

## SEC/CORPORATE

### **SEC Guidance Expanding Exclusions for Non-GAAP Information**

The Securities and Exchange Commission's Division of Corporation Finance issued two new Compliance and Disclosure Interpretations (C&DI), expanding its previously issued guidance related to the exemption from Item 10(e)(5) under Regulation S-K and Regulation G for non-GAAP financial information provided to a financial advisor in forecasts for business combination transactions. The previously issued guidance was discussed in the November 3, 2017 edition of the [Corporate & Financial Weekly Digest](#)

As previously addressed, C&DI 101.01 states that financial measures provided to a financial advisor in connection with a business combination transaction would be excluded from the definition of non-GAAP financial measures and thus, not subject to Item 10(e) of Regulation S-K or Regulation G, if and to the extent that the following conditions are satisfied:

1. The financial measures are included in forecasts to a financial advisor for the purpose of rendering of an opinion that is materially related to the business combination transaction; and
2. The forecasts are being disclosed to comply with Item 1015 of Regulation M-A or requirements under state or foreign law with respect to the disclosure of a financial advisor's analyses or substantive work.

New C&DI 101.02 clarifies that a company may rely on the guidance in 101.01 to the extent the same forecasts are provided to the company's board of directors or a board committee. New C&DI 101.03 further provides that, if a company exchanges forecasts with bidders, and disclosure of such forecasts is required under the federal securities laws, the financial measures included in those forecasts would be similarly excluded from the definition of non-GAAP financial measures and not subject to Item 10(e) of Regulation S-K and Regulation G.

The full text of the C&DIs is available [here](#).

### **ISS Launches Help Center**

Institutional Shareholder Services Inc. (ISS) recently launched the ISS Help Center, its new online communications portal that will help facilitate inquiries of ISS from investors, companies (issuers) and company advisors, including law firms and proxy solicitors, as well as responses from ISS to such inquiries. The ISS Help Center will provide a framework to submit questions on a range of matters, including proxy voting, shareholder meeting research, QualityScore corporate profiles/methodology questions and research engagement requests. The ISS Help Center replaces the current process for submitting questions to ISS via email to the Global Research Help Desk.

## BROKER-DEALER

### **FINRA Amends Rule 3310 to Reflect FinCEN's Customer Due Diligence Requirements**

The Financial Industry Regulatory Authority (FINRA) filed amendments to Rule 3310 to conform to the Financial Crimes Enforcement Network's (FinCEN's) customer due diligence requirements. Specifically, the amendments to Rule 3310 require each member to include in its anti-money laundering program appropriate procedures for conducting ongoing customer due diligence, including but not limited to, "[u]nderstanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile" and "[c]onducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information." For these purposes, "customer information" includes information regarding the beneficial owners of legal entity customers.

FinCEN's customer due diligence requirements were adopted on May 11, 2016, and went into effect on May 11, 2018. Likewise, FINRA's amendments to Rule 3310 went into effect on May 11, 2018.

More information is available [here](#).

## UK/BREXIT DEVELOPMENTS

### **UK Government Responds to Report on Brexit**

On May 9, the UK government published its response to the House of Lords European Union Committee's report, entitled "Brexit: The Future of Financial Regulation and Supervision," which was published on January 27. The Committee's report includes recommendations under six categories, including:

1. Incorporating the EU acquis (being the accumulated legislation and court decisions) in financial services; and
2. Regulatory innovation, financial technology (FinTech) and the future.

#### **Incorporating the EU Acquis**

The Committee's report identifies the resolution of so-called "inoperables." These include references in EU legislation to EU bodies which will no longer have jurisdiction after the United Kingdom's withdrawal from the European Union (more commonly referred to as Brexit), and the treatment of current EU third-country agreements and decisions (for example, central counterparty equivalence decisions under the European Market Infrastructure Regulation).

The response shows a willingness to facilitate, if required, EEA firms fulfilling their obligations to UK consumers in a variety of post-Brexit scenarios. In response to concerns of a decrease in democratic scrutiny, the government states that current EU "Level 1" legislation and "Level 2" delegated acts will become the responsibility of UK ministers and parliament, while "Level 2" technical standards will be handed to UK regulators (such as, the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority) mirroring the EU status quo.

#### **Regulatory Innovation, FinTech and the Future**

In its report, the Committee recommended that the implementation of the latest post-financial-crisis banking reforms be proportionate so as not to unduly burden smaller firms and, similarly, Brexit negotiations should preserve the United Kingdom's flexibility to innovate with respect to FinTech regulation. The government's response confirms that it will seek to encourage proportionate legislation in these areas and maintain a flexible approach regarding FinTech regulation.

