Katten
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SEC/CORPORATE

Register for Our 2017 Proxy Season Update Webinar

On Thursday, December 8 at 12:00 p.m. (CT), please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Sard Verbinnen & Co. for a webinar discussion of key developments and trends impacting public companies in the 2017 annual report and proxy season.

Further details are available here; click here to register.

ISS Releases 2017 Proxy Voting Guideline Updates

On November 21, ISS published its 2017 Proxy Voting Guideline Updates, which will be in effect for meetings held on or after February 1, 2017. The US 2017 updates cover numerous policies, with significant changes summarized below:

Restricting Binding Shareholder Proposals

ISS introduced a new policy to recommend against or withhold from members of the governance committee if a company's charter imposes undue restrictions on shareholders' ability to amend its bylaws. Such restrictions include outright prohibition on the submission of binding shareholder proposals, or share ownership requirements or time holding requirements in excess of SEC Rule 14a-8.

Shareholder Ratification of Director Pay Programs

ISS introduced a new policy and will recommend a vote on a case-by-case basis on management proposals seeking ratification of non-employee director compensation, relying on the following factors:

- if the equity plan under which non-employee director grants are made is on the ballot, whether or not it warrants support; and
- an assessment of the following qualitative factors:
    - the relative magnitude of director compensation as compared to companies of a similar profile;
    - the presence of problematic pay practices relating to director compensation;
    - director stock ownership guidelines and holding requirements;
    - equity award vesting schedules;
    - the mix of cash and equity-based compensation;
    - meaningful limits on director compensation;
    - the availability of retirement benefits or perquisites; and
    - the quality of disclosure surrounding director compensation.

Overboarded Directors

ISS changed its policy to recommend a vote against or withhold from an individual director who sits on more than five public company boards or is a CEO of a public company who sits on the boards of more than two public companies besides his/her own.

Equity Plan Scorecard

ISS added an additional factor to its U.S. Equity Plan Scorecard policy and made a few minor changes to its policies for certain equity based compensation plans. Under a new factor, full points will be earned if an equity plan expressly prohibits for all award types the payment of dividends before the vesting of the underlying award, although accrual of dividends payable upon vesting is acceptable. No points will be earned if this prohibition is absent or incomplete. A company's general practice, not enumerated in the plan document, of not paying dividends until vesting will not suffice. In addition, an equity plan must specify a minimum vesting period of one year for all award types under the plan in order to receive full points for this factor, and no points will be earned if a plan allows for individual award agreements that reduce or eliminate the one-year vesting requirement.

Unilateral Bylaw/Charter Amendments

For newly public companies, ISS changed its policy and will generally recommend a vote against or withhold from directors individually, committee members or the entire board if, prior to or in connection with company's public offering, the company or its board adopted bylaw or charter provisions materially adverse to shareholder rights, or implemented a multi-class capital structure in which the classes have unequal voting rights. A vote by shareholders within three years on such shareholder rights will now be insufficient; a sunset provision in the charter documents will be necessary.

The full text of the ISS 2017 Proxy Voting Guideline Updates is available here.

Glass Lewis Releases 2017 Proxy Season Guidelines

On November 18, Glass Lewis released its 2017 U.S. Proxy Season Guidelines. The guidelines are a detailed overview of the key policies Glass Lewis applies when analyzing individual companies and are formally updated on an annual basis.

One of the more significant changes to the Glass Lewis Guidelines is the director overboarding policy. Under this policy, Glass Lewis will generally recommend voting against a director who serves as an executive officer of any public company while serving on a total of more than two public company boards, and against any other director who serves on a total of more than five public company boards. Glass Lewis may consider factors such as the size and location of the other companies where the director serves on the board, the director's board roles at the companies in question, whether or not the director serves on the board of any large privately held companies, the director's tenure on the boards in question, and the director's attendance record at all companies. Glass Lewis may refrain from recommending against certain directors if the company provides sufficient rationale for their continued board service.

