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DUE TO THE HOLIDAYS, *CORPORATE AND FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON DECEMBER 25 OR JANUARY 1. THE NEXT ISSUE WILL BE DISTRIBUTED ON JANUARY 8.

SEC/CORPORATE

SEC Division of Corporation Finance Issues New C&DIs on FAST Act

As previously reported, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act) on December 4. The transportation bill includes several provisions related to securities laws and capital-raising measures, which were summarized in the December 11 edition of the *Corporate and Financial Weekly Digest*. One provision of the FAST Act requires the Securities and Exchange Commission to revise Form S-1 and Form F-1 to permit emerging growth companies (EGCs) to omit Regulation S-X financial information for historical periods otherwise required at the time of filing (or confidential submission), provided that the issuer reasonably believes the omitted financial information will not be required in the Form S-1 or F-1 at the time of the contemplated offering and that, prior to the issuer distributing a preliminary prospectus, such registration statement is amended to include all required Regulation S-X financial information at the date of such amendment. On December 11, the SEC issued two new Compliance and Disclosure Interpretations (C&DIs) to provide further guidance as to how to apply this provision.

The first C&DI clarifies that an EGC may not omit interim financial statements from its filing or submission if the interim information will be included in financial statements covering a longer period of time at the time of the offering. By way of example, the SEC noted that a calendar year-end EGC that files or submits a registration statement in December 2015, and reasonably expects to commence its offering in April 2016, may omit its 2013 annual financial statements from the December filing but may not omit its nine-month 2014 and 2015 interim financial statements because those statements include financial information that relates to annual financial statements that will ultimately be required at the time of the offering in April 2016.

The second C&DI provides that, in addition to omitting its own financial information for historical periods, an EGC may omit financial statements of other entities from its filing or confidential submission if it reasonably believes that those financial statements will not be required at the time of the offering. This would include, for example, an acquired business whose financial statements would otherwise be required by Rule 3-05 of Regulation S-X if the issuer reasonably believes that the financial statements will not be required at the time of the offering.

The complete text of the two new FAST Act C&DIs can be found here.

SEC Proposes Payment Disclosure Rules for Resource Extraction Issues

On December 11, the Securities and Exchange Commission proposed Rule 13q-1 of the Securities Exchange Act of 1934 (Exchange Act), often referred to as the "resource extraction rule," which would require an issuer to disclose payments made to US federal or foreign governments if such issuer is required to file an annual report with the SEC and is engaged in the commercial development of oil, natural gas or minerals. Under the proposed rules, commercial development would include exploration, extraction, processing and exporting activities or acquiring a license to do any of the foregoing. The proposed rules would cover payments made by the issuer, its subsidiary or an entity under its control.

The SEC previously proposed and adopted the resource extraction rule; however, as discussed in the July 12, 2013 edition of the *Corporate and Financial Weekly Digest*, on July 2, 2013, the US District Court for the District of Columbia vacated the previously adopted resource extraction rule, remanding the rule to the SEC to correct two "substantial errors."

On September 2, as discussed in the September 11 edition of the *Corporate and Financial Weekly Digest*, the US District Court for the District of Massachusetts ordered the SEC to file with the court an expedited schedule for promulgating the revised resource extraction rule, following a claim by Oxfam America, Inc. to compel the SEC to promulgate its resource extraction rule.

The following is a brief summary of the proposed resource extraction rule:

What Information is Required to be Disclosed

The proposed rules would require an issuer to disclose payments that are:

- not *de minimis* (meaning any payment or series of related payments equal to or greater than $100,000 in a single fiscal year);
- made as taxes, royalties, fees (which include license fees), dividends, production entitlements, bonuses or infrastructure improvement payments; and
- for the purpose of commercially developing oil, natural gas or minerals.

If the payment satisfies all three criteria, the issuer would be required to disclose the following about the payment(s):

- the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;
- the type and total amount of such payments for all projects made to each government;
- the total amounts of the payments by category;
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments, and the country in which the government is located;
- the project of the resource extraction issuer to which the payments relate;
- the particular resource that is the subject of commercial development; and
- the subnational geographic location of the project.

