

BROKER-DEALER

Nasdaq Proposes Rule Change to SEC to Assume Operational Responsibility for Certain Investigation and Enforcement Functions Currently Performed by FINRA

On April 3, the Securities and Exchange Commission published a notice to solicit comments on Amendment No. 2 to a proposed rule change filed by the Nasdaq Stock Market LLC, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934. The SEC also approved the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

Since becoming a national securities exchange, Nasdaq has contracted with the Financial Industry Regulatory Authority (FINRA) through various agreements to perform certain regulatory functions on Nasdaq's behalf, while it retained operational responsibility for a number of regulatory functions. Nasdaq now proposes to assume operational responsibility from FINRA for the following activities:

- investigation and enforcement responsibilities for conduct occurring on the Nasdaq Options Market; and
- investigation and enforcement responsibilities for conduct occurring on Nasdaq's equity market only (i.e., not also on non-Nasdaq equities markets).

Under the proposed rule change, FINRA will continue to perform certain functions, including, among other things:

- the investigation and enforcement of conduct occurring on the Nasdaq equity market that also related to cross market activity on non-Nasdaq exchanges;
- the handling of contested disciplinary proceedings arising out of Nasdaq Regulation-led investigation and enforcement activities; and
- matters covered by agreements to allocate regulatory responsibility under Rule 17d-2 of the Securities Exchange Act of 1934.

The full notice issued by the SEC is available [here](#).

DERIVATIVES

See "CFTC Issues No-Action Relief for Prime Brokerage Trading on SEFs" in the CFTC section, "FCA and SEC Sign Updated Memoranda of Understanding" in the Brexit/UK Developments section, and "Regulators in Singapore and the EU Agree on Mutual Recognition for Derivatives Platforms" in the Brexit/EU Developments section.

CFTC

CFTC Issues No-Action Relief for Prime Brokerage Trading on SEFs

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission has issued no-action relief to swap dealers (SDs) for certain swaps with prime brokerage customers where the customer initiates the swap by executing a trade as agent for the SD on a swap execution facility (SEF).

SDs generally are required to make certain disclosures to non-SD counterparties prior to entering into a swap, unless the transaction is executed anonymously on a designated contract market or a SEF. In a derivatives prime brokerage relationship, a swap can arise automatically between the SD and a non-SD prime brokerage customer as a result of a mirror swap negotiated by the customer on behalf of the SD, in which case the SD has no opportunity to make any disclosures to the customer.

In recognition of that practical problem, DSIO has extended the disclosure requirement exclusion to include transactions occurring off-SEF pursuant to a prime brokerage arrangement, so long as the terms of the off-SEF transaction are determined by a transaction that is executed by the prime brokerage customer for the SD anonymously on a SEF.

CFTC Letter No. 19-06 is available [here](#).

DIGITAL ASSETS AND VIRTUAL CURRENCIES

SEC Releases Framework for “Investment Contract” Analysis of Digital Assets

Recognizing the need for guidance as to the application of US federal securities law for those considering an Initial Coin Offering (ICO), or otherwise engaging in the offer, sale or distribution of a digital asset, the Securities and Exchange Commission released its *Framework for “Investment Contract” Analysis of Digital Assets*. The Framework represents the views of the SEC’s Strategic Hub for Innovation and Financial Technology (FinHub) and is designed to provide additional guidance in areas that the SEC has not previously addressed.

The US Supreme Court’s *Howey* case and subsequent case law have found that an “investment contract” exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. Whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances. Price appreciation resulting solely from external market forces (such as general inflationary trends or the economy) impacting the supply and demand for an underlying asset generally is not considered “profit” under the *Howey* test. The Framework provides guidance on how market participants should analyze the specific facts and circumstances surrounding the offer or sale of a digital asset to ascertain if such offer or sale is being made as an investment contract and, therefore, within the purview of the federal securities laws.

The full Framework issued by the SEC is available [here](#).

