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SEC/CORPORATE

SEC Decreases Registration Statement Filing Fees for Fiscal Year 2015

On August 29, the Securities and Exchange Commission announced that, effective October 1, the fees that public companies and other issuers pay to register their securities with the SEC will decrease from $128.80 per million dollars of securities registered to $116.20 per million dollars of securities, a decrease of approximately 10 percent. This decrease in the SEC registration statement filing fee follows a decrease in the filing fee from fiscal year 2013 to fiscal year 2014 (ending September 30) of approximately six percent. This fee rate adjustment applies to the filing fee under Section 6(b) of the Securities Act of 1933 applicable to the registration of securities, the filing fee under Section 13(e) of the Securities Exchange Act of 1934 applicable to the repurchase of securities, and the filing fee under Section 14(g) of the Exchange Act applicable to proxy solicitations and statements in corporate control transactions.

Click here for the SEC's fee rate advisory.

Click here for the SEC's order setting the registration fees.

STRUCTURED FINANCE AND SECURITIZATION

SEC Adopts Regulation AB II

On August 27, the Securities and Exchange Commission at an open meeting unanimously adopted Regulation AB II (Reg AB II). The final rule provides significant revisions to Regulation AB, which provides the rules regarding the offering process and disclosure and reporting requirements for publicly registered asset-backed securities (ABS). Reg AB II was first proposed in April 2010, subsequently re-proposed in July 2011 following the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and re-opened for limited comment in February 2014. The final rule, among other revisions, (i) revises the shelf registration eligibility by removing the previously required investment grade rating requirement, (ii) modifies the deadlines for the filing of offering documents by requiring a three-day waiting period between the filing of the preliminary prospectus and first sale to investors, (iii) requires an integrated offering document (rather than a base prospectus and prospectus supplement), (iv) requires the use of new registration forms SF-1 and SF-3 for ABS registration and (v) adds significant requirements for disclosure of asset-level data for ABS backed by residential mortgages, commercial mortgages, auto loans and leases and debt securities.

Significantly, the SEC did not adopt a proposed requirement that would have applied the enhanced asset-level data disclosure to private 144A transactions. In addition, the SEC did not adopt asset-level disclosure requirements for other asset classes such as equipment loans and leases, student loans or floorplan financings and did not adopt the proposed grouped-data disclosure for credit card ABS. However, the SEC has indicated that it is going to continue to consider these requirements and may propose additional rules in the future.

Under Reg AB II, ABS issuers are required to publicly file on EDGAR a new Form ABS-EE that contains the asset-level data points for each specific asset type required on newly adopted Schedule AL. The asset-level data

is required to be filed in XML, a machine-readable format (Asset Data File), at the time of the offering with both the preliminary prospectus and the final prospectus (subject to an exception for incorporation by reference) and for ongoing reporting on Form 10-D. Commenters to the initial proposal had raised cost, privacy and competitive concerns regarding the disclosure of detailed asset-level information and suggested certain modifications and limitations to address those issues. In the final rule, the SEC took significant steps to address the concerns of commenters by limiting or removing certain data points, but also expressed the importance that investors have the necessary information to be able to fully assess the risks underlying asset-backed securities and to make comparisons across different ABS pools.

The final rule requires compliance one year from the effective date, which is 60 days after the date of the final rule's publication in the *Federal Register*; however, issuers have two years from the effective date to comply with the asset-level disclosure requirements. The adopting release can be found here.

DERIVATIVES

US Banking Regulators Propose Margin Requirements for Uncleared Swaps

On September 3, the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Housing Finance Agency and Farm Credit Administration (collectively, Agencies) proposed rules that would establish margin requirements for certain market participants that enter into uncleared swaps and security-based swaps. The proposed rules are consistent with the international framework for margining derivative transactions that is set out in a paper published in September 2013 by the International Organization of Securities Commissions and the Bank for International Settlements. In general, the persons covered by this proposal include swap dealers, major swap participants, security-based swap dealers, major security-based swap participants (all of the foregoing, Covered Swap Entities) and financial end users. The proposal does not create mandatory margin requirements for uncleared derivatives for any other types of counterparties, but Covered Swap Entities may impose such requirements contractually on their counterparties (as is the current market practice).

