Katten
Katten Muchin Rosenman LLP

Corporate & Financial
Weekly Digest

May 5, 2017 Volume XII, Issue 17

SEC / CORPORATE

Jay Clayton Sworn in as SEC Chairman

On May 4, Jay Clayton was sworn into office as the new chairman of the Securities and Exchange Commission. As discussed in the January 6 edition of the *Corporate & Financial Weekly Digest*, Mr. Clayton was a partner at Sullivan & Cromwell and was nominated to serve as SEC chairman by President Donald Trump.

The SEC's press release regarding Mr. Clayton's swearing in is available here.

NYSE Issues Proposed Rule to Allow Listing Without an IPO

On March 13, the New York Stock Exchange (NYSE) issued a proposed rule to amend the provisions related to the qualification of companies listing without a prior registration under the Securities Exchange Act of 1934 (Exchange Act). This proposed rule amends Footnote (E) of Section 102.01B of the NYSE Listed Company Manual (Footnote (E)) and would allow companies to be listed on the NYSE without an initial public offering or other registration statement under the Securities Act of 1933 (Securities Act).

The NYSE generally lists companies in connection with a firm-commitment underwritten initial public offering (IPO), a transfer from another market, or a spin-off. Companies seeking to be listed in connection with an IPO must demonstrate that they have $40 million in market value of publicly held shares. Other companies must demonstrate they have $100 million in market value of publicly held shares. For a company that has not previously had its common equity securities registered under the Exchange Act (and is seeking to list without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements), the current rule provides that the NYSE will, on a case-by-case basis, exercise discretion to list such company and determine whether it has satisfied the $100 million market value requirement based upon the lesser of (1) an independent third-party valuation of the company, and (2) the most recent trading price of the company's common stock in a trading system for unregistered securities (a so-called "private placement market").

The proposed rule would amend Footnote (E) to allow it to apply to companies listing on the effectiveness of (1) a registration statement under the Exchange Act without a simultaneous registration statement under the Securities Act, or (2) a resale registration statement under the Securities Act. The proposed rule would also provide an exception to the private placement market trading requirement for a company with a recent valuation of at least $250 million in market value of publicly held shares. Consistent with the current rule, any such valuation would need to be provided by an independent third party with "significant experience and demonstrable competence in the provision of such valuations."

The proposed rule will be effective within 45 days of the date of publication of the Securities and Exchange Commission's notice of filing of proposed rule change in the *Federal Register*, or up to 90 days as the SEC may designate, if it deems appropriate.

The SEC's notice of proposed rule is available here.

BROKER-DEALER

SEC Grants No-Action Relief Regarding Created ETF Shares and Failure to Close Transactions

In a letter dated April 26, the Division of Trading and Markets of the Securities and Exchange Commission granted no-action relief to Latour Trading LLC (Latour Trading) in connection with its proposed use of newly created exchange traded fund (ETF) shares to comply with the requirements set forth in Rule 204 (Close-Out Requirement) of Regulation SHO (Rule 204). This rule requires a participant of a registered clearing agency to: (1) deliver securities to a registered clearing agency for clearance and settlement on a long- or short--sale transaction in any equity security by an applicable settlement date; or (2) close out a fail-to-deliver position at a registered clearing agency in any equity security for a long- or short-sale transaction in that equity security by borrowing or purchasing securities of like kind and quantity, by the beginning of regular trading hours on the applicable close-out date.

Latour Trading proposed to satisfy Rule 204 obligations with respect to the close out of a fail-to-deliver position in the securities of a covered ETF by submitting irrevocable instructions to an Authorized Participant (AP) of the covered ETF to create shares in such ETF. Such instructions would be given to the AP no later than the beginning of regular trading hours on the applicable close-out date; but because the creation process occurs after the beginning of regular trading hours, ETF share creations are not completed until sometime after the beginning of regular trading hours. The SEC staff granted no-action relief to Latour Trading based on the view that such an approach is consistent with the strict close-out requirements of Rule 204, contingent upon Latour Trading complying with several requirements including, but not limited to, ensuring that orders placed with the AP cannot be modified and such orders are reflected on the books and records of the firm.

A copy of the no-action letter is available here.

SEC and FINRA Announce 2017 National Compliance Outreach Program for Broker-Dealers

On May 3, the Securities and Exchange Commission and Financial Industry Regulatory Authority opened registration for the 2017 National Compliance Outreach Program for Broker-Dealers, which will be held in Washington, DC on July 27. Topics to be discussed will include cybersecurity and investing by seniors.

Registration information is available here.