Further, Glass Lewis clarified how it approaches corporate governance at newly public entities. Although Glass Lewis believes that such companies should be given adequate time to comply with exchange listing requirements and to comply with basic governance standards, it will review the terms of the company's governing documents in order to determine whether shareholder rights are being severely restricted from the outset. If Glass Lewis concludes shareholder rights are significantly restricted from the outset, it will consider recommending that shareholders vote against members of the governance committee or the directors serving at the time of the governance documents adoption. The specific areas of governance that will be reviewed by Glass Lewis include anti-takeover mechanisms, supermajority vote requirements and general shareholder rights, such as the ability of shareholders to remove directors and call special meetings.

Additionally, Glass Lewis has clarified its approach to board evaluation, succession planning and refreshment. Glass Lewis believes a robust board evaluation process focused on the assessment and alignment of director skills is more effective than solely relying on age or tenure limits.

The full text of the Glass Lewis 2017 Proxy Season Guidelines is available here.

SEC Division of Corporation Finance Issues New C&DIs Relating to Tender Offer Rules

On November 18, the Division of Corporation Finance of the Securities and Exchange Commission issued seven new Compliance and Disclosure Interpretations (C&DIs): 1) two new C&DIs with respect to the tender offer rules under Section 14(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and Regulation 14D; and 2) five new C&DIs with respect to the tender offer rules under Section 14(e) of the Exchange Act and Regulation 14E.

These C&DIs, which are summarized in more detail below, clarify 1) certain disclosure requirements under Schedule 14D-9, which must be filed by an issuer in response to a tender offer and in which such issuer recommends that its shareholders accept, reject or take other action with respect to such tender offer; and 2) the SEC staff's application of the positions previously expressed in the "Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities" no-action letter (issued January 23, 2015) (the "No-Action Letter") and discussed in a *Corporate & Financial Weekly Digest* article from the February 6, 2015 edition, "SEC Issues New Debt Tender Offer Guidance."

1. **C&DI 159.01** clarifies that a financial advisor engaged by an issuer's board or independent committee for the exclusive purpose of providing financial advice constitutes a person "directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with" a tender or exchange offer under Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A (an "Item 1009 Covered Person") if 1) such advisor is providing advice with respect to the tender or exchange offer; and 2) such advisor's analyses or conclusions are discussed in the issuer's Schedule 14D-9. That is the case even if the financial advisor's opinion provides that it is not making a solicitation or recommendation to any of the target company shareholders.

2. **C&DI 159.02** sets forth the SEC staff's expectation that the disclosure of compensation payable to Item 1009 Covered Persons, as required under Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A should generally include:

    a. types of fees payable (e.g., independence fees, "success" fees, periodic advisory fees, discretionary fees), and, if multiple types of fees are payable and the issuer does not quantify the fees in its disclosure, a sufficiently detailed narrative regarding the primary financial incentives for the Item 1009 Covered Persons;

    b. contingencies, milestones or triggers relating to such compensation; and

    c. any other information material to security holders' assessment of Item 1009 Covered Persons' analyses or conclusions.

    Accordingly, disclosure that an Item 1009 Covered Person's compensation is "customary" would generally be deemed insufficient by the SEC staff.

3. **C&DI 162.01** provides that a foreign issuer may satisfy the condition set forth in the No-Action Letter that, if the issuer is an Exchange Act reporting company, the issuer must furnish a press release announcing the abbreviated tender or exchange offer for non-convertible debt (an "Abbreviated Offer") on a Form 8-K prior to noon Eastern time on the first business day of the abbreviated offer, by instead filing a Form 6-K prior to such deadline.

4. **C&DI 162.02** clarifies that an Abbreviated Offer can have minimum tender conditions despite language in the No-Action Letter that states Abbreviated Offers must be made "for any and all" subject debt securities.