SEC Issues TurnKey Jet, Inc. No-Action Letter

On April 3, the Securities and Exchange Commission’s Division of Corporate Finance (the “Division”) responded to TurnKey Jet, Inc.’s (TKJ) letter dated April 2, requesting confirmation that the Division would not recommend enforcement action to the SEC in connection with its offer and sale of tokens without registration under the Securities Act of 1933 and the Securities Exchange Act of 1934. In issuing its response that it would not recommend enforcement action to the SEC, the Division noted that:

- the tokens will be immediately usable for their intended functionality (purchasing air charter services) at the time they are sold;
- TKJ will restrict transfers of tokens to TKJ Wallets only, and not to wallets external to the platform;
- TKJ will sell tokens at a price of one USD per token throughout the life of the program, and each token will represent a TKJ obligation to supply air charter services at a value of one USD per token;
- if TKJ offers to repurchase tokens, it will only do so at a discount to the face value of the tokens (one USD per token) that the holder seeks to resell to TKJ, unless a court within the United States orders TKJ to liquidate the tokens; and
- the token is marketed in a manner that emphasizes the functionality of the token, and not the potential for the increase in the market value of the token.

The Division’s full response, dated April 3, is available [here](#), and TKJ’s incoming letter, dated April 2, is available [here](#).

BREXIT/UK DEVELOPMENTS

FCA and SEC Sign Updated Memoranda of Understanding

On March 29, the UK Financial Conduct Authority (FCA) issued a press release announcing that it has signed two updated memoranda of understanding (MOUs) with the Securities and Exchange Commission. Both MOUs aim to ensure the continued ability of the United Kingdom and the United States to cooperate and consult with each other regarding the effective and efficient oversight of regulated entities across national borders.

The first MOU is a comprehensive supervisory arrangement covering regulated entities that operate on a cross-border basis. Among other things, the MOU has been updated to expand the scope of covered firms under the MOU to include firms that conduct derivatives, credit rating and derivatives trade repository businesses. This is to reflect the post-financial crisis reforms related to derivatives, and the FCA's assumption of responsibility from the European Securities and Markets Authority (ESMA) for overseeing credit rating agencies and trade repositories in the event of the United Kingdom's withdrawal from the European Union (Brexit).

The second MOU, which is required under the UK Alternative Investment Fund Managers Regulations, provides a framework for supervisory cooperation and exchange of information relating to the supervision of covered entities in the alternative investment fund (AIF) industry. It ensures that, regardless of the outcome of Brexit, investment advisers, fund managers, private funds and other covered entities in the AIF industry that are regulated by the SEC and the FCA, will be able to continue to operate on a cross-border basis without interruption.

The MOUs will go into effect on the same date as when EU legislation ceases to have direct effect in the United Kingdom.

The FCA's press release is available [here](#).

FCA Confirms Final Rules and Guidance for Firms for No-Deal Brexit

On March 29, the UK Financial Conduct Authority (FCA) issued a press release announcing that it had published its final instruments and guidance that will apply if the United Kingdom withdraws from the European Union without a deal or an implementation period (No-Deal Brexit).

The FCA has published the final versions of the instruments following its approval by HM Treasury. The finalized instruments contain amendments to the *FCA Handbook* and onshored EU regulations containing binding technical standards. The FCA also has published the final versions of its guidance relating to a No-Deal Brexit.

In its statement, the FCA notes that the final instruments are largely unchanged from the near-final versions that they published in February. The most significant change, however, is that the instruments will now commence on the so-called "exit day" as defined in the European Union (Withdrawal) Act 2018, instead of at 11:00 p.m. on March 29.

The FCA's press release is available [here](#).

BREXIT/EU DEVELOPMENTS

ESMA Publishes Updates Q&As on MAR

On March 29, the European Securities and Markets Association (ESMA) published an updated version of its questions and answers document (Q&As) on the Market Abuse Regulation (MAR). ESMA last updated the Q&As on November 12, 2018 (as reported in the November 16, 2018 edition of the [Corporate & Financial Weekly Digest](#)).

