

## SEC/CORPORATE

### **SEC Staff No Longer Requires “Tandy” Representations in Filing Reviews**

On October 5, the staff (Staff) of the Securities and Exchange Commission announced that, effective immediately, a company will no longer be required to make affirmative “Tandy” representations in correspondence with the Staff in connection with the Staff’s review of the company’s filings. Previously, the Staff required a company to acknowledge in writing its responsibility for the disclosures in its filings and also that the company would not raise the Staff’s review process and acceleration of effectiveness as a defense in any legal proceeding. In connection with the Staff’s new policy, the Staff will include in its review comment letters a statement reminding a company and its management of their responsibility for the accuracy and adequacy of disclosures, notwithstanding any review, comments, action or absence of action by the Staff.

The SEC’s press release is available [here](#).

### **SEC Staff Issues Three No-Action Letters Regarding Proxy Access Proposals**

On September 27, the staff (Staff) of the Securities and Exchange Commission’s Division of Corporation Finance issued three no-action letters relating to proxy access proposals. In two of the no-action letters, the Staff stated that it would not recommend enforcement action if the company seeking no action relief omitted proposals to *adopt* proxy access bylaws in reliance upon Rule 14a-8(i)(10) under the Securities Exchange Act of 1934, where the company adopted “standard” proxy access bylaws. In the third no-action letter, however, the Staff was unable to concur with a company’s view that a proposal to *amend* existing proxy access bylaw provisions could be excluded from the company’s proxy statement in reliance upon Rule 14a-8(i)(10).

Rule 14a-8(i)(10) allows a company to exclude a shareholder proposal from its proxy statement if the company has “substantially implemented” the proposal. Applying Rule 14a-8(i)(10), the Staff has permitted companies to exclude proposals where the applicable company’s policies, practices and procedures compared favorably with the guidelines of the proposal. The Staff also has indicated that Rule 14a-8(i)(10) does not require a company to implement the action requested in a proposal exactly as proposed, so long as the company action satisfies the “essential objective” of the proposal.

Consistent with these principles (and several no-action letters issued in February, discussed in the February 19 edition of [Corporate & Financial Weekly Digest](#)), the September 27 no-action letters clarify that a company’s own proxy access bylaw may “substantially implement” a proposal to adopt proxy access bylaw provisions, despite the fact that the proposal deviates in some respects from the provision adopted by the company, even where the company’s bylaw excludes various ancillary terms specifically highlighted in the proposal as “essential elements for substantial implementation.” For instance, the company bylaws that the Staff determined to have substantially implemented the proposals at issue in the September 27 no-action letters: (1) limited the number of shareholders whose holdings could be aggregated to 20 shareholders (in contrast to the proposal, which did not restrict the number of shareholders that could form a group for such purposes); (2) limited proponents access to 20 percent of the board seats (in contrast to the proposal, which provided for access to 25 percent of the board); and (3) in one instance, imposed a two-year restriction for re-nomination of candidates who fail to receive the requisite percentage of votes (instead of no restriction on re-nominations, as proposed).

In contrast (and consistent with a no-action letter issued to [H&R Block](#) in July 2016), a proposal to amend specific aspects of an existing proxy access bylaw could not be excluded under Rule 14a-8(i)(10) on the same grounds.

These letters suggest that a company could not exclude a proposal to amend even a “market” proxy access bylaw without taking some responsive action. At least two other companies are awaiting responses from the Staff regarding requests for similar no action relief.

To view the complete text of the September 27 no-action letters, click [here](#), [here](#) and [here](#).

## BROKER-DEALER

### **FINRA To Publish Block-Size Trade Data for ATS Trades**

On October 3, the Financial Industry Regulatory Authority began publishing monthly data on block-size trades occurring on alternative trading systems (ATSs). Statistics for ATS block-size trades are being aggregated across all National Market System (NMS) stocks for a one-month trading period and will be published no earlier than one month following the end of the month for which such trading was aggregated. The initial report covers August ATS trades.

In defining a block-size trade, FINRA uses both share-based and dollar-based categories. For each category, FINRA publishes and displays information including, but not limited to: (1) the “ATS Block Market Share” (the proportion of each ATS’s block-size trading volume in relation to total block-size trading by all ATSs); (2) the “ATS Block Business Share” (the proportion of a particular ATS’s overall trading volume done as block-size trades); and (3) rankings of those metrics for each category. Such information is published on the OTC Transparency Data portion of FINRA’s website under the “ATS Blocks” and “ATS Blocks Download” tabs.