5. **C&DI 162.03** clarifies a requirement in the No-Action Letter, that Abbreviated Offers for consideration consisting of "Qualified Debt Securities" (as defined therein) may be made to all qualified institutional buyers (QIBs) and non-US persons for a fixed amount of Qualified Debt Securities; *provided* that a fixed amount of cash consideration is concurrently offered to persons other than QIBs and non-US persons*;* and, *provided, further*, as per this new C&DI, that the amount of cash consideration offered to persons other than QIBs and non-US persons may instead be calculated with reference to a fixed spread to a benchmark so long as the calculation is the same as the calculation used in determining the amount of Qualified Debt Securities.

6. **C&DI 162.04** makes clear that offers may issue Qualified Debt Securities under Section 3(a)(9) of the Securities Act of 1933, as amended (the "Securities Act"), rather than pursuant to Section 4(a)(2) of the Securities Act or Rule 144A thereunder, to "Eligible Exchange Offer Participants" (as defined in the No-

Action Letter) and still conduct an Abbreviated Offer in reliance on the No-Action Letter.

7. **C&DI 162.05** clarifies a requirement in the No-Action Letter, that while an Abbreviated Offer may not be commenced *prior to* 5:01 p.m. on the 10^{th} business day after the first public announcement of a purchase, sale or transfer of a material business or amount of assets described in the No-Action Letter, such Abbreviated Offer may be announced at any time.

The original text of the C&DIs can be found here.

SEC Division of Corporation Finance Issues C&DIs on Offerings Under Regulation A and Regulation D

On November 17, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued four new Compliance and Disclosure Interpretations (C&DIs), three of which relate to offerings under Regulation A and one of which relates to offerings under Regulation D under the US Securities Act of 1933 (the "Securities Act").

1. **C&DI 182.12** discusses the form requirements for an issuer to qualify an additional class of securities by post-qualification amendment to a previously-qualified Regulation A offering statement on Form 1-A. The SEC staff noted in the C&DI that, in order to satisfy the requirements of Item 4 to Part I of Form 1-A ("Summary Information Regarding the Offering and Other Current or Proposed Offerings), the issuer only needs to provide such information about the additional class of securities. The SEC staff also reminded issuers to update Item 6 of Part I of Form 1-A ("Unregistered Securities Issued or Sold Within One Year") to include any class of securities previously issued or sold in a Regulation A offering over the past year.

2. In **C&DI 182.13**, the SEC staff responded to the question of how an issuer calculates whether the change in price in an offering exceeds 20% of the maximum aggregate offering price in order to determine whether the issuer needs to file a post-qualification amendment (or whether such change may be made instead through an offering circular supplement). The note to Rule 253(b) under Regulation A under the Securities Act provides that, if the change in price is no more than 20% of the maximum aggregate offering price, then the issuer is not required to file a post-qualification amendment. The SEC staff clarified that the 20% change is measured from the low end of the range (if the offering price decreases) or from the high end of the range (if the offering price increases). The SEC staff also noted that an issuer may not, in any event, rely upon the note to Rule 253(b) to make an offering in excess of the Tier 1 or Tier 2 limits under Rule 251(a) or if the change in the price of the offering would result in a Tier 1 offering becoming a Tier 2 offering.

3. In **C&DI 182.14**, the SEC staff's interpretation indicated that an issuer making an offering under Regulation A may omit financial information for historical periods in a Form 1-A offering statement if the issuer reasonably believes that such financial information will not be required at the time of qualification of the Form, consistent with the treatment of emerging growth company registration statements under the Fixing America's Surface Transportation Act (a summary of which is available in the ***Corporate & Financial Weekly Digest*** edition of December 11, 2015). The SEC staff clarified that an issuer would be obligated to amend its offering statement prior to qualification to include all financial information required to be included at the time of qualification and to redistribute solicitation materials in accordance with Rule 255(d) under Regulation A if any previously omitted financial information is included in an amended offering statement.

