doctrine.

Plaintiffs, Nog, Inc. and Sorbee International, Ltd., represented a putative class of direct purchasers of Aspartame, an artificial sweetening product. Defendants are producers of Aspartame and entities related to its distribution and supply. Plaintiffs commenced this action on April 25, 2006, alleging that defendants conspired to fix the price of Aspartame between January 1993 and December 2003. Nog, however, had not purchased the sweetener since 1995 and Sorbee's last purchase occurred in 2001. Defendants moved for summary judgment on the grounds that plaintiffs' claims were brought outside the four-year statute of limitations applicable to federal antitrust claims. Plaintiffs argued that their delay in bringing this action was attributable to defendants' efforts to fraudulently conceal their anticompetitive behavior.

The Third Circuit stated that even if it was assumed that defendants fraudulently concealed their anticompetitive conduct, there was no evidence to show that plaintiffs exercised the level of due care necessary to toll the limitations period. The court found that in spite of three clear "storm warnings," which should have put plaintiffs on notice that defendants were engaging in price fixing, plaintiffs did nothing. (*In re Aspartame Antitrust Litigation*, No. 09-1487, 2011 WL 263647 (3d Cir. Jan. 25, 2011))

District Court Grants Leave to Add New Geographic Market to Antitrust Complaint

Plaintiffs, Newmarket Corporation, and defendants, Innospec, Inc., both produce and sell competing chemical fuel additives designed to enhance the performance of gasoline. Plaintiffs claimed that defendants bribed Iraqi and Indonesian government officials to help defendants achieve, maintain and exploit their monopoly of these fuel additives.

Plaintiffs filed a motion to amend their complaint, claiming that they should be granted leave to file a second amended complaint to include Iraq as a new, relevant, geographic market. In response, defendants asserted that the proposed amendment would be futile under what is known as the single purchaser doctrine: that a geographic market cannot be defined, for antitrust purposes, to include an area occupied by only a single purchaser. Relying on this doctrine, defendants claimed that plaintiffs' proposed amendment to the market definition would fail to survive a motion to dismiss.

The court ruled that plaintiffs' proposed amendment was not frivolous on its face and granted the motion, stating that there is some disagreement among courts as to the viability and applicability of the single purchaser doctrine. (*Newmarket Corp., v. Innospec, Inc.*, No. 3:10CV503, 2011 WL 250993 (E.D. Va. Jan. 26, 2011))

UK DEVELOPMENTS

Longest Insider Dealing Jail Sentence Imposed

On February 2, the UK Financial Services Authority (FSA) announced the longest custodial sentence so far imposed for insider dealing. Christian Littlewood, a senior investment banker, was sentenced to three years and four months; his wife, Angie Littlewood, to twelve months suspended for two years; and a family friend, Helmy Sa'aid, to two years. The three had pleaded guilty to eight counts of insider dealing alleging that they had made almost £590,000 (approximately \$930,000) profit from trades in a number of London Stock Exchange and Alternative Investment Market listed shares between 2000 and 2008 (see the January 14 edition of [Corporate and Financial Weekly Digest](#)).

Mr. Sa'aid was also ordered to pay £640,000 (approximately \$1.03 million) in confiscation. Confiscation orders in relation to Christian and Angie Littlewood will be dealt with at a later date.

In passing sentence, His Honour Judge Leonard QC noted that sentences need to deter others. "Those rogue traders that let down the honest, discreet majority must be made to pay," he said.

Margaret Cole, the FSA's managing director of enforcement and financial crime said, "This was a case of systematic abuse by an approved person of their privileged position in the market—we are determined to stamp out such abuse. Our tough, coordinated approach to insider dealing and our commitment to taking on difficult criminal prosecutions has really begun to pay off; the guilty pleas and sentencing of the Littlewoods and Sa'aid shows that we can, and will, uncover insider dealing, even across borders, and that the people who commit these market offenses will not go unpunished."

To read the FSA's announcement, click [here](#).

EU DEVELOPMENTS

ESMA Updates Table of Short-Selling Measures

On January 31, the European Securities and Markets Authority (ESMA) published an updated version of its table of EU member states' short-selling measures showing new measures by France and Germany.

France: With effect from February 1, the short positions disclosure regime developed by ESMA will be effective for all French shares admitted to trading on Euronext Paris and Alternext Paris. The French emergency measures adopted in September 2008 will cease to apply.

Germany: BaFin extended its net short-selling position notification and publication requirements in respect of 10 financial stocks. These requirements will continue to apply through March 25.

To view the updated ESMA table, click [here](#).

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SEC/CORPORATE

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UK/EU DEVELOPMENTS

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