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SEC/CORPORATE

SEC Amends Disclosure Rules for Registered Debt Offerings

On March 2, the Securities and Exchange Commission adopted amendments to the financial disclosure requirements for registered debt offerings involving subsidiary guarantees and other credit enhancements. In announcing the new rules, the SEC noted the amendments are intended to improve the quality of disclosures made in the context of registered debt offerings and increase the likelihood that issuers will conduct debt offerings on a registered basis, in part by reducing the compliance burden on issuers.

As a general matter, Rule 3-10 of Regulation S-X required financial statements to be filed for all issuers and guarantors of debt securities registered or being registered, subject to important exceptions. Existing Rule 3-10 generally provided that, where a subsidiary guaranteed its parent's debt securities or the parent guaranteed its subsidiary's debt securities, separate subsidiary financial statements may have been omitted if each such subsidiary issuer or guarantor was 100 percent owned by the parent company, if each guarantee was full and unconditional and if each required additional subsidiary financial disclosure was included in the parent's periodic reports or filings, typically in the form of condensed consolidating financial information. The parent company was required to continue to provide the additional subsidiary disclosure, for so long as the guaranteed registered debt securities remained outstanding.

Any subsidiary that may omit separate financial statements pursuant to Rule 3-10 is also automatically exempt from the ongoing reporting requirements of the Securities Exchange Act of 1934 (Exchange Act).

Under the newly adopted rules, the requirement that the subsidiary issuer or guarantor be 100 percent owned by the parent company has been replaced by a requirement that such subsidiary be consolidated in the parent company's consolidated financial statements. The new rules also streamline the level of detailed additional disclosure that the parent must include with respect to the subsidiary issuer or guarantor of the registered debt securities, requiring summarized financial information with respect to the subsidiaries, reducing the number of periods that must be presented to the most recently ended fiscal year and year-to-date interim period included in the parent company's financial statements and permitting the required disclosure to be included outside the footnotes to the parent's financial statements. In addition, under the new rules, the additional disclosure must only be included for so long as the issuer or the guarantors have an Exchange Act reporting obligation with respect to the registered debt securities, rather than as long as the registered debt securities remain outstanding.

Similarly, existing Rule 3-16 of Regulation S-X required that a registrant provide separate financial statements for each affiliate of the registrant whose securities are pledged as collateral for any class of securities registered or being registered, where such securities constituted a substantial portion of the collateral. The new rules replace the requirement to provide separate financial statements with a requirement to provide summary financial and non-financial disclosure about the affiliate and the collateral arrangements. Such summary information may be included outside the footnotes to the registrant's financial statements. The existing rule that disclosure was only required when the assets pledged as collateral exceeded a specific threshold has been replaced with a requirement to provide disclosure in all cases but only to the extent such disclosure would be material.

The new rules will become effective on January 4, 2021, although voluntary compliance with the new rules will be permitted in advance of the effective date.

The full text of the SEC's adopting release is available here.

SEC Proposes Rule Changes to Harmonize and Simplify Offering Exemptions

On March 4, the Securities and Exchange Commission voted to propose a set of amendments (the Proposal) to "harmonize, simplify and improve the exempt offering framework to promote capital formation and expand investment opportunities while preserving and enhancing important investor protections," according to the SEC's press release announcing the Proposal. As highlighted in the press release, if adopted, the Proposal would, among other things:

- increase the offering limits for Regulation A, Regulation Crowdfunding and Rule 504 offerings and revise certain related individual investment limits;
- set clear and consistent rules governing offering communications between investors and issuers, providing greater certainty to issuers and protection to investors, including permitting certain "demo day" activity without violating the prohibition on general solicitation;
- address in one rule the ability of issuers to move from relying on one exemption to another and ultimately to a registered offering; and
- harmonize certain disclosure and eligibility requirements and bad actor disqualification events to decrease differences between exempt offerings.

The SEC is soliciting comments on the Proposal for a period of 60 days after publication in the Federal Register.

The full text of the Proposal is available here, and the press release and fact sheet are available here.

DERIVATIVES

See "Industry Groups and NFA Request Changes to Swap Dealer Capital Rules" in the CFTC section.