4. **C&DI 256.34** addresses the question of whether an offering by an issuer that involves general solicitation of investors in reliance on Rule 506(c) under Regulation D commenced less than six months after the most recent sale by the same issuer in a private offering in reliance on Rule 506(b) under Regulation D will, together with such Rule 506(b) offering, constitute a single offering under Regulation D. The SEC staff expressed the view that, under these circumstances, so long as the private placement met all of the applicable requirements of Rule 506(b) prior to the general solicitation, such 506(b) offers and sales would not be integrated with subsequent 506(c) offers and sales. As indicated in the SEC staff's interpretation, this position is consistent with Rule 152 under the Securities Act, which provides that a private placement will not lose its exempt status as a result of a subsequent public offering.

The complete text of the new C&DIs is available here, here, here and here.

BROKER-DEALER

CBOE Files Proposal To Amend Priority Rules

On November 22, the Chicago Board Options Exchange, Inc. (the "Exchange" or CBOE) filed a proposal to amend CBOE Rules 6.45A, 6.45B and 6.73, specifying that, for transactions between floor brokers and market makers, the "initiator" of an order is the party responsible for ensuring that transactions are executed in accordance with open outcry priority and allocation requirements and trade-through prohibitions. The Exchange's current rules and interpretations regarding responsibility for trade-throughs were considered ambiguous, and the Exchange has taken the position in enforcement actions that all parties to a trade are liable for any trade-through violation. The filing specifically states that in a typical open outcry transaction, it is the floor broker representing an order and requesting quotes from market makers in the trading crowd. In that circumstance, the floor broker will be deemed to have initiated the transaction.

The proposal does not affect transactions between floor brokers or transactions between market makers. If such transactions result in a trade-through violation, that violation would continue to be enforced against both parties to the transaction.

The Exchange asserts that this proposal places responsibility for ensuring compliance with priority, allocation, and trade-through rules on the appropriate parties.

The Commission has up to 90 days to approve or disapprove the proposed rule change, or institute further proceedings to determine whether the proposed rule change should be amended.

The Exchange's proposal is available here.

DERIVATIVES

See "CFTC Issues No-Action Relief Relating to Risk Disclosure Statements for Non-Institutional Customers," "CFTC Staff Extends Time-Limited Swap Data Reporting Relief for Certain Foreign Swap Dealers and Major Swap Participants" and "CFTC Grants CME Clearing Europe Registration as a Derivatives Clearing Organization" in the CFTC section, and "European Commission Adopts MiFID II Delegated Regulations" and "MiFIR Delegated Regulations Published in Official Journal of the EU" in the EU/Brexit Developments Section.

CFTC

CFTC Issues No-Action Relief Relating to Risk Disclosure Statements for Non-Institutional Customers

On November 30, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight granted no-action relief for futures commission merchants (FCM) and introducing brokers (IB) consolidating risk disclosure statements sent to non-institutional customers (customers that are not eligible contract participants).

CFTC regulations require an FCM or IB to provide each non-institutional customer with written risk disclosure statements before opening a customer's account. The no-action letter clarifies that an FCM or IB may provide its non-institutional customers with the Futures Industry Association (FIA) Combined Risk Disclosure Statement in lieu of the separate disclosure statements the regulations require.

CFTC Staff Letter 16-82 is available here.

CFTC Staff Extends Time-Limited Swap Data Reporting Relief for Certain Foreign Swap Dealers and Major Swap Participants

On November 21, the Commodity Futures Trading Commission Division of Market Oversight extended time-limited relief for certain registered swap dealers (SDs) and major swap participants (MSPs) from the swap data reporting rules set forth in Part 45 and Part 46 of the CFTC's regulations. The relief is available to non-US SDs and non-US MSPs established in Australia, Canada, the European Union, Japan or Switzerland that are not a part of an affiliated group with a US parent entity that is an SD, MSP, bank, financial holding company or bank holding company.

The relief will expire on the earlier of 1) December 1, 2017; or 2) 30 days following the CFTC's issuance of a comparability determination regarding the swap data reporting rules for the jurisdiction in which the non-US SD or non-US MSP is established.

