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SEC/CORPORATE

SEC Adopts and Proposes New Rules, Including Easing the Prohibition on General Solicitation
On July 10, the Securities and Exchange Commission adopted certain new rules and proposed others applicable to certain securities offerings that are exempt from registration under the Securities Act of 1933 (Securities Act). The SEC voted to adopt final rules (i) lifting the decades-old ban on general solicitation and general advertising in connection with private securities offerings conducted in reliance upon the exemptions from registration provided by Rule 506 of Regulation D under the Securities Act and Rule 144A under the Securities Act (Final General Solicitation Rules), and (ii) disqualifying issuers from relying on Rule 506 for securities offerings involving certain felons and other so-called "bad actors" (Final Bad Actor Rule). The SEC also proposed several new rules related to private securities offerings, including rules that would impact Form D filings and written general solicitation materials (Proposed Rules).

Final General Solicitation Rules

Section 201(a) of the Jumpstart Our Business Startups Act (JOBS Act) required the SEC to adopt rules eliminating the ban on general solicitation and general advertising (which, while not defined by the SEC, include advertisements in newspapers, communications broadcast over television, radio or unrestricted websites and seminars whose attendees have been invited by one of the foregoing means) in connection with offers and sales of securities made in reliance upon Rule 506. In accordance with that directive, the Final General Solicitation Rules add a new paragraph (c) to Rule 506 to permit an issuer or placement agents acting on behalf of the issuer to engage in general solicitation or general advertising in securities offerings conducted in reliance upon Rule 506; provided that all purchasers of the securities are accredited investors and the issuer takes "reasonable steps to verify" that such purchasers are accredited investors. The SEC's adopting release provides that the determination of the reasonableness of the steps taken to verify an accredited investor is an objective assessment by the issuer, and the release provides guidance regarding principles to be considered when analyzing whether an issuer has taken "reasonable steps to verify" accredited investor status. Moreover, in contrast to the SEC's proposed rules to lift the ban on general solicitation (which were described in the September 7, 2012 edition of Corporate and Financial Weekly Digest), the final rules adopted by the SEC include a non-exclusive list of methods that issuers may use to satisfy the verification requirement for purchasers who are natural persons.[1] The Final General

[1] The non-exclusive list of acceptable methods of verifying that a natural person is an accredited investor includes: (i) if accredited status is based on net income, reviewing an Internal Revenue Service form that reports the person's income for the two most recent years, (ii) if accredited status is verified on the basis of net worth, with respect to the person's assets, reviewing recent bank or securities account statements, certificates of deposit, tax assessments or independent appraisals, and, with respect to the person's liabilities, reviewing a recent consumer report from a nationwide consumer reporting agency and obtaining representations that all of the person's liabilities necessary to make a determination of net worth have been disclosed to the issuer, (iii) obtaining written confirmation that a registered broker-dealer or investment adviser, a licensed attorney or a certified public accountant has recently verified that the

Solicitation Rules did not modify the requirements of Rules 501, 502(a) and 502(d), which remain applicable to Rule 506 offerings.

The SEC also adopted amendments to Rule 144A under the Securities Act that similarly will permit general solicitation and general advertising in Rule 144A offerings. Although Rule 144A does not expressly prohibit general solicitation, sellers (such as initial purchasers and other intermediaries) relying on Rule 144A, as currently in effect, are only permitted to offer securities to qualified institutional buyers (QIBs), which yields the same result. In accordance with Section 201(a)(2) of the JOBS Act, the Final General Solicitation Rules amended Rule 144A(d)(1) to eliminate references to "offer" and "offeree," thereby permitting sellers and intermediaries in Rule 144A offerings to offer securities to persons other than QIBs (including by means of general solicitation). Rule 144A continues to require, however, that securities are only sold to purchasers that are QIBs or that the seller and any intermediary or person acting on behalf of the seller reasonably believe are QIBs.

Final Bad Actor Rule

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required the SEC to adopt rules that disqualify issuers from relying on Rule 506 for securities offerings involving certain felons and other so-called "bad actors".