Under the proposal, uncleared swaps between Covered Swap Entities and between Covered Swap Entities and financial end users that have material swaps exposure would be subject to mandatory two-way initial margin requirements. ("Material swaps exposure" is defined as more than $3 billion notional in uncleared swaps and FX forwards as a daily average during June, July and August in any year.) The amount of initial margin required to be posted would be based either on the amounts required under the proposal or on amounts determined by an internal margin model utilized by a Covered Swap Entity that has previously been approved by the relevant Agency. However, a Covered Swap Entity would be permitted to adopt an initial aggregate margin threshold of $65 million which must be applied to all the uncleared swaps executed by the Covered Swap Entity and its affiliates with the counterparty and its affiliates (with affiliation being measured by 25 percent ownership). The proposal also specifies the types of collateral that may be posted as initial margin (generally, cash, government securities, liquid debt, equity securities and gold) and sets forth prescribed haircuts for these assets. All initial margin posted must be segregated and held by an independent custodian and may not be rehypothecated.

The proposal also would impose variation margin requirements on uncleared swaps that are effected between Covered Swap Entities and between Covered Swap Entities and financial end users without regard to the swaps exposure of such financial end users. Variation margin would be required to be exchanged on a daily basis, subject to a combined minimum transfer amount of $650,000 for initial and variation margin. The only collateral that could be used for variation margin is cash in any of 11 major currencies. Variation margin is not subject to segregation and may be held and, if permitted by contract, rehypothecated by the relevant secured party.

Under the proposal, the variation margin requirement would become effective on December 1, 2015, while the initial margin requirement would be phased in over a four-year period commencing on that date. As a practical matter, the initial margin rule will not come into effect until December 1, 2019 for entities that have less than $1 trillion in notional amount of uncleared derivatives and foreign exchange forwards (measured on a consolidated basis each year for all affiliated companies in a group by the daily average of their transactions during June, July and August).

The Commodity Futures Trading Commission and the Securities and Exchange Commission are required to enact margin rules for Covered Swap Entities that are not subject to regulation by the Agencies. They have not yet done so, but it is expected that their margin rules will be quite similar.

Comments on the proposed rules must be submitted no later than 60 days after publication in the *Federal Register*.

The joint press release announcing the proposed rules is available here.

The *Federal Register* notice is available here.

CFTC

CME Group Adopts New Disruptive Trading Practices Rule

On August 28, the Chicago Mercantile Exchange, Chicago Board of Trade, New York Mercantile Exchange and Commodity Exchange, Inc. (Exchanges) notified the Commodity Futures Trading Commission that they have adopted a new Rule 575 to prohibit certain disruptive trading practices. Among other things, Rule 575 prohibits activity identified by the CFTC as “spoofing” (bidding or offering with intent to cancel before execution), “quote stuffing practices” (submitting or canceling bids or offers to overload the quotation system or delay another person’s trade execution) and the disorderly execution of transactions during the closing period.

The Exchanges also filed with the CFTC Market Regulation Advisory Notice RA 1405-5. The Advisory Notice provides additional guidance with respect to practices that violate Rule 575. The Notice includes a question-and-answer section as well as a non-exhaustive list of practices considered by the Exchanges to be violative of Rule 575.

Absent action by the CFTC, Rule 575 and the Advisory Notice will become effective September 15.

The CME Group filing with the CFTC is available here.

BANKING

Banking Agencies Adopt Supplementary Leverage Ratio Final Rule

On September 3, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency adopted a final rule modifying the definition of the denominator of the supplementary leverage ratio in a manner consistent with recent changes agreed to by the Basel Committee on Banking Supervision. The revisions to the supplementary leverage ratio apply to all banking organizations subject to the advanced approaches risk-based capital rule. The changes strengthen the ratio by more appropriately capturing a banking organization's on- and off-balance-sheet exposures and, based on estimates, would increase the aggregate measure of exposure across firms.