Under the proposed rules, the SEC could provide an exemption from the disclosure requirements on a case-by-case basis.

How and When Should the Information be Disclosed

The issuer would be required under the proposed rules to disclose the specified information about relevant payments on Form SD no later than 150 days after the conclusion of its fiscal year.

The comment period on the proposed resource extraction rule is open until January 25, 2016.

The full text of the proposed resource extraction rule can be viewed here.

DERIVATIVES

See "CFTC Adopts Final Margin Rules for Swap Dealers" and "CFTC Proposes Cybersecurity Testing for DCOs, DCMs, SEFs and SDRs" in the CFTC section.

CFTC

CFTC Adopts Final Margin Rules for Swap Dealers

On December 16, the Commodity Futures Trading Commission adopted final rules that set margin requirements for swap dealers and major participants (collectively, Swap Entities) regulated by the CFTC with respect to swaps that are not cleared with a derivatives clearing organization or clearing agency. The final rules are generally consistent with the rules adopted on October 30 by the US prudential regulators (the Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve, Office of the Comptroller of the Currency, Farm Credit Administration and Federal Housing Finance Agency) and the international standards for non-cleared swap margin published by the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions in September 2013. The CFTC's margin rules will be implemented in phases starting on September 1, 2016. These margin rules are not intended to have retroactive effect and pre- and post-compliance date swaps can be treated separately even if they are documented under the same master agreement if they are separated into different netting portfolios.

Except as noted below, the substance of CFTC's margin rules is virtually identical to that of the margin rules promulgated by the prudential regulators and are based on the regulatory categorization of the two counterparties. If the swap is between two Swap Entities or between a Swap Entity and a financial end user with "material swaps exposure," there are mandatory initial margin (IM) and variation margin (VM) requirements. If the swap is between a Swap Entity and a financial end user that does not have a material swaps exposure, only VM applies. There are no mandatory margin requirements for any other pairs of counterparties, but swap dealers remain free to impose traditional contractual margin requirements as they see fit. When IM is mandatory, it must be segregated with a custodian that is not affiliated with the party receiving the IM and cannot be rehypothecated.

The differences between the CFTC's margin rules and the rules of the prudential regulators are described below.

First, while transactions between a Swap Entity and its affiliates will be subject to mandatory variation margin requirements, a Swap Entity generally will not be required to collect initial margin from its affiliates if it has a centralized risk management system in place for managing the risks associated with these transactions. For transactions with foreign affiliates, a Swap Entity will be required to collect initial margin from such affiliate only if: (1) the affiliate is a financial end user; (2) the affiliate enters into swaps with third parties (directly or indirectly) under which the CFTC margin rules would apply if the affiliate were a Swap Entity; and (3) the affiliate is located in a jurisdiction that the CFTC has not found to be eligible for substituted margin compliance and does not collect initial margin from such third parties. Under these transactions, however, the Swap Entity or its foreign affiliate may be the custodian of such initial margin.

Second, the CFTC's margin rule delegates to the National Futures Association the responsibility for approving internal risk models that may be used by Swap Entities to calculate initial margin requirements.

The text of the new final rules can be found here.

CFTC Proposes Cybersecurity Testing for DCOs, DCMs, SEFs and SDRs

The Commodity Futures Trading Commission has proposed rules that would require all derivatives clearing organizations (DCOs), swap data repositories (SDRs), designated contract markets (DCMs) and swap execution facilities (SEFs) to conduct cybersecurity testing with respect to: (1) vulnerability testing; (2) internal and external penetration testing; (3) controls testing; (4) security incident response plan testing; and (5) enterprise technology risk assessments.

The proposal sets forth specific testing timeframes for DCOs, SDRs and covered DCMs. (For these purposes, a "covered" DCM is a DCM with 5 percent or more of the combined annual trading volume of all DCMs.) Specifically, these entities would be required to conduct vulnerability testing on a quarterly basis, and penetration testing, security incident response plan testing and enterprise technology risk assessments annually. Controls testing would be required to be conducted on a biennial basis. Certain tests may be conducted by employees who are not responsible for the development or operation of the systems or capabilities being assessed, whereas certain other tests must be conducted by independent contractors.