Subject to a reasonable care exception where the issuer can show that it did not, or could not, know that a covered person with a disqualifying event participated in the offering, the Final Bad Actor Rule will disqualify an issuer from relying on Rule 506 if the issuer, its predecessors, affiliated issuers, directors, executive officers, other officers participating in the offering, general partners and managing members, beneficial owners of 20 percent or more of the voting power of the issuer's voting securities, promoters, investment managers or principals (in the case of a pooled investment fund) or persons compensated for soliciting investors (or such person's affiliates) have been subject to a "disqualifying event." The Final Bad Actor Rule enumerates applicable disqualifying events, including specified criminal convictions, court injunctions and restraining orders, certain orders of the Commodity Futures Trading Commission or other specified agencies, certain disciplinary orders related to brokers, dealers, municipal securities dealers, investment companies and investments advisers (as well as associated persons), SEC cease and desist orders related to violations of certain anti-fraud provisions and registration requirements under the federal securities laws, certain SEC stop orders, suspensions or expulsions from self-regulatory organizations and US Postal Service false representation orders.

Unlike the proposed rule, the Final Bad Actor Rules will apply only to disqualifying events occurring after effectiveness of the rule amendments, although pre-existing events would be subject to mandatory disclosure.

Proposed Rules

In a separate release, the SEC proposed further rule amendments that, if adopted, would:

- Require an issuer selling securities in reliance upon Rule 506 (i) to file a Form D at least 15 calendar days before engaging in general solicitation for the offering (in the case of an offering pursuant to new paragraph (c) of Rule 506) and (ii) to update the information contained in its Form D and indicate that the offering has concluded within 30 days after completing the offering.

- Disqualify an issuer that has failed to comply with Form D filing requirements in the previous five years (but without taking into account any non-compliance prior to the adoption of the new rule) from using the Rule 506 exemption in any subsequent offering for a period of one year following the date the Form D is filed, subject to applicable cure periods and potential waivers by the Staff of the SEC.

- Require legends or cautionary statements in any written general solicitation materials used in a Rule 506 offering.

- Temporarily require (for a period of two years) issuers to submit written general solicitation materials to the

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person is an accredited investor or (iv) if the person has previously purchased, and continues to hold, the issuer's securities, obtaining certification from the person as to his or her accredited investor status.

SEC (which materials would not be subject to an SEC comment process or be made publicly available by the SEC).

- Expand the content required to be included in a Form D, particularly in the context of Rule 506 offerings, such as expanded information regarding the issuer, the offered securities, the types of investors in the offering, the types of general solicitation used, the methods used to verify accredited investor status and the use of proceeds from the offering.

- Amend Securities Act Rule 156, which currently contains guidance regarding the sales literature used by public funds, to apply that guidance to the sales literature used by private funds generally soliciting under the new rule.

Click here to view the SEC's adopting release regarding the Final General Solicitation Rules.
Click here to view the SEC's adopting release regarding the Final Bad Actor Rule.
Click here to view the SEC's proposing release regarding the Proposed Rules.

The Final General Solicitation Rules and the Final Bad Actor Rule will become effective 60 days after their respective publication in the Federal Register. The SEC is seeking public comment on the Proposed Rules, and the comment period ends 60 days after the publication of the Proposed Rules in the Federal Register.

The Final General Solicitation Rules, the Final Bad Actor Rule and the Proposed Rules, including their implications for hedge funds, venture capital funds, private equity funds and other private investment vehicles, will be discussed further in an upcoming Katten *Client Advisory*.

District Court Vacates SEC's Resource Extraction Issuer Rule

On July 2, the US District Court for the District of Columbia vacated the resource extraction issuer disclosure rule that the Securities and Exchange Commission adopted last year in accordance with mandates under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Rule 13q-1 under Securities Exchange Act of 1934, as amended, the resource extraction issuer rule, would have required an issuer engaged in the commercial development of natural gas, minerals and oil resources to publicly disclose, on new "Form SD," detailed information about payments made by the issuer, a subsidiary of the issuer or another entity under the issuer's control to the US federal government or foreign governments in connection with the development of such resources. The Court vacated and remanded the rules to the SEC, which may either appeal the Court's ruling or promulgate a new rule in accordance with the Court's ruling.

