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ISS Publishes Results of 2015–2016 Annual Global Policy Survey

On September 28, Institutional Shareholder Services (ISS), a leading proxy advisory firm, published the results of its 2015–2016 global voting policy survey. The survey, which received 421 responses from a combination of institutional investors, corporate issuers and advisors and other corporate governance stakeholders, is an important component in ISS' voting policy formulation process. Some findings from the 2015-2016 survey include:

Compensation Related Survey Results

- **Adjusted Metrics in Incentive Programs**: A significant majority of investor and issuer respondents indicated that non-GAAP (generally accepted accounting principles) or other adjusted performance metrics (Adjusted Metrics) in the incentive compensation context are sometimes acceptable, depending on the nature and extent of the adjustments. Of those respondents that believe that Adjusted Metrics are acceptable, two-thirds responded that Adjusted Metrics are acceptable so long as (1) performance goals and results are clearly disclosed, (2) they are reconciled with comparable GAAP metrics in the proxy statement, and (3) the reasons for the Adjusted Metrics are adequately explained.

- **Director Compensation**: The survey results suggest that most investor and issuer respondents believe that it is acceptable for non-executive directors (NEDs) to receive stock in lieu of cash for retainers or meeting fees. Additionally, a majority of all respondents indicated that the granting of time-vesting stock to NEDs is appropriate. There is less support, however, for the granting of stock options, stock appreciation rights and performance-vesting restricted stock to NEDs. Of the investor respondents, 70 percent responded that the granting of stock options and stock appreciation rights to NEDs is not appropriate, and 63 percent responded that the granting of performance-investing restricted stock is not appropriate. Among non-investor respondents, 50 percent indicated the granting of stock options to NEDs is appropriate, while 69 percent responded that the granting of performance-vesting shares to NEDs is not appropriate.

Governance Related Survey Results

- **Proxy Access**: Survey respondents were asked, in the event that (1) a non-binding shareholder proposal to provide proxy access receives majority support and (2) the board adopts proxy access rights with material restrictions that are not in the majority shareholder proposal, which types of restrictions would potentially warrant negative votes on directors. Of the investor respondents, 72 percent responded that ISS should issue negative director recommendations if an ownership threshold in excess of 3 percent or an ownership duration in excess of three years is adopted (rising to 90 percent when respondents were asked about an ownership duration in excess of three years or an ownership threshold in excess of 5 percent). Issuer respondents were less likely to indicate that ISS should issue negative director recommendations if the board imposes proxy access restrictions similar to the above. If the board sets an ownership threshold of greater than 5 percent, a slight majority of issuers responded that ISS should issue negative director votes, and 40 percent responded that ISS should issue negative recommendations if the ownership duration requirement is in excess of three years.

- **Unilateral Bylaw Amendments**: The survey results suggest that there are several unilateral bylaw amendments that a high percentage of investors find objectionable, including the following: classifying boards (92 percent), establishing supermajority voting requirements for charter/bylaw amendments (89 percent), limiting shareholders' ability to call special meetings or act by written consent (85 percent), adopting fee shifting (78 percent), implementing dissident director nominee compensation restrictions (77 percent), and increasing advance notice requirements (64 percent).

- **Overboarding**: With respect to directors who are not CEOs, 34 percent of investor respondents indicated that a limit of four total board seats is appropriate, 18 percent indicated a limit of five board seats is appropriate and 20 percent indicated a six board limit is appropriate. With respect to directors who are active CEOs, 48 percent of investor respondents indicated that a limit of two total board seats is appropriate and 32 percent indicated a three board limit is appropriate.

- **Director Independence – "Cooling Off Periods"**: ISS policy currently deems a former executive (other than the CEO) serving on his/her former company's board of directors to be independent five years after that individual last held an executive position at the company. Of the investor respondents, 46 percent indicated the five-year period should begin only if the executive leaves his/her executive post and is not a member of the board of directors, and 26 percent of investor respondents indicated ISS's current policy is sufficient. Among non-investor respondents, 68 percent indicated that the five-year period should begin as soon as the executive leaves his/her executive position, and only 18 percent of non-investor respondents indicated support for the position that the five-year period should begin after the executive leaves both his/her executive position and the board of directors.

ISS expects to release its 2016 draft policy updates (and solicit comments on the policy updates) on October 26. ISS then plans to publish its final benchmark voting policies on February 1, 2016.

BROKER-DEALER

FINRA Files Proposed Rule Change to Amend Margin Requirements for the TBA Market

The Financial Industry Regulatory Authority proposed to amend FINRA Rule 4210 to establish margin requirements for to-be-announced transactions, specified pool transactions and collateralized mortgage obligations that are issued in conformity with a program of an agency or government-sponsored enterprise (collectively, Covered Agency Transactions).