The Q&As clarify:

1. Q&A 5.6, the scope of collective investment undertakings (CIUs) that are subject to the MAR provision to disclose inside information;
2. Q&A 5.7, examples of specific cases of inside information that may arise with respect to CIUs admitted to trading or traded on a trading venue;
3. Q&A 11.2, the meaning of parent and related undertakings for the purpose of emission allowance market participants complying with the provisions of MAR relating to the public disclosure of inside information concerning emission allowances with respect to their business; and
4. Q&A 11.3, when emission allowances market participants are under an obligation to disclose inside information concerning emission allowances where such inside information relates to installations of group undertakings.

ESMA's updated Q&As are available [here](#) and its accompanying press release is available [here](#).

ESMA Updates Q&As on the Application of the AIFMD

On March 29, the European Securities and Markets Association (ESMA) published an updated version of its questions and answers document (Q&As) on the application of the Alternative Investment Fund Managers Directive (AIFMD).

In their updated Q&As, ESMA has added the following under section VII:

1. Q&A 6, on the treatment of short-term interest rate futures for the purposes of AIFMD leverage exposure calculations according to the gross and commitment methods; and
2. Q&A 7, on how frequently an alternative investment fund manager should calculate the leverage of each EU alternative investment fund that employs leverage.

The updated Q&As are available [here](#) and its accompanying press release is available [here](#).

Regulators in Singapore and the EU Agree on Mutual Recognition for Derivatives Platforms

On April 1, the European Commission (EC) and the Monetary Authority of Singapore (MAS) published a joint media release announcing their concurrent adoption of equivalence decision for certain trading venues in the European Union and Singapore.

The decision will allow EU investment banks to operate as swaps dealers in Asia when executing derivatives with counterparties in Singapore, while complying with the EU trading obligations under the Markets in Financial Instruments Regulation (MiFIR) and the G20 reforms for standardized derivatives. Singaporean participants also will be able to trade with EU counterparties on EU multilateral and organized trading facilities in compliance with Singapore's derivatives trading obligations.

The decision follows the agreement jointly announced on February 20 by the EC and the MAS regarding their common approach on certain derivatives trading platforms, the aim of which is to connect the two markets to boost liquidity and to help firms hedge their exposure to currency risks. It also follows a similar decision made between the MAS and the Commodity Futures Trading Commission made on March 13, as reported in the March 15, 2019 edition of the [Corporate & Financial Weekly Digest](#).

The decision takes the form of an implementing act, which goes into effect on the day following its publication in the *Official Journal of the European Union*.

The EC's and MAS' joint media release is available [here](#).

The implementing act is available [here](#) and its annex is available [here](#).

Equivalence for UK CCPs and CSDs Extended

On April 4, two Commission Implementing Decisions (Amending Decisions) were published in the *Official Journal of the European Union*, amending the following December 20, 2018 equivalence decisions (Equivalence Decisions):

- Implementing Decision (EU) 2018/2031, on the temporary equivalence of the UK's regulatory framework for central counterparties (CCPs); and
- Implementing Decision (EU) 2018/2030, on the temporary equivalence of the UK's regulatory framework for central securities depositories (CSDs).

The Amending Decisions ensure that the Equivalence Decisions will apply in the event that the UK leaves the EU without a withdrawal agreement after the expiry of the period referred to in Article 50(3) of the Treaty on European Union (TEU), as extended by the European Council on March 22 to April 12.

On April 5, the European Securities and Markets Association (ESMA) announced that it had adopted new recognition decisions for the three CCPs and the CSD established in the UK to reflect the extension to Article 50 of the TEU (Recognition Decisions). The Recognition Decisions are intended to ensure that UK CCPs and the UK CSD are recognized and usable by market participants in the EU in the event a no-deal Brexit occurs on April 12.

The Amending Decisions and Recognition Decisions follow statements made by ESMA and the European Commission in March 2019 (for more information, see the March 29, 2019 edition of [Corporate & Financial Weekly Digest](#)).

The CCP Amending Decision is available [here](#).

The CSD Amending Decision is available [here](#).

ESMA's announcement relating to the Recognition Decisions 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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BREXIT/UK/EU DEVELOPMENTS

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