FINRA Amends Rule Regarding the Online Publication of Data Related to the Regulation NMS Plan to Implement a Tick Size Pilot Program

On April 28, the Financial Industry Regulatory Authority filed with the Securities and Exchange Commission an amendment to Rule 6191 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot Program), which modifies the publication date for Appendix B website data related to the Regulation NMS Plan to Implement a Tick Size Pilot Program (the Plan). (For a more complete discussion of the Plan, see the May 8, 2015 edition of *Corporate and Financial Weekly Digest*). Prior to the rule filing, Rule 6191.12 required FINRA to make publicly available on its website certain data regarding the Plan's Pre-Pilot and Pilot Period beginning on April 28. The rule filing allows Appendix B data for a given month to be published within 120 calendar days following month end. The delayed publication date is intended to provide FINRA with additional time to consider a methodology to mitigate concerns raised in connection with the publication of Appendix B data. FINRA requested that the rule change become effective upon filing.

A copy of the rule is available here.

DERIVATIVES

See "CFTC Issues Guidance on the Calculation of Projected Operating Costs by DCMs and SEFs" and "CFTC Proposes Amendments to Certain Rules Governing CCO Duties and Annual Reports" in the CFTC section.

CFTC

CFTC Issues Guidance on the Calculation of Projected Operating Costs by DCMs and SEFs

On April 28, the Commodity Futures Trading Commission issued guidance on the calculation by designated contract markets (DCMs) and swap execution facilities (SEFs) of projected operating costs for purposes of complying with DCM Core Principle 21 and CFTC Regulation 38.1101(c), and SEF Core Principle 13 and CFTC Regulation 37.1303.

The guidance indicates that, for a calculation of a DCM or SEF's projected operating costs to be reasonable, it must include the costs and expenses of such DCM or SEF's compliance with the Commodity Exchange Act, CFTC regulations, and such DCM or SEF's rulebook. The guidance also provides a list of other expenses that would be reasonable to exclude from such a calculation and addresses permitted proration of certain expenses (such as those expenses shared among affiliated entities).

Further, the guidance indicates that a DCM or SEF's quarterly financial reports must identify and explain any expenses that were prorated or not included, and provide sufficient information for the CFTC to assess the reasonableness of any such calculation.

CFTC Staff Letter 17-25 is available here.

CFTC Proposes Amendments to Certain Rules Governing CCO Duties and Annual Reports

On May 3, the Commodity Futures Trading Commission announced proposed rules amending its regulations regarding certain duties of chief compliance officers (CCOs) of swap dealers (SDs), major swap participants (MSPs) and futures commission merchants (FCMs; each, a Registrant). In addition, the proposed rules amend certain requirements for preparing and furnishing CCO annual reports on a Registrant's compliance activities to the CFTC. Many of the changes seek to harmonize such regulations with the Securities and Exchange Commission's parallel rules.

Among other changes, the proposed rules (1) clarify that CCOs are responsible for administering policies and procedures specifically related to a Registrant's business as an SD, MSP and/or FCM (as applicable), and not all of a Registrant's business that may otherwise be subject to CFTC regulation; (2) add a reasonableness standard to the steps a CCO must take to resolve certain conflicts of interest; and (3) make certain changes to the CCO annual report's content and submission process. In addition, the proposed rules provide a definition of "senior officer" that is consistent with how the CFTC's staff has generally interpreted that term in the past.

The comment period on the proposed rules will end 60 days after publication in the *Federal Register*.

The proposed rule filing is available here.

CFTC Requests Public Input on Simplifying Rules

On May 3, the Commodity Futures Trading Commission voted to seek comment from interested parties on applying CFTC's regulations in simpler and less burdensome ways. The request for comment relates to the CFTC's Project KISS, which stands for "Keep It Simple, Stupid." In announcing the project, CFTC Acting Chairman J. Christopher Giancarlo noted that the initiative would not necessarily focus on repealing or rewriting existing regulations, but rather on the implementation of existing regulations. Members of the public can submit their ideas and suggestions by emailing projectkiss@cftc.gov or visiting cftc.gov/projectkiss.

The CFTC press release is available here.

BREXIT / UK DEVELOPMENTS

FCA Publishes MiFID II Commodity Position Reporting Instructions

On May 3, the UK Financial Conduct Authority (FCA) published a document containing reporting instructions (Instructions) for trading venues and investment firms submitting position reports under the revised Markets in Financial Instruments Directive (MiFID II).

The FCA has created the document to provide instructions for entities that will submit commodity derivative position reports to it for processing. It advises firms to read the document in conjunction with the final draft of chapter 10 of its Market Conduct sourcebook (MAR 10), which was published in its March 2017 policy statement on the implementation of MiFID II (PS17/5) (for further information on the policy statement, see the April 7 issue of *Corporate & Financial Weekly Digest*).