CFTC Staff Letter 16-79 is available here.

CFTC Unanimously Approves Final Rule Amendments to Its Regulations Regarding CPO Financial Reports

On November 21, the Commodity Futures Trading Commission announced unanimous approval of amendments to the required financial reports that a commodity pool operator (CPO) provides on each pool the CPO operates. The amendments contain provisions similar to the guidance previously provided through exemptive relief or no-action letters and include the following changes:

- approved use of additional generally accepted accounting standards in annual reports, account statements, and in Form CPO-PQR;
- relief from the annual report audit requirement for certain new pools with limited participants and contributions;
- relief from the CPO annual report audit requirement if pool participants are exclusively specified insiders; and
- clarification of the requirement to distribute an audited annual report at least once during the life of the pool.

The amendments will go into effect on December 27. The *Federal Register* notice is available here.

CFTC Extends Time-Limited No-Action Relief From the Clearing and Trade Execution Requirements for Certain Affiliated Counterparties

On November 28, the Commodity Futures Trading Commission's Division of Clearing and Risk (DCR) and Division of Market Oversight (DMO) each extended previously issued no-action relief from clearing and trade execution requirements for certain inter-affiliate transactions. As discussed in the November 20, 2015 edition of the *Corporate & Financial Weekly Digest*, DMO previously provided time-limited no-action relief exempting certain affiliates from the trade execution requirement. This relief is available to affiliate counterparties that satisfy CFTC regulation 50.52(a) but not 50.52(b), (c) or (d), and are not exempt from clearing. DMO has extended its relief to December 31, 2017.

The DCR relief permits eligible affiliate counterparties to continue to rely on the alternative compliance framework provided in CFTC regulation 50.52(b)(4)(ii)-(iii) until the earlier of 1) December 31, 2017; and 2) with respect to a particular jurisdiction, 60 days after the date on which the CFTC announces that it has made a comparability determination described in regulation 50.52(b)(4)(i).

CFTC Staff Letter 16-80 is available here.

CFTC Staff Letter 16-81 is available here.

CFTC Grants CME Clearing Europe Registration as a Derivatives Clearing Organization

On November 29, the Commodity Futures Trading Commission approved the CME Clearing Europe (CMECE) registration as a derivatives clearing organization (DCO) under the Commodity Exchange Act. As a registered DCO, CMECE may provide clearing services with respect to 1) swaps, subject to certain requirements; and 2) futures and options on futures contracts traded on or subject to the rules of a designated contract market.

The order granting the CMECE registration is available here.

Changes in Required Minimum Security Deposits for Forex Transactions

On November 28, National Futures Association changed the minimum security deposits required to be collected for certain forex transactions in response to margin changes that CME and ICE recently implemented. For foreign currency futures involving the Mexican peso, Japanese yen and New Zealand dollar, forex dealer members must collect and maintain the following increased minimum security deposits:

- Mexican peso – 8%
- Japanese yen – 4%
- New Zealand dollar – 3%

In contrast, foreign currency futures involving the Swiss franc will have a lower minimum security deposit:

- Swiss franc – 3%

The amendments will go into effect at 5 p.m. (CST) on December 5. Notice I-16-27 announcing the changes is available here.

NFA Proposes Changes to Forex Customer Disclosure Requirements

On November 25, National Futures Association (NFA) submitted to the Commodity Futures Trading Commission a proposed amendment to NFA Compliance Rule 2-36. The amended rule would require a forex dealer member (FDM), upon customer request, to disclose the following information for each of the 15 forex transactions in the same currency pair occurring immediately before and after the customer's transaction:

1. Execution date and time;
2. Customer side (i.e., buy or sell);
3. Quantity;
4. Currency pair;
5. Execution price (including any mark-up);
6. Commission and other charges assessed by the FDM (if applicable); and
7. Currency denomination of commission or other charges.