The proposal does not specify the frequency with which SEFs and non-covered DCMs would be required to conduct cybersecurity tests. In addition, SEFs and non-covered DCMs may choose whether to engage independent contractors or rely on independent employees to conduct testing.

The proposal also would require testing protocols and results to be reviewed by each entity's senior management and board of directors.

The CFTC's proposed rules and related fact sheet and Q&A may be accessed here. Upon publication in the *Federal Register*, the proposed rules will be subject to a 60-day comment period.

BANKING

FDIC Finalizes Change of Control Rules

On December 16, the Federal Deposit Insurance Corporation (FDIC) issued Financial Institution Letter 60-2015, which summarizes a final rule with respect to non-member banks, state savings and loan associations, and certain holding companies.

The final rule:

- consolidates and conforms the change in control regulation of state savings associations, and rescinds the change in control regulation and guidance transferred from the Office of Thrift Supervision;
- adopts presumptions of acting in concert consistent with the other federal banking agencies;
- adopts definitions for previously undefined terms, such as "voting securities;"
- adopts a rebuttable presumption that the acquisition of convertible securities, options or warrants is presumed to constitute the acquisition of voting securities;
- requires, unless waived by the FDIC, a person who has been approved to acquire control of a covered institution and who has maintained that control to file a second notice if that person's ownership, control or power to vote will increase to 25 percent or more of any class of voting securities; and
- establishes reporting requirements for stock loans held by foreign banks and their affiliates, and for a new CEO or director of a bank following a change in control.

The rule will become effective on January 1, 2016.

Read more here and here.

Federal Banking Agencies Seek Comment on Interagency Effort To Reduce Regulatory Burden

On December 17, the Federal Financial Institutions Examination Council, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Board of Governors of the Federal Reserve (collectively, federal banking agencies) approved a notice requesting comment on the fourth and final set of regulatory categories as part of their review to identify outdated or unnecessary regulations applied to insured depository institutions. The Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) requires the federal agencies to review their regulations at least every 10 years. The federal agencies also are required to categorize and publish the regulations for comment, and submit a report to the US Congress that summarizes any significant issues raised by the comments and the relative merits of such issues. The agencies have divided their regulations into 12 categories and have requested comments for nine categories. The fourth and final notice seeks comment on regulations in three additional categories: (1) rules of procedure; (2) safety and soundness; and (3) securities. Comments will be accepted within 90 days after publication of the notice in the *Federal Register*, which is expected shortly. In addition, as previously announced by the agencies, the scope of the EGRPRA review has been expanded to cover newly issued regulations that were not included in prior EGRPRA categories or rules that will be issued by the year's end. Accordingly, comments also are being requested on those final rules. Any final rules issued between the publication of the final *Federal Register* notice and the end of the year will be posted on the EGRPRA website. Comments on regulations in any of the 12 categories also will be accepted by the agencies during this final comment period.

Read more.

OCC Issues Recovery Proposal for Institutions With Assets of $50 Billion or More

On December 17, the Office of the Comptroller of the Currency (OCC) requested comment on a proposed rule to establish enforceable guidelines for recovery planning by insured national banks, insured federal savings associations and insured federal branches of foreign banks with average total consolidated assets of $50 billion or more (collectively, covered banks). The guidelines are issued pursuant to a federal statute that authorizes the OCC to prescribe operational and managerial standards for national banks and federal savings associations. The OCC guidelines would be enforceable under the terms of that statute.

The comment period for the proposed rule ends February 16, 2016. A summary follows of the proposed guidelines follows.

