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DUE TO THE HOLIDAYS, *CORPORATE & FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON DECEMBER 23 OR DECEMBER 30. THE NEXT ISSUE WILL BE DISTRIBUTED ON JANUARY 6.

SEC / CORPORATE

SEC Division of Corporation Finance Issues 35 New C&DIs Regarding Foreign Private Issuers, QIBs and Offshore Offerings

On December 8, the staff (Staff) of the Securities and Exchange Commission's Division of Corporation Finance issued 35 new Compliance and Disclosure Interpretations (C&DIs) with respect to foreign private issuers, qualified institutional buyers and offshore offerings. The new C&DIs include the following interpretative guidance:

Foreign Private Issuers and Form 20-F:

- The SEC clarified certain requirements with respect to Form 20-F, including the following:
  - an F-series registration statement may be used to register an offering of securities under the Securities Act of 1933 (Securities Act), and Form 20-F may be used to satisfy associated SEC reporting obligations, where a foreign private issuer: (1) guarantees the securities of a subsidiary that is not a foreign private issuer, or (2) issues securities that are guaranteed or co-issued by one or more subsidiaries that are not foreign private issuer;
  - a wholly owned subsidiary of a foreign-private issuer may omit certain information from its Form 20-F annual report in the same way that a wholly owned subsidiary required to file a Form 10-K may omit information; and
  - a foreign private issuer may incorporate by reference information previously filed into its Form 20-F annual report, subject to Rule 12b-23 under the Securities Exchange Act of 1934 (Exchange Act).
- The SEC provided guidance regarding the determination of whether an issuer is a "foreign private issuer," which is defined under Securities Act Rule 405 and Exchange Act Rule 3b-4(c) as any foreign issuer (other than a foreign government), except an issuer satisfying the following conditions: (1) more than 50 percent of the outstanding voting securities are directly or indirectly owned by U.S. residents; and (2) any of the following: (a) the majority of the issuer's executive officers or directors are US residents or citizens; (b) more than 50 percent of the assets of the issuer are located in the United States; or (c) the business of the issuer is administered principally in the United States. In particular, the new C&DIs clarify that:
  - an issuer with multiple classes of voting stock with different voting rights may, in its discretion, apply one of two different methods to determine whether residents in the United States directly or indirectly own more than 50 percent of its outstanding voting securities. Specifically, the issuer may make the determination based on: (A) whether more than 50 percent of the voting power of those classes on a combined basis is owned directly or indirectly by residents of the United States; or (B) whether more than 50 percent of the total number of voting securities is owned directly or indirectly by US residents;
  - an issuer must choose criteria (such as tax residency, mailing address, physical presence, nationality, immigration status or location of a significant portion of their financial and legal relationships) to determine the residency of non-permanent US residents. A permanent resident of the United State is presumed to be a US resident for purposes of Securities Act Rule 405 and Exchange Act Rule 3b-4(c);
  - an issuer must make four determinations with regard to its executive officers and directors, in particular, (A) the residency of the executive officers, (B) the citizenship of the executive officers, (C) the residency of the directors and (D) the citizenship of the directors;

    - an issuer may use geographic information, or another reasonable methodology, in assessing its location and amount of its assets to determine whether more than 50 percent of its assets are located outside of the United States; and
    - an issuer must assess whether it administers its business principally in the United States by assessing the location where its officers, partners or managers primarily direct, control and coordinate the issuer's activities.
- The SEC also clarified that a non-reporting foreign private issuer should file a Form 6-K when it succeeds to the reporting obligation of an issuer under Exchange Act Rule 12g-3. Further, the SEC clarified that an issuer may consider all securities trading markets in countries within the European Union as a single foreign jurisdiction.

Qualified Institutional Buyers:

- The SEC clarified that, for purposes of determining whether an entity owns or invests on a discretionary basis at least $100 million and may qualify as a "qualified Institutional buyer" (QIB), an entity may include the securities that it (1) purchased and continues to hold on margin and (2) owns but has loaned out to borrowers of securities. An entity may not include (a) securities that it has borrowed, or (b) short positions in securities that it has established. The SEC also reiterated that only registered investment companies may use the aggregation method under Rule 144A(a)(1)(iv). Finally, the SEC clarified that, for purposes of determining whether the limited partnership is a QIB, limited partners are the equity owners of a limited partnership. A general partner is generally not considered for purposes of determining whether the limited partnership is a qualified institutional buyer.

Offshore Offerings:

- The SEC clarified various definitions and guidance related to offshore offerings pursuant to Regulation S under the Securities Act: the SEC explained the criteria for determining the status of an individual as a "natural person resident in the United States" for the purposes of Rule 902(k)(1)(i) of Regulation S. A permanent resident is presumed to be a US resident. For other individuals without permanent resident status, an issuer may determine such individuals' status by consistently applying various factors, such as tax residency, mailing address, physical presence, nationality, immigration status or location of a significant portion of their financial and legal relationships.
- The SEC also clarified that an issuer may rely on Rule 903(b)(1)(ii) of Regulation S (which Rule generally provides for an exemption for offerings in a single foreign country) for an offering of securities in more than one country within the EU, and may rely on Rule 903(b)(1)(iv) of Regulation S for an offering of securities to employees in more than one country within the European Union, in each case to the extent that local laws and customary practices and documentation are those of the European Union rather than of a single country within the European Union.
- The SEC further clarified that an individual seeking to rely on the Category 3 safe harbor under Rule 903 of Regulation S may rely on Category 2 safe harbor guidance. The Category 2 guidance provides that persons must ensure that any non-distributor to whom they sell securities is a non-US person and is not purchasing for the account or benefit of a US person. Further, under such guidance, safe harbor protection is unavailable where offers and sales were made nominally to non-US persons to evade the restrictions.
- The SEC also stated that the certification and agreement required under Regulation S may be provided electronically, as there are no specific requirements under Regulation S relating to the manner in which such documents are made.
- Finally, the SEC clarified that Rule 903(b)(4) of Regulation S (relating to guaranteed securities) applies (1) when the parent company is the issuer or co-issuer of debt securities and one or more subsidiaries is a guarantor, or (b) when the parent company is guarantor and there are one or more subsidiaries which are also guarantors, of the securities, in each case so long as the payment obligation of the parent company is full and unconditional.