The final rule modifies the methodology for including off-balance-sheet items, including credit derivatives, repo-style transactions and lines of credit in the denominator of the supplementary leverage ratio. The final rule also requires institutions to calculate total leverage exposure using daily averages for on-balance-sheet items and the average of three month-end calculations for off-balance-sheet items. Certain public disclosures required by the final rule must be made starting in the first quarter of 2015 and the minimum supplementary leverage ratio requirement using the final rule's denominator calculations is effective January 1, 2018.

This rule finalizes the joint notice of proposed rulemaking released on April 8, with certain revisions and clarifications based on comments received on the proposed rule.

To view the final rule and statements about the rule issued by Federal Reserve Chair Janet Yellen and Governor Daniel Tarullo, click here.

Federal Banking Regulators Finalize Liquidity Coverage Ratio

On September 3, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency finalized a rule to strengthen the liquidity positions of large financial institutions.

The rule will for the first time create a standardized minimum liquidity requirement for large and internationally active banking organizations. Each institution will be required to hold high-quality, liquid assets (HQLA) such as central bank reserves and government and corporate debt that can be converted easily and quickly into cash in an amount equal to or greater than its projected cash outflows minus its projected cash inflows during a 30-day stress period. The ratio of the firm's liquid assets to its projected net cash outflow is its "liquidity coverage ratio," or LCR. The LCR will apply to all banking organizations with $250 billion or more in total consolidated assets or $10 billion or more in on-balance-sheet foreign exposure and to these banking organizations' subsidiary depository institutions that have assets of $10 billion or more. The rule also will apply a less stringent, modified LCR to bank holding companies and savings and loan holding companies that do not meet these thresholds, but have $50 billion or more in total assets. Bank holding companies and savings and loan holding companies with substantial insurance or commercial operations are not covered by the final rule.

The final rule is largely identical to the proposed rule, "with a few key adjustments in response to comments from the public." Those adjustments include changes to the range of corporate debt and equity securities included in HQLA, a phasing-in of daily calculation requirements, a revised approach to address maturity mismatch during a 30-day period, and changes in the stress period, calculation frequency and implementation timeline for the bank holding companies and savings and loan companies subject to the modified LCR. The final rule does not apply to non-bank financial companies designated by the Financial Stability Oversight Council for enhanced supervision. Instead, the Federal Reserve Board plans to apply enhanced prudential liquidity standards to these institutions through a subsequently issued order or rule following an evaluation of the business model, capital structure and risk profile of each designated nonbank financial company.

The rule approved by the federal agencies is based on a liquidity standard agreed to by the Basel Committee on Banking Supervision. The LCR will establish an enhanced prudential liquidity standard consistent with section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The rule is generally consistent with the Basel Committee's LCR standard, but is more stringent in certain areas, including a shorter transition period for implementation. The accelerated transition period reflects a desire to maintain the improved liquidity positions that US institutions have established since the financial crisis, in part as a result of supervisory oversight by US bank regulators. US firms will be required to be fully compliant with the rule by January 1, 2017.

To view a copy of the rule, click here.

LITIGATION

Ninth Circuit Holds That Loan Purchasers Are Victims Under the MVRA

The US Court of Appeals for the Ninth Circuit recently affirmed a restitution order in favor of both the originator and purchaser of two fraudulently obtained mortgages under the Mandatory Victim Restitution Act (MVRA).

According to the Ninth Circuit, from 2006 to 2008, Defendant Marco Luis was involved in a conspiracy to engage in monetary transactions in property with fraudulently obtained loans in violation of 18 U.S.C. §§ 1956(h) and 1957. Luis falsely stated the source and amount of co-conspirators' earnings in order to obtain four mortgages, which he then used to purchase parcels of land. By September 2009, all four loans went into default and their fraudulent nature was discovered during a criminal investigation of one of Luis's co-conspirators. In March 2012, Luis pled guilty to two counts of conspiracy and was sentenced to four years in jail. The District Court ordered restitution to the originator of two mortgages and the purchaser of the other two. Luis appealed.