The Court cited two "substantial errors" by the SEC in making its ruling. First, the Court ruled as erroneous the SEC's interpretation that Section 13(q) of the Securities Exchange Act of 1934, as amended, required public disclosure of an issuer's resource extraction payments. Instead, the Court stated that Section 13(q) provided the SEC with discretion as to whether resource extraction payments should be made public, noting that the language of Section 13(q) only required public disclosure of a compilation of such payments "to the extent practicable." The Court also indicated that the SEC may determine to revise the resource extraction issuer disclosure rules "in light of the flexibility it did not know that it had."

Second, the Court ruled that the SEC's failure to create an exemption from the rule relating to countries that prohibit payment disclosure was arbitrary and capricious. Citing the SEC's statutory authority to make exemptions from certain Exchange Act provisions, the Court noted that the SEC did not properly consider the competitive burdens that the rule would have on issuers operating in countries where disclosure of resource extraction payments is prohibited. The lack of such an exemption, at the SEC's admission, "drastically increased the Rule's burden on competition and cost to investors." By failing to adequately take into account these costs, the Court ruled that the SEC "abdicated its statutory responsibility to investors."

Click here for the District Court's opinion.

SEC Announces Three New Anti-Fraud Enforcement Initiatives

On July 2, the Securities and Exchange Commission announced three new initiatives in the Division of Enforcement (the "Division") focused on the detection and prevention of fraud. First, the newly-created Financial Reporting and Audit Task Force will focus on the identification of securities-law violations relating to (i) the preparation of financial statements, (ii) issuer reporting and disclosure, and (iii) audit failures, with the goal of increasing both the detection of fraud and the prosecution of violations involving false or misleading financial statements or disclosures. In addition, the Microcap Fraud Task Force will focus on identifying and combating fraud related to the issuance, marketing and trading of microcap securities, including by focusing on attorneys, auditors, broker-dealers, transfer agents and other significant players in the microcap market. Finally, the Center for Risk and Quantitative Analytics will work in close coordination with other SEC offices and divisions to identify risks and threats that could harm investors, assist in conducting risk-based investigations and allocate the Division's resources in light of identified risks. The Center for Risk and Quantitative Analytics is also intended to serve as the SEC's central information source regarding characteristics and patterns indicative of fraud or other illegal activity.

To view the SEC's release regarding these new enforcement initiatives, click here.

CFTC

CFTC Expands No-Action Relief Granted to FBOTs

The Commodity Futures Trading Commission's Division of Market Oversight previously issued no-action letters to foreign boards of trade (FBOTs), pursuant to which FBOTs that list futures and options for trading are permitted to grant electronic access to exchange members or participants located in the United States. As provided in CFTC Letter No. 13-46, FBOTs are now able to provide direct access for swaps that are listed for trading on an FBOT, subject to certain requirements, including the following: (i) the FBOT must ensure that each such swap is centrally cleared (but the clearinghouse does not need to be registered with the CFTC as a derivatives clearing organization); (ii) the FBOT must satisfy certain swap data reporting obligations; and (iii) the FBOT must report volume data for each swap on a quarterly basis. The relief granted by CFTC Letter No. 13-46 becomes unnecessary and expires if an FBOT registers with the CFTC pursuant to Part 48 of the CFTC Regulations.

CFTC Letter No. 13-46 is available here.