CFTC

Industry Groups and NFA Request Changes to Swap Dealer Capital Rules

In the last week, the Commodity Futures Trading Commission (CFTC) has received a flurry of comment letters concerning its capital rules for swap dealers originally proposed in 2016. Two of these merit special attention.

The first letter, dated March 2, came from the National Futures Association (NFA), the self-regulatory group that, under the proposed rules, has been assigned the task of approving internal models that CFTC-regulated swap dealers want to use to calculate their market and credit risk capital charges instead of using standardized rule-based charges. The NFA letter states that completion of its assigned task in a timely fashion will be difficult without several changes to the CFTC's position, including permitting the use of a model without NFA approval, if the model has been approved by a foreign regulator of a non-US swap dealer or by the prudential regulator of a bank swap dealer affiliate of a US swap dealer. The NFA goes on to say that, even if the CFTC follows the NFA's suggestions to reduce the number of swaps dealers needing model approval, the CFTC should set a compliance date for the capital rules that is no less than 15 months after their effective date to give sufficient time for the validation process.

The second letter, dated March 3, was submitted jointly by the Institute of International Bankers, the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association. This 74 page document explains in great detail why the submitters believe that the proposed rules would, if adopted without modification, "have a significant negative impact on U.S. swap markets." They point out in particular, with examples, that the proposed minimum capital requirement based on 8 percent of the theoretical initial margin associated with covered derivatives does not take into account the effect of risk-mitigating hedges and collateral and could therefore discourage prudent risk management.

A copy of the NFA letter is available here.

A copy of the industry group letter is available here.

NFA Issues Guidance Regarding Coronavirus

On March 4, National Futures Association (NFA) published a Notice to Members with information regarding the Coronavirus. In the notice, NFA acknowledged that Members may be concerned about their ability to meet Commodity Futures Trading Commission (CFTC) and NFA regulatory requirements in light of the potential impact of the Coronavirus. If regulatory relief is necessary, NFA and CFTC staff intend to take a practical approach to offer Members flexibility in implementing contingency plans required to continue business operations.

In addition, NFA encouraged its Members to review and update their business continuity plans to address the potential impact of a pandemic on their businesses and key relationships (such as those with clearing firms, telecommunications networks, third party providers, internal departments, mail or email services and utilities). NFA also requested that Members consider instituting employee trainings to address remote working arrangements.

NFA requested that Members keep NFA apprised of particular concerns or needs for regulatory relief as the Coronavirus situation develops. NFA contact information and more details are available in Notice I-20-10.

CFTC Approves Rule Change Relating to Termination of Exemptive Relief for Foreign Brokers

On March 4, the Commodity Futures Trading Commission (CFTC) announced that it unanimously approved amendments to CFTC Rule 30.10 to codify the CFTC's authority to terminate exemptive relief issued to foreign firms. Through an existing exemptive program, the CFTC provides foreign entities with access to U.S. customers and U.S. customers with increased access to foreign futures markets by allowing customers to interface with foreign brokers subject to comparable regulatory oversight. To apply for exemptive relief under Rule 30.10, a foreign regulator or self-regulatory organization acting on behalf of foreign brokers within its jurisdiction must specify with particularity the corresponding laws and regulations applicable in the broker's home jurisdiction.

The amended rule clarifies the circumstances under which the CFTC may terminate the exemptive relief. Specifically, the CFTC may terminate the exemptive relief if the CFTC determines, after an opportunity to respond, that: (1) there is a material change or omission in the facts and circumstances pursuant to which relief was granted that demonstrate that the standards set forth in Appendix A to Part 30 of this part forming the basis for granting relief are no longer met; (2) the continued effectiveness of any such exemptive relief would be contrary to the public interest or inconsistent with the purposes of the Rule 30.10 exemption; or (3) the arrangements in place for the sharing of information with the CFTC do not warrant continuation of the exemptive relief granted.

The rule provides that the CFTC will give an affected party notice prior to terminating a Rule 30.10 exemption, and the affected party, and any other interested person, will have 30 business days to respond.