The Ninth Circuit affirmed the restitution order as mandatory under the MVRA because Luis was convicted of an offense against property, and the owners of the mortgages were identifiable victims who suffered pecuniary loss. The Ninth Circuit held that an offense against property did not require physical damage to property, as Luis argued, and that any offense that involves pecuniary loss met the requirement. The Ninth Circuit also held that

under the MVRA a loan purchaser is a victim if the defendant fraudulently obtained the loan and the fraud was not discovered until after the purchase. The Ninth Circuit therefore found an identifiable victim for all four mortgages.

The Ninth Circuit affirmed the order, but vacated the District Court's calculation with respect to the amount of restitution owed to the loan purchaser. The Ninth Circuit held that the District Court erred by calculating the restitution amount in the same way for both the originator and the purchaser. The Ninth Circuit held that the amount for the loan purchaser must be based on the value of the loans when purchased rather than the unpaid principal balance (which is the formula for a loan originator).

United States v. Luis, No. 13-50020 (9th Cir. Aug. 28, 2014).

CFTC Settles Prearranged Trades Violation with Foreign Bank

The Commodity Futures Trading Commission recently accepted an offer of settlement submitted by FirstRand Bank, Ltd. in anticipation of an administrative proceeding resulting from FirstRand's alleged violations of the Commodity Exchange Act (CEA).

According to the CFTC, between June 2009 and August 2011, FirstRand entered into prearranged trades involving corn and soybean futures contracts on the Chicago Board of Trade (CBOT). FirstRand and its trading partner agreed upon the futures contracts they would trade and the direction that each party would take, as well as the quantity, price and timing of each trade. In the settlement offer, FirstRand maintained that the prearranged trades were meant to hedge its position on related futures contracts in the Johannesburg Stock Exchange (JSE). FirstRand asserted that because the JSE permits prearranged trades, the bank mistakenly believed that they were allowed on the CBOT as well. Once FirstRand became aware of concerns regarding the trades, it ceased the practice and cooperated with the CFTC investigation.

Under Sections 4c(a)(1), (2) of the CEA, it is unlawful to offer to enter into a transaction that is a fictitious sale, which includes wash trades, accommodation trades and prearranged trades. These types of trades appear to utilize the open market but actually eliminate market risk and price competition.

Without admitting or denying the CFTC's findings, FirstRand agreed to settle for a civil penalty of $150,000. In addition, FirstRand agreed to: (i) cease and desist from any ongoing violations; (ii) strengthen its internal policies and provide training on fictitious sales; and (iii) provide periodic compliance reporting to the CFTC for a period of two years.

In the Matter of FirstRand Bank, Ltd., No. 14-23 (CFTC Aug. 27, 2014.

EU DEVELOPMENTS

Final Text of UCITS V Is Published

On August 28, the final text of a Directive to update Directive 2009/65/EC (UCITS IV Directive) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) in relation to depositary functions, remuneration policies and sanctions (UCITS V) was published in the *Official Journal of the European Union*.

The *depositary* rules will bring UCITS funds more in line with the requirements for depositaries of alternative investment funds (AIFs) under the AIFM Directive. The requirements include, among other tasks, that the depositary should:

- Ensure that the sale, issue, re-purchase, redemption and cancellation of units of the UCITS are carried out in accordance with applicable national laws and the fund rules or instruments of incorporation.
- Ensure that the value of the units of the UCITS is calculated in accordance with applicable national laws and the fund rules or the instruments of incorporation.
- Ensure that the income of the UCITS is applied in accordance with applicable national laws and the fund rules or the instruments of incorporation.

- Ensure that the cash flows of the UCITS are properly monitored.
- Ensure the safekeeping of the UCITS' assets.
- On a regular basis, provide the management company or the investment company with a comprehensive inventory of all of the assets of the UCITS.