The FDM must supply the data to the customer within 30 minutes of the customer's request, and send a copy to the NFA. Additionally, the FDM must prominently display a notice on its website informing customers of their ability to request this information.

The proposed amendment is available here.

UK DEVELOPMENTS

Update on UK Brexit Challenge

On November 25, the UK Supreme Court published an update (Update) on its website concerning *R (on the application of Miller & Dos Santos) v Secretary of State for Exiting the European Union* (the Article 50 "Brexit" case). The Update confirms that the UK Supreme Court had considered and determined the outcomes of further applications to intervene in the Article 50 "Brexit" case.

By way of background, on November 3, the UK High Court ruled that the UK government does not have requisite prerogative powers necessary to give notice under Article 50 for the UK to withdraw from the EU. On November 8, the UK Supreme Court confirmed it had granted permission for the UK government to appeal of the High Court's decision. On November 18, the UK Supreme Court confirmed that it had granted applications to intervene submitted by the Scottish Government, Welsh Government, the "Expat Interveners", George Birnie and others, as well as the Independent Workers Union of Greater Britain, and that a reference had been submitted by the Attorney General for Northern Ireland in relation to devolution issues. The case (Case) of the Secretary of State for Exiting the EU appealing the High Court ruling also was made available online.

The Update confirms 1) that Lawyers for Britain Limited have been granted permission to file a written submission in intervention; and 2) that applications to intervene from 4A Law and New Europeans have been refused.

The Update is available here; and the Case, here.

UK FCA Confirms No Guidance to be Published on the Application of the UCITS Remuneration Code

On November 17, the UK Financial Conduct Authority (FCA) updated its webpage focused on Undertakings for Collective Investment in Transferable Securities fund (UCITS) remuneration issues to confirm that it does not intend to publish any specific guidance on the application of the UCITS Remuneration Code. The FCA notes that UCITS management companies may wish to review the correlating requirements of the UCITS V Directive and the Alternative Investment Funds Directive (AIFMD), as well as guidance issued by the European Securities and Market Authority (ESMA) under each of those directives. The FCA indicates that firms also may look to the FCA's existing AIFMD guidance to understand the regulator's expectations for such firms' remuneration policies and procedures.

The FCA's UCITS Remuneration Code webpage is available here.

FCA Publishes Interim Report on Asset Management Market Study

On November 18, the UK Financial Conduct Authority (FCA) published an interim report on its findings from an asset management market study (Report). The FCA launched the market study in November 2015, focusing on competition in the asset management industry and the ability of retail and institutional investors to get value for money when purchasing asset management services.

The Report is divided into 11 chapters covering topics, including: 1) the manner in which investors choose between asset managers; 2) the impact of intermediaries and fund governance bodies on competition between asset managers; 3) analysis of prices, performance and profitability; 4) the ability of asset managers to control costs and quality along the value chain; 5) the effect of intermediaries (such as investment consultants) on competition for institutional asset management; and 6) barriers to innovation and technological advances. While some of these topics are focused on the retail sector, many of the themes will be of broad relevance to the UK asset management industry, including those in the wholesale sector such as UK-based hedge fund managers and other AIFMs.

Overall, the Report highlights a number of areas for improvement. The FCA found that price competition is limited for actively managed funds, and that investors often pay unjustifiably high charges which are not reflected in the relevant funds' returns. The Report notes that strong competition exists on price for passively managed funds; however, the FCA nonetheless identified examples of poor value for money. The FCA stated in the Report that in its view fund objectives are not consistently clear and fund performance is not always reported against an appropriate benchmark. Further, the FCA found that intermediaries and other investment consultants provide valuable due diligence for pension funds, but were not apt at identifying outperforming fund managers, and that conflicts of interest in the investment consulting business model warranted further attention.

In order to address these findings, the FCA has proposed a series of remedies, including: 1) a strengthened duty for asset managers to act in the best interests of investors; 2) a possible new "all-in" fee for investors to improve price transparency; 3) measures to assist retail investors to select funds, including requirements for asset managers to disclose the objectives of the fund and clarify the use of benchmarks on performance; and 4) standardization of information on costs and charges for institutional investors to improve transparency, among others.