The new C&DIs is available here.

DERIVATIVES

See "CFTC Grants No-Action Relief From Certain Swap Clearing Requirements for Swaps With Eligible Affiliate Counterparties in Australia or Mexico" in the CFTC section.

CFTC

CFTC Grants No-Action Relief From Certain Swap Clearing Requirements for Swaps With Eligible Affiliate Counterparties in Australia or Mexico

On December 15, the Commodity Futures Trading Commission Division of Clearing and Risk granted US swap participants temporary no-action relief from the required clearing rule with respect to swaps entered into with eligible affiliate counterparties located in Australia and Mexico. The no-action relief will expire on December 31, 2017.

Currently, US swap participants are exempt from the mandatory swap clearing requirements in connection with swaps entered into with eligible affiliate counterparties located in the European Union, Japan and Singapore, subject to certain terms and conditions. The no-action letter extends the same relief to US swap participants that enter into swaps with eligible affiliate counterparties located in Australia and Mexico.

More details can be found in CFTC Letter 16-84, which is available here.

BANKING

Federal Banking Agencies Finalize Rules Increasing Number of Banks and Savings Associations Eligible for 18-Month Examination Cycle

On December 12, the Federal Deposit Insurance Corporation, Federal Reserve Board and Office of the Comptroller of the Currency issued joint final rules permitting these federal banking agencies to conduct examinations every 18 months instead of every 12 months for qualifying insured depository institutions with less than $1 billion in total assets. These final rules are intended to reduce regulatory compliance costs for smaller insured depository institutions while still maintaining safety and soundness standards. Interim final rules have been in effect since February 29, which are identical to the joint final rules.

Under the final rules, well capitalized and well managed insured depository institutions with less than $1 billion in total assets can benefit from an extended 18-month examination schedule, as opposed to a 12-month examination schedule. Previously, only qualifying insured depository institutions with less than $500 million in total assets were eligible for an extended examination schedule. In addition, qualifying US branches and agencies of foreign banks also are eligible for an extended 18-month examination schedule.

These final rules increase the number of qualifying insured depository institutions by approximately 611 institutions, bringing the total number of qualifying insured depository institutions to 4,793. In addition, under the final rules, the number of eligible US branches and agencies of foreign banks increased by 30, which means approximately 89 total US branches and agencies of foreign banks are eligible for an extended 18-month examination cycle.

The final rules are available here.

UK/BREXIT DEVELOPMENTS

Treasury Committee Calls for Written Submissions on EU Transitional Arrangements

On December 12, the UK Treasury Committee (Committee) published a call for written submissions (Call) on transitional arrangements. The Call forms part of the Committee's inquiry into the United Kingdom's future economic relationship with the European Union, and seeks evidence on the possible relationships that the United Kingdom might pursue with the European Union and the practical consequences anticipated by individuals and businesses.

"Transitional arrangements" under the Call include any arrangement scheduled to take effect from the date the United Kingdom formally leaves the European Union (i.e., two years following the Article 50 notification) and the date on which the final relationship with the European Union becomes effective. The Call requests evidence from firms, trade associations, regulators, experts and any other interested parties on the following:

- Desirability of transitional arrangements, including: (1) in principle arrangements; (2) any pre-emptive action firms might take if transitional arrangements are not committed to during negotiations; (3) possible risks faced in the absence of transitional arrangements, and; (4) information on how the Great Repeal Bill (see the *Corporate & Financial Weekly Digest* edition of December 2) might provide enough "certainty and continuity" to deem transitional arrangements unnecessary.
- Design of transitional arrangements, including: (1) how much notice firms would need to make preparations, once the United Kingdom's final relationship with the European Union is settled; (2) the form of transitional arrangements necessary to prevent pre-emptive action by the private sector; (3) the desirability of a "standstill," temporary period where the relationship between the United Kingdom and the European Union does not change.
- Negotiation of transitional arrangements, including: (1) the interests of EU member states and EU businesses in transitional arrangements; (2) the possible timeframe for finalizing transitional arrangements during Article 50 negotiations; (3) the compatibility of transitional arrangements with the UK Government's intention to leave the European Union by April 2017; and (4) the practicalities of negotiating transitional arrangements prior to the final relationship with the European Union being agreed (among others).

Written submissions must be provided to the Committee by January 31, 2017.

The Call can be found here.

EU DEVELOPMENTS

EU Regulation Extends Transitional Period for Own Fund Requirements for CCP Exposures to June 2017

On December 10, an implementing regulation (Regulation) on the extension of transitional periods set out in the Capital Requirements Regulation (CRR) and the European Market Infrastructure Regulation (EMIR) was published in the *Official Journal of the European Union*. The CRR established a transitional period to ensure that institutions were not subject to higher own funds requirements during the period that existing central counterparties (CCPs) became authorized and recognized. The Regulation notes that while authorization processes for existing CCPs established in the European Union have been completed, there are still third-country CCPs awaiting recognition. In order to ensure that EU institutions (and/or their subsidiaries established outside the European Union) with exposures to those third-country CCPs (which provide the specific type of clearing services required) are not subject to higher own funds requirements, the Regulation extends the transitional period by an additional six months to June 15, 2017.

The Regulation 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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