The amended rule is effective upon publication in the Federal Register. More information on the Rule 30.10 amendment is available here.

UK DEVELOPMENTS

ESMA Publishes Annual Transparency Calculations

On February 28, the European Securities and Markets Authority (ESMA) published the annual transparency calculations for equity and equity-like instruments. This information is published for the purposes of the MiFID II/MiFIR transparency requirements, in particular:

- pre-trade transparency requirements for all market participants are waived for transactions whose size is above large-in-scale (LIS) thresholds;
- systematic internalisers (SIs) have pre-trade transparency obligations for instruments traded on a trading venue, which are waived if the instrument is illiquid; and
- SIs have pre-trade transparency obligations, which are waived when dealing with orders over the standard market size (SMS).

The LIS thresholds and the determination of liquidity and the SMS are calculated using these annual transparency calculations. Technically, the national competent authorities of the EU member state in which the relevant MiFID

firm is based should make these calculations; however, all EU member states apart from Poland have delegated this obligation to ESMA.

Currently, there are 1,493 liquid shares and 788 liquid equity-like instruments other than shares, which are subject to MiFID II/MiFIR transparency requirements. The full list of assessed equity and equity-like instruments is published on ESMA's Financial Instruments Transparency System (FITRS), available here. The full list for instruments available for trading before January 3, 2018, through separately maintained registers for equity and non-equity instruments, is available here and here respectively.

These calculations are applicable starting April 1, and until then the 2019 annual transparency calculations continue to apply. For more information, please see the March 8, 2019 edition and June 28, 2019 edition of *Corporate & Financial Weekly Digest.*

ESMA's press release is available here.

FCA Publishes TechSprint Report

On March 3, the UK's Financial Conduct Authority (FCA) published a report entitled, "Fostering innovation through collaboration: The evolution of the FCA TechSprint Approach" (the Report).

In the Report, the FCA explained that since April 2016 they have been holding TechSprints, which are also known as "Hackathons," which involve bringing together computer programmers, interface designers and other experts to collaborate intensively over a short period of time on a software project. The purpose of this is to take advantage of the FCA's "convening powers," both as a regulator and RegTech thought leader.

The seven TechSprints held so far ranged in size (from 40 to 200 participants), location (the most recent TechSprint was held in London and Washington DC, in parallel) and subject matter but were consistent in their application of the following "working principles":

- The solution or approach should enhance a firm's regulatory compliance outcomes or promote enhanced outcomes for consumers;
- The initiative is led by industry and characterized by multi-firm collaboration and participation;
- The solution is developed in an open and transparent manner;
- The initiative is made public, ensuring that other participants with genuine interest and contributions to make can be involved;
- The FCA can participate in the discussion but are not being asked to endorse the solutions developed; and
- Experimentation and the learnings this provides are of value and should be facilitated where possible.

The body of the Report describes the process of planning a TechSprint, from choosing the subject matter and participants to briefing the teams and judging the final output. Overall, the FCA reported that these TechSprints are a successful tool for exploring innovative solutions but noted problems relating to, for example, "maximizing post-sprint momentum."

The Report is available here.

FCA Publishes LIBOR Dear CEO Letter

On February 27, the UK's Financial Conduct Authority (FCA) published a "Dear CEO" letter regarding the London Interbank Offered Rate (LIBOR) (the Letter). In the Letter, Head of Asset Management Supervision at the FCA, Nick Miller, noted that "LIBOR will cease after December 2021" and that asset managers must "prepare now for the end of LIBOR."

This is the latest in a series of statements from the FCA and the other UK financial regulators urging firms to transition from LIBOR to overnight risk-free rates (RFRs), including a "Dear CEO" letter in February 2019 (for more information, please see the March 1, 2019 edition of *Corporate & Financial Weekly Digest*) and a suite of documents published in January by the Working Group on Sterling Risk-Free Reference Rates (RFRWG, available here).

In the Letter, Mr. Miller reiterated the FCA's position that "LIBOR ending is a market event and the transition to alternatives is market-led…Firms should not expect or base their transition plans on future regulatory relief or guidance or on legislative solutions."