The FCA is currently consulting on whether to make a market investigation reference to the Competition and Markets Authority on the investment consultancy market. The FCA has also recommended to HM Treasury that institutional investment advice is brought within the FCA's regulatory remit.

All UK-based asset managers should review the FCA findings in the Report and considering whether or not they need to make adjustments to meet the FCA's objectives.

Comments and feedback on the Report and proposed remedies must be submitted by February 20, 2017.

The Report is available here; and the FCA's accompanying press release, here.

The FCA's terms of reference for the market study are available here.

EU/BREXIT DEVELOPMENTS

European Commission Adopts MiFID II Delegated Regulations

On December 1, the European Commission adopted two delegated regulations (together, Delegated Regulations) to supplement the revised Markets in Financial Instruments Directive. The Delegated Regulations adopted include:

- regulation regarding the application of position limits to commodity derivatives, available here; and
- regulation pertaining to the criteria for establishing when an activity is considered to be ancillary to the main business, available here.

The European Council and European Parliament will consider the Delegated Regulations and, once formally approved, the Delegated Regulations will go into effect 20 days following their publication in the *Official Journal of the European Union*.

Briefing Paper on Legislating for Brexit and the Great Repeal Bill Published

On November 21, the House of Commons published a briefing paper (Paper) that suggested legislation regarding Brexit and the Great Repeal Bill. The Paper covers topics including the likely features of the Great Repeal Bill, the process for repealing the European Communications Act 1972 (ECA), the transposition of EU law into UK law, other primary legislation that implements EU law, and the proposed use of delegated powers, devolved institutions and the UK court system.

Notably, the Paper outlines high-level provisions that the Great Repeal Bill may contain, including: 1) provisions to maintain secondary legislation implemented under section 2(2) of the ECA, to keep them in place once the ECA is repealed; 2) a broad "continuance clause" to transpose all directly applicable EU legislation into UK law on the day the UK officially leaves the EU; 3) commencement provisions; 4) delegated powers to enable ministers to alter primary and secondary legislation to give effect to the withdrawal agreement and to make any changes post withdrawal; 5) provisions detailing a parliamentary procedure for the scrutiny of delegated legislation made by ministers under the Great Repeal Bill; and 6) schedules listing primary legislation to be repealed (for example, the European Union Act 2011).

For more information, see our *Corporate & Financial Weekly Digest* editions of November 11, September 23, July 22, July 22 and June 24.

The Paper is available here; and the House of Commons press release, here.

Brexit FAQ's Published

On November 22, the Department for Exiting the EU published a set of frequently asked questions and answers (Q&A) on the UK's withdrawal from the EU (or Brexit). The Q&A cover topics including the referendum, exiting the EU, migration, trade and the EU single market, EU funding for UK projects, the Great Repeal Bill and EU legislation, and devolution questions in respect of the Scottish Government, Welsh Assembly and Northern Ireland Executive.

The Q&A: 1) confirm that the UK government's intention is to trigger Article 50 (to commence the UK's formal withdrawal process) no later than March 2017; 2) reiterate that in the view of the UK government, triggering Article 50 is a prerogative power; and 3) that the UK government will not pursue an existing model (such as the Norwegian or Swiss models) for the future relationship between the UK and the EU.

The Q&A is available here.

EU Commission Publishes Roadmap of Proposal To Criminalize Money Laundering

On October 25, the European Commission (Commission) published a roadmap (Roadmap) in relation to its proposal for an EU directive on the criminalization of money laundering. The Roadmap forms part of the Commission's action plan (Action Plan) against terrorism financing, published in February 2016, and aims to introduce minimum rules for the definition of the criminal offense of money laundering and sanctions.