The FCA states that its market data processor (MDP) system supports entities' daily reporting obligations set out in Article 58(1)(b) and 58(2) of MiFID II. The Article 58(1)(a) obligation to make public a weekly report with the aggregate positions held by the different categories of persons for the various commodity derivatives traded on the trading venue (TV) will not be facilitated by the MDP system. The FCA will set up a dedicated inbox for firms to communicate these reports to it.

MiFID II requires TVs to report a daily breakdown of the positions held by all persons on that venue in commodity derivatives and emission allowances (or their derivatives). It also requires investment firms that trade in commodity derivatives or emission allowances (or their derivatives) outside a TV to provide the national competent authority (NCA) for the trading venue, where the contract is traded daily, with position reports for those instrument types and for their economically equivalent OTC (EEOTC) positions. This enables an NCA, such as the FCA, to aggregate positions and determine if a position holder is in breach of a position limit.

The MiFID II position limits and reporting regime for commodity derivatives will be effective on January 3, 2018.

A copy of the Instructions is available here.

European Union Adopts Brexit Negotiation Guidelines

On April 29, a Special European Council, meeting as 27 member states (as opposed to the full 28 member states, as would usually be present), adopted the Article 50 guidelines (Guidelines) to formally define the EU's position in Brexit negotiations with the United Kingdom. This follows the resolution of the European Parliament on key principles and conditions for the negotiations, adopted on April 5 (for further information, see the April 7 issue of *Corporate & Financial Weekly Digest*).

The Guidelines are set out under six headings covering:

- core principles;
- a phased approach to the negotiations;
- agreement on arrangements for an orderly withdrawal;
- preliminary and preparatory discussions on a framework for the EU-UK future relationship;
- the principle of sincere cooperation; and
- the procedural arrangements for negotiations under Article 50.

On May 22, the EU General Affairs Council is expected to authorize the opening of the negotiations, nominate the European Commission as the EU negotiator and adopt negotiating directives.

The Guidelines are available here.

EU DEVELOPMENTS

European Commission Proposes Reforms to EMIR

On May 4, the European Commission (EC) proposed reforms (Proposal) to the European Market Infrastructure Regulation (EMIR). The Proposal aims to provide simpler and more proportionate rules for over-the-counter (OTC) derivatives to reduce costs and regulatory burdens for market participants without compromising financial stability.

The main proposed changes to EMIR in the Proposal relate to the following:

- Reporting requirements: Reporting requirements are being streamlined for all counterparties. Exchange-traded derivatives will only be required to be reported by the central counterparty (CCP) on behalf of both counterparties. To reduce the burden for all non-financial counterparties (NFCs), intragroup transactions will not have to be reported if one of the counterparties is an NFC. To reduce the burden for small NFCs (an NFC below the EMIR clearing threshold), transactions between a financial counterparty and a small NFC will be reported by the financial counterparty on behalf of both counterparties. Reporting on historic transactions will no longer be required.

- NFCs: In the future, only non-hedging contracts will be counted towards thresholds triggering the clearing obligation. While under the current rules, NFCs must clear all derivatives if they exceed the clearing threshold for one class of derivatives; the EC is now proposing that NFCs clear only the asset classes for which they have breached the clearing threshold.

- Financial counterparties: The Proposal introduces a clearing threshold for small financial counterparties. This clearing threshold is based on the volume of OTC derivatives transactions. While all financial counterparties are required to report and collateralize OTC derivative transactions, only counterparties exceeding that threshold would be required to clear centrally.

- Pension funds: The Proposal introduces a new three-year temporary exemption for pension funds from central clearing. This is designed to allow the various counterparties involved, including pension funds, CCPs and the clearing members, to develop a solution that enables pension funds to participate in central clearing without negatively impacting the revenues of future pensioners.

The EC states that the changes include measures that could save market participants, and in particular corporates such as energy companies or manufacturers, up to €2.6 billion in operational costs and up to €6.9 billion in one-off costs. The Proposal will become effective once the European Parliament and Council have approved them.

A copy of the Proposal is available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
UK DEVELOPMENTS		
David A. Brennand	+44.20.7776.7643	david.brennand@kattenlaw.co.uk
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@kattenlaw.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@kattenlaw.co.uk

* Click here to access the *Corporate & Financial Weekly Digest* archive.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.
©2017 Katten Muchin Rosenman LLP. All rights reserved.

Katten
Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at kattenlaw.com/disclaimer.