Recovery

A covered bank should develop and maintain a recovery plan that is appropriate for its individual risk profile, size, activities and complexity, including the complexity of its organizational and legal entity structure. The proposed guidelines state that a recovery plan should do the following:

- Establish triggers, which are quantitative or qualitative indicators of the risk or existence of severe stress that should always be escalated to management or the board of directors, as appropriate, for purposes of initiating a response. To identify triggers that appropriately reflect the particular vulnerabilities of a covered bank, the bank should design severe stress scenarios that would threaten its critical operations or cause the covered bank to fail if one or more recovery options were not implemented in a timely manner.
- Identify a wide range of credible options that a covered bank could undertake to restore financial and operational strength and viability. A recovery plan should include an assessment and description of the effect of each credible option on the covered bank.
- Address escalation procedures, management reports and communication procedures.

Management and Board of Directors

- Management of the covered bank should review the recovery plan at least annually and in response to a material event. Management should revise the plan as necessary to reflect material changes in the covered bank's risk profile, complexity, size and activities, as well as changes in external threats. This review should evaluate the covered bank's organizational structure and its effectiveness in facilitating a recovery.
- The covered bank's board of directors (or an appropriate committee of the board) should review and approve the recovery plan at least annually and more often as needed to address any changes made by management.

Enforceability of the Guidelines

The proposed guidelines would be enforceable pursuant to section 39 of the Federal Deposit Insurance Act (FDIA), 12 USC 1831p-1. If a covered bank fails to meet a standard prescribed by the guidelines, the OCC may require the covered bank to submit a plan specifying the steps it will take to comply with the standard. The OCC may issue an order enforceable under section 8 of the FDIA, 12 USC 1818(b), if a covered bank, after being notified that it is in violation of a standard, fails to submit an acceptable compliance plan or fails materially to comply with an OCC-approved plan. The OCC is proposing to issue the guidelines as a new appendix E to part 30 of OCC regulations.

The bulletin is available here.

UK DEVELOPMENTS

FCA Consultation on Implementation of MiFID II in UK Rules

On December 15, the Financial Conduct Authority (FCA) published an initial consultation paper (Consultation Paper) on implementing the revised and recast Markets in Financial Instruments Directive (MiFID II) and the associated Markets in Financial Instruments Regulation (MiFIR) into UK law and rules.

The Consultation Paper is likely to be the first of several given that the full suite of rules have not yet been finalized in Brussels by the European Commission. It covers topics where the FCA has enough certainty from Brussels regarding the final rules under MiFID II and MiFIR so as to be able to make its proposals regarding UK implementation. The FCA's suggestions in the Consultation Paper cover, principally, key changes to the mechanisms required for the trading of financial instruments, including:

- **Trading venues.** MiFID I brought new regulations to regulated markets, multilateral trading facilities (MTFs) and systematic internalizers. However, MiFID II and MiFIR will extend the existing rules and apply these extended rules to existing venues and to a new type of venue to be known as "organized trading facilities" (OTFs). The FCA has proposed making changes to its Recognized Investment Exchanges sourcebook and its Market Conduct sourcebook (MAR) to cover these new venues and associated terminology changes. There also will be a new and separate chapter in MAR to cover OTFs.
- **Transparency.** The FCA has proposed changes to its rules to deal with the expansion of transparency requirements to equity-like and non-equity markets under MiFID II and MiFIR.
- **Market data.** A new chapter 9 of MAR will cover data reporting service providers and their responsibilities.
- **Algorithmic and high-frequency trading requirements.** The FCA's proposed changes to MAR 5 and a new MAR 7 will cover business continuity, systems and controls, financial crime, and market abuse for algorithmic and high frequency trading firms.
- **Perimeter Guidance manual (PERG).** The FCA has proposed changes to chapter 13 of PERG to take account of the changes to the scope of investment services and activities, and financial instruments.

The FCA's consultation suggested that the new rules will close on March 8, 2016, and will be followed in the first half of 2016 by a policy statement with the final rules.

As referenced in *Corporate and Financial Weekly Digest* in recent weeks, there have been statements and discussions in Brussels recently regarding whether the European Union is, in fact, ready for MiFID II and MiFIR to come into effect on the proposed January 3, 2017 implementation date. It seems likely (though not yet confirmed) that it may be delayed.

The Consultation Paper is available here.

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

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