Regarding the potential loss of funds from the European Investment Bank and European Investment Fund, the government indicates that it is looking at preserving this aspect of the UK-EU relationship. The government also highlights an increase in the British Business Bank's limits on investment in venture capital funds, the bringing

forward of £400 million of additional investment and a 10-year action plan to unlock over £20 billion to finance growth in innovative firms, as measures to ensure investment finance in the United Kingdom continues after Brexit.

The government's response to the Committee is available [here](#).

## EU DEVELOPMENTS

### **ESMA Unveils One-Stop Company Portal for Information on EU Authorization**

On May 7, the European Securities and Markets Authority (ESMA) announced a new portal for investors seeking information on whether a financial services provider is authorized within the European Union. The portal includes registers of the following:

1. Markets in Financial Instruments Directive (MiFID) investment firms, including systematic internalizers;
2. MiFID trading venues;
3. MiFID data reporting service providers;
4. Undertakings for the collective investment of transferable securities ( UCITS) management companies; and
5. Fund managers authorized under the Alternative Investment Fund Managers Directive (AIFMD), including funds managed or marketed in the European Union.

The portal also incorporates machine-to-machine functionality and provides reference to sanctions applied by competent authorities in the EU member states.

The portal is available [here](#).

ESMA's press release announcing the portal is available [here](#).

### **ECB Speech on CCP Recovery and Resolution**

The Bank for International Settlements has published a speech, entitled "Resolution in Europe: The Unresolved Questions," given by Benoît Cœuré, a member of the executive board of the European Central Bank (ECB), on April 23 in Frankfurt. The speech concerns a cooperative approach to central counterparty (CCP) recovery and resolution, and has three focuses:

1. The need for increased international cooperation in this area. The Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions are conducting work in this regard (a recent example of this is the CCP stress test framework, considered in the April 13 edition of [Corporate & Financial Weekly Digest](#));
2. Improving authorities' conception of a possible CCP resolution; and
3. The coordination of arrangements for CCP recovery and resolution across the European Union and, in particular, efforts to strengthen the European Union's supervisory framework for third country CCPs (for example, the proposals to amend the European Markets Infrastructure Regulation in relation to CCPs, sometimes referred to as EMIR 2.2).

Mr Cœuré's speech is available [here](#).

## **ESMA Releases Latest Double Volume Cap Data Under MiFID II**

On May 8, the European Securities and Markets Authority (ESMA) updated its public register with the latest set of double volume cap (DVC) data under the revised Markets in Financial Instruments Directive (MiFID II). The update follows last month's update to the DVC public register (for further details, see the April 13 edition of [Corporate & Financial Weekly Digest](#)).

New breaches total 58 equities for the 8 percent cap, which applies to all trading venues, and 10 equities for the 4 percent cap, which only applies to individual trading venues. For those instruments in breach of the caps, suspensions of trading under the waivers apply from May 14, 2018 to November 14, 2018. Due to corrected data received by ESMA, for 12 instruments, previously identified breaches of the 8 percent and 4 percent caps are incorrect and the relevant suspensions of trading under the waivers should be lifted, according to ESMA's announcement.

ESMA has changed the DVC files to facilitate their use. ESMA now provides a separate consolidated Suspensions File to collate all the information in one place for national competent authorities and market participants to identify the instruments affected by the caps.

The updated public register regarding the DVC mechanism is available [here](#).

ESMA's announcement in relation to the updated DVC register is available [here](#).

## **ESAs Publishes Consultation Papers Regarding Securitization Regulation**

The European Market Infrastructure Regulation (EMIR) imposes clearing and risk mitigation obligations on firms trading in the European Economic Area. On May 4, the Joint Committee of European Supervisory Authorities (ESAs) published two consultation papers in relation to the interaction of the Securitization Regulation (SR) with those obligations under EMIR, specifically:

1. A consultation paper with respect to amending the existing regulatory technical standards (RTS) on risk mitigation techniques for over-the-counter (OTC) derivative contracts not cleared by a central counterparty under EMIR in light of simple, transparent and standardized (STS) securitizations under the SR; and
2. A consultation paper regarding amendments to the RTS for the EMIR clearing obligation under the SR, with a particular focus on analysis of the costs and benefits of the legal provisions of the draft RTS in the consultation paper.

The consultation paper on EMIR risk mitigation techniques for uncleared OTC derivatives in light of STS securitizations under the SR is available [here](#).

The consultation paper on amendments to the EMIR clearing obligation under the SR 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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UK/EU/BREXIT DEVELOPMENTS

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