The ATS block-size trade data is available [here](#).

The FINRA news release is available [here](#).

## DERIVATIVES

*See “CFTC and UK Financial Conduct Authority Sign Memorandum of Understanding” in the CFTC section and “ESMA Publishes Final Guidance on Inside Information for Commodity Derivatives Under MAR” in the EU Developments section.*

## CFTC

### **CFTC and UK Financial Conduct Authority Sign Memorandum of Understanding**

The Commodity Futures Trading Commission and the UK Financial Conduct Authority (FCA) have entered into a memorandum of understanding pursuant to which they have agreed to cooperate in the supervision and oversight of certain regulated firms that operate on a cross-border basis in the United States and in the United Kingdom. The affected firms include 20 entities that are registered as swap dealers with the CFTC.

The memorandum of understanding may be accessed [here](#).

## UK DEVELOPMENTS

*See “CFTC and UK Financial Conduct Authority Sign Memorandum of Understanding” in the CFTC section.*

## EU DEVELOPMENTS

### **ESMA Publishes Final Guidance on Inside Information for Commodity Derivatives Under MAR**

On September 30, the European Securities and Markets Authority (ESMA) published a final report containing guidelines (Guidelines) on inside information and commodity derivatives under the EU Market Abuse Regulation (MAR). The Guidelines are issued under Article 7(5) of MAR and set out a non-exhaustive list of indicative

information that is reasonably expected or required to be disclosed on commodity derivatives markets and/or spot markets. The Guidelines group the non-exhaustive indicative list of information into three categories: (1) information relating directly to commodity derivatives; (2) information relating indirectly to commodity derivatives without a related spot market; and (3) information directly relating to a spot commodity contract.

The Guidelines will apply two months after their translation into each official language of the European Union.

The Guidelines can be found [here](#).

ESMA's earlier consultation paper on the proposed Guidelines published in March can be found [here](#).

### **Seven EU Member States Opt Out of EBA Guidelines on Sound Remuneration Policies Under CRD IV**

On October 3, the European Banking Authority (EBA) published a compliance table (Compliance Table) in relation to the EBA's guidelines (Guidelines) on sound remuneration policies under the EU Capital Requirements Directive IV (CRD IV) and disclosures under Capital Requirements Regulation (CRR). The Compliance Table shows that the relevant competent authorities of Denmark, Germany, France, Slovakia, Finland, Sweden and the United Kingdom have indicated to the EBA that they do not intend to comply with all or part of the Guidelines. In February, the UK Financial Conduct Authority indicated its intention not to comply with the Guidelines.

The Compliance Table can be found [here](#).

### **ESMA Official Gives Speech on FinTech**

On September 27, Patrick Armstrong, a senior risk analysis officer in the Innovation and Products Team of the European Securities and Markets Authority (ESMA), delivered a speech discussing regulatory opportunities and challenges for financial technology (FinTech) in the European Union. Mr. Armstrong covered a broad range of topics in relation to FinTech, including: (1) the challenges of FinTech; (2) history and drivers of financial innovation; (3) work by ESMA in relation to financial innovation, including in relation to automated advice; (4) big data and artificial intelligence; (5) crowdfunding; and (6) distributed ledger technology. Mr. Armstrong also discussed regulatory responses to technological change.

The speech can be found [here](#).

### **European Commission Adopts Delegated Regulation on Risk Mitigation Techniques Under EMIR**

On October 4, the European Commission (EC) adopted a delegated regulation (Delegated Regulation) containing regulatory technical standards (RTS) on risk mitigation techniques for uncleared over-the-counter derivatives, made under the European Market Infrastructure Regulation (EMIR).

The European Supervisory Authorities (ESAs, consisting of the European Banking Authority, European Insurance and Occupational Pensions Authority, and European Securities and Markets Authority) first submitted the draft RTS to the EC in March. In July, the EC confirmed its intention to endorse the RTS subject to amendments, and in September, the ESAs published a further opinion on the draft RTS.

The European Council and European Parliament will consider the Delegated Regulation and, once formally approved, it will go into effect 20 days following publication in the *Official Journal of the European Union*.

For further information, see the *Corporate & Financial Weekly Digest* editions of [September 16](#), [August 12](#) and [March 18](#).

The Delegated Regulation can be found [here](#) and its annexes [here](#).

The EC's accompanying press release can be found [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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\* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

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