He also explained, specifically, the role that the FCA expects asset managers to play, both as investors in instruments and funds that reference LIBOR and as operators of such funds. The FCA expects asset managers to engage with their third-party providers to develop and offer new products that reference RFRs and to convert existing products to these alternative rates. Firms must ensure that clients are treated fairly through the transition and are not exposed to "unpredictable or unreasonable costs, losses or risks."

In particular, Mr. Miller noted the product governance implications of the LIBOR transition to RFRs. The potential pricing difference between LIBOR and the alternative RFR could alter the original target market assessment for a fund or its underlying instruments. Any change to the target market assessment could have repercussions for an investment product's distribution strategy, the investment advice given to a client and applicable suitability assessment(s), which should be revised accordingly.

The other sections of the Letter focused on the governance tasks presented by this transition. For example, the FCA expects firms to develop a transition plan, with oversight from the Board, which incorporates all relevant priorities and milestones and is monitored throughout its execution.

Finally, Mr. Miller referenced a LIBOR Q&A, which sets out the FCA's expectations regarding the LIBOR transition and the Senior Managers and Certification Regime (SM&CR). As a first step, firms must identify the senior manager who is responsible for the LIBOR transition and ensure that the Statement of Responsibility and Responsibility Map (if applicable) are updated. For more information on SM&CR, please see the December 20, 2019 edition of *Corporate & Financial Weekly Digest*.

The Letter is available here and the FCA's LIBOR Q&A is available here.

FCA Issues Coronavirus Statement

On March 4, the UK's Financial Conduct Authority (FCA) issued a statement on Covid-19, the novel coronavirus that originated in China in December 2019 and recently spread to Italy and Iran, among many other countries globally (the Statement).

In the Statement, the FCA explained that they are working with the Bank of England and HM Treasury to engage with firms, trade associations and industry bodies to understand the pressures they are facing. This work includes actively reviewing the contingency plans of a wide range of firms.

The FCA noted that all firms are already expected to have contingency plans in place to deal with major events such as this and that firms should be taking all reasonable steps to meet their regulatory obligations. While the FCA has no objection in principle to staff working from home or from alternative sites, firms still need to be able to, for example, use recorded lines when trading and give staff access to any compliance support they may need.

The Statement is available here.

EU DEVELOPMENTS

EBA Announces 2020 Digital Finance Priorities

On March 3, the European Banking Authority (EBA) published a speech by Chair of the EBA, José Manuel Campa, at the 4th Annual Conference on "FinTech and Digital Innovation: Delivering for the Future" (the Speech).

In the Speech, Mr. Campa focused on three discrete areas: 1) the impact of regulation on the development of new technologies; 2) the impact of supervision; and 3) the EBA's plans for 2020 with regards to FinTech.

Regarding the impact of regulation, Mr. Campa described a "patchwork of domestic requirements" across the European Union (EU) that are "impacting firms' capacity to integrate technological solutions into their businesses."

He advocated for consistency in the guidance issued by EU institutions and also identified areas "where additional regulation is needed," in particular in relation to third-party service providers (TPPs) and crypto-assets.

Mr. Campa outlined a similar view of the impact of supervision and noted that a firm with a presence in multiple jurisdictions might encounter "differing approaches" from each local supervisor. Suggesting that these different approaches might be due to a "lack of familiarity with newer technologies," Mr. Campa highlighted the EBA's "FinTech Knowledge Hub" and other initiatives to promote knowledge sharing and education.

Finally, Mr. Campa set out the three areas of focus for the EBA in 2020 in relation to digital finance:

- RegTech (the use of technologies to address regulatory and compliance requirements more effectively and efficiently) and SupTech (relating to the harmonization of technologies used for suspicious transaction monitoring);
- "Platformization," which refers to "the trend towards the reaggregation of products and services on platforms, and emerging new forms of interconnection in the financial sector"; and
- Operational resilience (supporting the implementation of their Guidelines on ICT risk and continuing follow-up work in relation to cryptoassets). For more information, please see the August 23, 2019 edition of *Corporate & Financial Weekly Digest*).

The Speech 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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