CFTC Grants No Action Relief to EU Swap Dealers from Swap Documentation Rules

Demonstrating coordination between US swap rules and those of the European Union, the Commodity Futures Trading Commission issued a no action letter (no. 13-45) on July 11 that permits a company organized under the laws of the EU and registered as a swap dealer or major swap participant with the CFTC to satisfy its obligations under certain CFTC documentation rules by complying with similar rules enacted under Article 11 of the European Market Infrastructure Regulation (EMIR) and the related EMIR Technical Standards. The basis for the relief is a series of determinations that the relevant CFTC and EMIR rules are "essentially identical" for regulatory purposes. Unfortunately, the granularity of the relief, which in some cases gives different results for different subsections of the same rule, ensures that the relief will not be simple to apply.

The specific CFTC rules covered by the relief are as follow:

1. 23.501 (Confirmations)
2. 23.502 (other than 23.502(c)) (Portfolio Reconciliation)
3. 23.503 (Portfolio Compression)
4. 23.504(b)(2) (Incorporation of Confirmations into trading relationship documentation)
5. 23.504(b)(4) (Valuations)

The relief described in the letter does not apply to other sections of subpart I of Part 23 of the CFTC Rules. These requirements include § 23.502(c) (requiring reporting to the CFTC of any swap valuation dispute in excess of $20,000,000 (or its equivalent in any other currency)), § 23.504 (except for (b)(2) and (b)(4))(swap trading relationship documentation), § 23.505 (end-user exception documentation) and § 23.506 (swap processing and clearing).

A CFTC press release announcing the relief can be found here.

A copy of the letter can be found here.

CFTC Grants No-Action Relief to SDs and MSPs Regarding Relationship Documentation and Business Conduct

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission issued no-action letters relating to certain trading relationship documentation obligations and external business conduct standards by swap dealers (SDs) and major swap participants (MSPs).

In CFTC Letter No. 13-38, DSIO granted time-limited no-action relief to SDs and MSPs from certain trading relationship documentation obligations prescribed in CFTC Regulation 23.504. Pursuant to the temporary no-action relief, if an SD's or MSP's transactions with a counterparty are limited to foreign exchange (FX)-related swaps or FX-related products exempted by the Secretary of the US Treasury, then such SD or MSP is not required to comply with the documentation requirements in CFTC Regulation 23.504 with respect to transactions with such counterparty. To obtain such relief, the SD or MSP must maintain written policies and procedures required under CFTC Regulation 23.504(a)(2), and the SD or MSP must not already have an ISDA Master Agreement in place with such counterparty that covers either of the FX transactions referenced above.

The no-action relief is available to SDs and MSPs until September 1, 2013 for transactions with counterparties that are active funds, or until December 31, 2013 for transactions with any other counterparties.

CFTC Letter No. 13-38 is available here.

In CFTC Letter No. 13-39, DSIO granted no-action relief to SDs from certain external business conduct standards in CFTC Regulation 23.400 through 23.451 for FX-related swaps or FX-related products exempted by the Secretary of the US Treasury. To obtain no-action relief, an SD must execute such FX transactions pursuant to an intermediated prime brokerage arrangement, and the FX intermediary must be either an introducing broker or futures commission merchant. Under such circumstances, the SD may allocate certain external business conduct standards to the FX intermediary, subject to certain conditions.

CFTC Letter No. 13-39 is available here.

In CFTC Letter No. 13-33, DSIO granted no-action relief to SDs and MSPs from trading relationship documentation obligations under CFTC Regulation 23.504 with respect to swaps not executed on a swap execution facility or designated contract market, but are intended to be cleared. In addition, DSIO granted no-action relief to SDs and MSPs from certain external business conduct standards for such swaps in cases in which the SD or MSP does not know the identity of the counterparty prior to the execution of the swap.

Such no-action relief is conditioned on the SD or MSP satisfying certain requirements, including the requirement that the SD or MSP and the counterparty enter in to a fallback agreement in the event the swap fails to be accepted for clearing by a clearing member or the relevant derivatives clearing organization.

CFTC Letter No. 13-33 is available here.