The *remuneration* rules will bring UCITS management companies more into line with alternative investment fund managers (AIFMs) managing AIFs under the AIFM Directive. UCITS management companies are required to establish and apply remuneration policies and practices that promote sound and effective risk management and do not encourage risk-taking that is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS they manage. UCITS management companies must have remuneration policies and practices for staff whose professional activities have a material impact on the risk profiles of the management companies or of the UCITS they manage, including senior management, risk takers, control functions and any employees receiving total remuneration that falls within the remuneration bracket of senior management and risk takers. As with AIFMs under the AIFM Directive, there is also a requirement to balance salaries and bonuses so that applicable staff are not remunerated for taking excessive risk, with a requirement for up to 50 percent bonuses for such staff to be paid in units of the UCITS, subject to deferrals and clawback requirements. As with the AIFM remuneration rules, it remains to be seen whether some EU regulators (such as the UK Financial Conduct Authority or the Irish Central Bank) will eliminate the more onerous elements of the remuneration rules for smaller UCITS management companies (in the way that they have for smaller AIFMs). It is anticipated that the European Securities and Markets Authority will publish guidelines for the remuneration of applicable staff at UCITS management companies in due course, after which EU national regulators will implement their own UCITS remuneration rules on a country-by-country basis.

The *sanctions* requirements in UCITS V are intended to achieve a harmonization of UCITS sanctioning rules across the European Union by requiring EU countries to implement a minimum catalogue of administrative sanctions and measures (including administrative fines), as well as whistle-blowing mechanisms.

UCITS V contains amendments to the current UCITS IV Directive (which itself recasts the preceding UCITS Directives), but does not recast the UCITS IV Directive. UCITS IV and UCITS V directives must therefore be read together for a full understanding of the EU UCITS rules.

UCITS V will become effective on September 17. However, given it is an EU Directive and it is not binding upon market participants until it is implemented into national law, EU countries have until March 18, 2016 to transpose UCITS V into national law, at which time the national implemented rules will become binding upon UCITS managers.

The final text of UCITS V is available here.

OECD Publishes its Standards for the Automatic Exchange of Information

On July 21, the Organisation for Economic Co-operation and Development (OECD) published its Standard for Automatic Exchange of Financial Account Information in Tax Matters. The report contains the OECD's model competent authority agreement (CAA), the common standard on reporting and due diligence for financial account information (CRS) and commentaries on both the CAA and CRS.

The report follows the G20 meeting of the Finance Ministers and Central Bank Governors on April 19, 2013, where the members endorsed automatic exchange as the expected new standard. On May 23, 2013, the European Council agreed to prioritize the efforts to extend automatic exchange at the EU and global levels by May 2014. More than 60 jurisdictions had committed to swiftly implement the CRS into domestic law with 44 of those jurisdictions further agreeing to a common timetable.

The OECD's intention is to create a core set of common standards for information gathering, due diligence standards and the exchange of such relevant information that would apply to those financial institutions operating in jurisdictions that implement the CAA. In creating the standards, the OECD drew upon the experience gained through the intergovernmental approach to implementing the Foreign Account Tax Compliance Act (FATCA). While the OECD hopes that a commonality in approach will limit arbitrage opportunities for tax evaders,

each jurisdiction will still need to implement the CAA and CRS into domestic law, which increases the chances that variations amongst the jurisdictions will occur.

Financial institutions servicing the offshore asset management industry will be familiar with US FATCA. However, they will soon need to turn their attention to the OECD's new standards if the jurisdictions in which they operate adopt these standards. Care will need to be taken to understand the variations between US FATCA, the CAA/CRS and, for those companies where it is relevant, UK FATCA.

While some time remains before these new standards will be implemented into local law, the OECD's standards highlight the next phase in the evolutionary stage of combating tax evasion outside of the United States while continuing to increase the level of complexity and costs of compliance for those operating within the offshore financial centers. This development should be seen as being a further step towards converting the aspiration of tax transparency into reality.

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