The Commission notes that there are significant differences between EU Member States as to the definition of money laundering, the predicate offenses and the sanctions to be imposed and that this impedes effective enforcement and deterrence. The Roadmap sets out the context for the initiative, the problems the initiative aims to address and what it aims to achieve and the manner in which the Commission plans to consult on the Proposal. Notably, the Roadmap states that the Commission will consider both non-legislative action (in the form of EU-wide or national guidance in cross-border money laundering cases) and legislative solutions for a more uniform approach to money laundering in the EU. The legislative solution would transpose international standards and treaties into EU law and is further broken down into three options for consideration. These include harmonizing:

- the definition of money laundering to be in line with the Financial Action Task Force (known as FATF) recommendations, with some discretion left for EU member states for certain matters, such as possession or use of criminal property, self-laundering and attempts and complicity, the scope of predicate offenses of money laundering and appropriate sanctions;
- in accordance with the Warsaw Convention and affording EU member states less discretion, such as in relation to the criminalization of negligent conduct; or
- beyond international obligations, by defining conditions and concepts of money laundering offenses and predicate offenses, implementing sanctions thresholds, and implementing rules on information exchange for enforcement purposes.

Money laundering is already a criminal offense in the UK, so the new directive may be of limited impact in the UK—whereas many other EU member states may have to bring significant new laws into effect to transpose the requirements of the directive into their domestic law.

For more information on the Commission's Action Plan, see the *Corporate & Financial Weekly Digest* edition of February 12.

The Roadmap is available here.

Who Pays for MiFID II implementation in UK?

On November 16, the UK Financial Conduct Authority (FCA) published a consultation (Consultation) on regulatory fees and levies, and its policy proposals for 2017/2018. The Consultation sets forth the FCA's proposals on: 1) the structure of a new levy to fund action against illegal money lending; 2) the relevant groups (fee-blocks) of regulated firms from which the FCA intends to recover the costs of implementing the revised Market in Financial Instrument Directive (MiFID II); 3) proposals for market infrastructure providers to use income as a measure to calculate fees to recover the FCA's annual funding requirement; and 4) amendments and clarifications to be made to the FCA's Fee Manual, among others.

With regard to MiFID II implementation, the FCA notes in the Consultation that it only intends to recover costs from those participants who are themselves most directly impacted by MiFID II. Chapter 3 of the Consultation sets out a list of all relevant firm categories and indicates which will be liable—and whether the FCA proposes to recover costs from them—notably:

- portfolio managers (i.e., firms offering managed account services);
- managers and depositaries of investment funds (whether directly appointed or with authority delegated from an AIFM or a UCITS manager);
- operators of collective investment schemes or pension schemes;
- firms dealing as principal (i.e., proprietary trading firms);
- advisers, arrangers, dealers or brokers;
- corporate finance advisers; and
- market operators, operators of multilateral trading facilities and organized trading facilities and recognized investment exchanges.

Responses to the Consultation must be submitted to the FCA by January 16, 2017. The FCA intends to publish feedback on the Consultation and rules in a final FCA Handbook notice in February or March 2017.

The Consultation is available here.

MiFIR Delegated Regulations Published in *Official Journal of the EU*

On November 21, 2016, three delegated regulations (together, Delegated Regulations) made under the Markets in Financial Instruments Regulation were published in the *Official Journal of the EU*. The Delegated Regulations are:

- Delegated Regulation (EU) 2016/2020 on the criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation, available here;
- Delegated Regulation (EU) 2016/2021 on access in respect of benchmarks, available here;
- Delegated Regulation (EU) 2016/2022 on the information for registration of third-country firms and the format of information to be provided to clients, available here.

The Delegated Regulations will go into effect on December 11, which is 20 days following publication in the *Official Journal of the EU*. However, as with all legislation under MiFID II (including MiFIR and the Delegated Regulations), they do not go into effect across EU member states (and are not binding on market participants) until January 3, 2018.

See "Update on UK Brexit Challenge" in the UK Developments Section.

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

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