LITIGATION

FTC Formalizes Withdrawal and Refiling Process

On June 28, the Federal Trade Commission (FTC) formalized new rules to codify its informal procedures for companies completing transactions that require US merger control filings pursuant to the Hart-Scott-Rodino Act (HSR). Most transactions involving assets, sales or shares valued at more than $70.9 million are subject to HSR which, in most instances, requires the parties to observe a 30-day waiting period before a transaction can be consummated. Consistent with its current procedures, parties may withdraw their premerger notification filing by notifying the FTC and the Antitrust Division in writing. Further, the FTC has traditionally allowed parties seeking to pursue an acquisition to withdraw a pending HSR filing and resubmit it within two business days in order to restart the waiting period without having to pay another filing fee.

Under the codified rules, if the parties wish to pursue the acquisition, new notifications and a new filing fee will be required, unless the filing occurs within two business days of the withdrawal. A new waiting period also must be observed prior to consummation of the acquisition. The procedure may only be used once and only under the following circumstances: (i) the proposed acquisition does not change in any material way; (ii) the resubmitted notification is recertified and relevant parts of the submission are updated; and (iii) the resubmitted notification is refiled within two business days of the withdrawal.

The most significant amendments relate to the creation of automatic withdrawals of HSR filings for an incomplete tender offer and a terminated definitive agreement, both of which require disclosure to the Securities and Exchange Commission. According to the FTC, when these circumstances occur, the transactions have become merely “hypothetical.” Accordingly, the new rules require that any associated HSR filings submitted with respect to these two types of transactions are automatically deemed to be withdrawn on the date of the SEC filing. The party submitting the SEC filing must notify the FTC and the US Department of Justice (DOJ) in writing when such filing is made. An HSR filing is not automatically withdrawn if the applicable HSR waiting period has expired or terminated, and the parties have not entered into a timing agreement with the FTC or DOJ to delay the closing.

BANKING

Banking Agencies Issue Final Basel III Capital Regulations

A new regulatory capital framework for US banks has been introduced by the issuance on July 2 of final capital regulations (the Final Regulation) for bank holding companies and state-chartered member banks by the Board of Governors of the Federal Reserve System (Federal Reserve) and on July 8 of virtually identical rules for state-chartered non-member banks and national banks by, respectively, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies).

The Final Regulation (an approximately 1,000-page magnum opus) implements the most comprehensive changes to capital standards for the US banking system that have been made since the adoption of the Basel I rules in 1989. These changes blend the Basel III global capital standards and the Dodd-Frank Wall Street Reform and Consumer Protection Act-mandated standards into a comprehensive framework that contains significant changes from the proposed capital regulations (the Proposal) that were the subject of intense scrutiny from industry groups and Congress. In general, the Final Regulation increases the amount of capital that banking institutions will have to carry at the same time as it squeezes the definition of capital by requiring adjustments and deductions to what previously would have counted as capital. However, in recognition of the fact that the costs of imposing the new standards fully on small banks could outweigh the benefits they might provide, the Final Regulation has some special rules for banks with less than $15 billion in total assets and does not apply at all to bank holding companies (BHCs) with less than $500 million in consolidated assets unless the BHCs are engaged in a significant amount of nonbanking or off-balance sheet activities, or have large amounts of SEC-registered debt or equity securities. Further, the implementation of the Final Rule has been delayed to January 1, 2015, for all but the largest banks, which are subject to the so-called “non-standardized” approach.

Some of the most important changes being introduced by the Final Regulation can be summarized as follows:

- The Final Regulation for risk-weighting purposes requires eight percent total capital, of which 56.25 percent (4.5 percent in absolute terms) must consist of Common Equity Tier 1 capital (a new and strict definition of capital). Additional Tier 1 capital may comprise 18.75 percent (1.5 percent in absolute terms) of total capital, and Tier 2 capital may comprise 25 percent (two percent in absolute terms) of total capital. All the new capital ratios and risk weights will go into effect on January 1, 2015.

- Common Equity Tier 1 capital excludes non-cumulative perpetual preferred stock, qualifying minority interests and trust preferred securities. For institutions with less than $15 billion of assets, all such instruments, subject to certain limitations, may be included in Additional Tier 1 capital. For institutions with more than $15 billion in assets, only noncumulative perpetual preferred stock may be included in Additional Tier 1 Capital, with qualifying minority instruments and trust preferred securities moving to Tier 2 Capital. Common Equity Tier 1 capital also requires the deduction, among other things, of goodwill and other intangibles, as well as deferred tax assets that were produced by operating loss and tax credit carryforwards.

- The so-called capital conservation buffer of 2.5 percent, which must be comprised of Common Equity Tier 1 capital, will be phased in in four equal installments during the period from January 1, 2016 to January 1, 2019. By January 1, 2019, an institution must achieve a Total Capital ratio of 10.5 percent. Failure to achieve required increments will result in limitations of dividends payable and on discretionary bonus payments to high bank level officers.

- A standardized approach institution has a one-time opportunity to retain the existing capital treatment for accumulated other comprehensive income by opting out of the proposed new method. The one-time opt-out, which is permanent, must be taken when filing the first call report due after January 1, 2015, and, if selected, is expected to reduce regulatory capital volatility.

- The Final Regulation changes the rule in the Proposal that would have prevented dividends from being paid from surplus capital. Under the Final Regulation, dividends, if otherwise permissible, may be paid from surplus, net income or retained earnings.

- The Final Regulation retains the risk weighting standards for residential mortgages, such that prudently underwritten, performing mortgages will have a risk weight of 50 percent, and others will have a risk weight of 100 percent. Commercial real estate (CRE) loans will generally be risk weighted at 100 percent, except for high-volatility CRE loans, which will be risk weighted at 150 percent. Past-due loans will generally be weighted at 150 percent.

- The Final Regulation generally increases some of the components of capital for prompt corrective action standards. To be well-capitalized, institutions must have risk-based capital ratios for total capital of 10 percent or greater, Tier 1 capital of eight percent or greater, and Common Equity Tier 1 capital of 6.5 percent or greater, with a leverage ratio of at least five percent. These ratios will go into effect on January 1, 2015.

- Finally, top-tier BHCs (and certain savings and loan holding companies), whether public or not, that have more than $50 billion in assets must make public disclosures about their regulatory capital each quarter, beginning at the end of the first calendar quarter in 2015.

Read more.

Federal Reserve, OCC and FDIC Propose Higher Capital Requirements for Largest Banks

On July 9, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (collectively, the Agencies) issued a joint notice of proposed rulemaking (NPR) that would strengthen the leverage requirements applicable to the largest, most systemically important banking organizations and their subsidiary insured depository institutions. The NPR applies only to banking organizations with at least $700 billion in total consolidated assets at the top-tier bank holding company (BHC) or at least $10 trillion in assets under custody (covered BHCs), and any insured depository institution subsidiary of these BHCs (covered insured depository institutions).

The interim final rule:

- Would increase the three percent supplementary leverage ratio requirement contained in the interim final rule titled “Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action; Standardized Approach for Risk-Weighted Assets; Market Discipline and Disclosure Requirements; Advanced Approaches Risk-Based Capital Rule; and Market Risk Capital Rule.”

- Would apply to the largest, most interconnected banking organizations with at least $700 billion in total consolidated assets at the top-tier BHC or at least $10 trillion in assets under custody (covered BHCs) and any insured depository institution subsidiary of these BHCs (covered insured depository institutions (IDIs).

- Would establish for covered IDIs a supplementary leverage ratio of six percent as a “well-capitalized” threshold for prompt corrective action.

- Establishes for covered BHCs a capital conservation buffer composed of Tier 1 capital of two percent of total leverage exposure, thus mandating a supplementary leverage ratio of five percent to avoid restrictions on capital distributions.

- Would have a denominator consistent with total leverage exposure in the Agencies’ Basel III rule.

The Agencies “are seeking comment on the proposed calibration, including whether the increase in leverage requirements would appropriately complement the increases in the risk-based capital requirements in the final rule, and whether and how risk-based capital requirements could be simplified.”

Read more.

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