Under this proposal, FINRA members that engage in Covered Agency Transactions must establish risk limits for these transactions in accordance with the member's written risk policies and procedures. In addition, for transactions with non-exempt accounts, members must collect maintenance margin from counterparties in an amount equal to 2 percent of the contract value of the counterparty's net long or net short position plus any net mark to market loss. Any deficiency that is not satisfied by the close of business on the next business day must be deducted from the member's net capital until the deficiency is satisfied. If the deficiency is not satisfied within five business, the member must promptly liquidate positions to satisfy the deficiency unless FINRA has specifically granted the member additional time.

Maintenance margin would not be required for transactions where the original contractual settlement is in the same month as the trade date or in the following month if the customer regularly settles its Covered Agency Transactions on a delivery verses payment basis or for "cash"—provided, however, that such exception does not apply to customers that engage in dollar rolls, "round robin" trades, or that use other financing techniques for its Covered Agency Transactions.

No maintenance margin would be required to be collected for transactions with exempt accounts. However, those transactions must be marked to the market daily and the member must collect any net mark to market loss. If this loss is not satisfied by the close of business on the next business day, the member must take the same net capital deductions and liquidation actions noted above.

All requirements to collect any deficiency or mark to market loss from a single counterparty is subject to a $250,000 minimum transfer amount. The proposed rule would exempt from the foregoing margin requirements: (1) transactions with central banks and multilateral development banks; (2) transaction that are cleared through a registered clearing agency, and (3) subject to certain other requirements, short-dated transactions between a member and a counterparty where the dollar amount of the counterparty's gross open positions in Covered Agency Transactions with the member are equal to or less than $2.5 million.

FINRA Provides Guidance on Liquidity Risk Management Practices

The Financial Industry Regulatory Authority has issued Regulatory Notice 15-33 to provide guidance on liquidity risk management practices for senior management and risk managers to consider and implement.

Beginning in March 2014 and continuing into the first quarter of 2015, FINRA conducted a review of the policies and practices at 43 participating firms related to managing liquidity needs in a stressed environment. Each such firm conducted a stress test for a 30-day period using stress criteria selected based on FINRA's review and analysis of broker-dealers whose businesses had failed during the past 30 years. In particular, the tested stresses included funding inventory positions, financing mismatched financing transactions, operational drains, funding customer withdrawals, losses from forced deleveraging and trading losses. As a result of this testing, FINRA found that the large majority of participating firms had sufficient resources, staff and liquidity plans to be likely to surmount the stress scenario posed. However, FINRA found that a small number of smaller firms did not demonstrate their preparedness to surmount the stress scenario.

Based on its review, FINRA expects firms to evaluate their liquidity needs related to market and idiosyncratic stresses, devote sufficient resources to measuring risks, report results to senior management, develop contingency plans for addressing risks, conduct stress tests to evaluate the effectiveness of contingency plans, have a training plan for its staff and have tested processes on which to rely if such stresses occur.

FINRA intends to continue to review firm liquidity risk planning and will use stress tests in the future with groups of firms or as part of the examination of individual firms.

Regulatory Notice 15-33 is available here.

DERIVATIVES

See "CFTC Extends Relief from Electronic OCR Requirements," "CFTC Extends Relief for Eurex Clearing and U.S. Clearing Members" and CFTC Permits ICE Trade Vault to Accept Interest Rate and Foreign Exchange Swaps in the CFTC section.

See "ESMA Publishes Final Report and Draft Technical Standards on New EU Market Abuse Rules" and "ESMA Publishes Final Report and Draft Regulatory and Implementing Technical Standards on MiFID II and MiFIR" in the EU Developments section.

CFTC

CFTC Extends Relief from Electronic OCR Requirements

The Division of Market Oversight of the Commodity Futures Trading Commission has extended no-action relief from certain of the CFTC's ownership and control reporting (OCR) regulations, including electronic reporting via new Form 71, revised Form 40/40S and revised Form 102 (which includes Form 102A, Form 102B and Form 102S). CFTC Letter No. 15-52 replaces CFTC Letter No. 15-03, which previously granted similar relief.

Specifically, CFTC Letter No. 15-52 provides temporary relief from the reporting requirements of (1) Form 102A and Form 102S until April 27, 2016, (2) Form 102B with respect to designated contract market volume threshold accounts until April 27, 2016, (3) Form 102B with respect to swap execution facility volume threshold accounts until February 13, 2017, and (4) Form 40/40S and Form 71 until September 28, 2016. To rely on this relief, market participants must continue to submit legacy Form 102, Form 102S and Form 40/40S, as applicable. Market participants must additionally cooperate with staff of the CFTC's Office of Data and Technology to test and implement any information technology standards or systems related to OCR.

CFTC Letter No. 15-52 also includes specific instructions on submitting legacy Form 102, Form 102S and Form 40/40S. The letter is available here.

CFTC Extends Relief for Eurex Clearing and US Clearing Members

The Division of Clearing and Risk of the Commodity Futures Trading Commission has further extended temporary no-action relief to Eurex Clearing AG and its clearing members that are US persons, which authorizes US clearing members to clear for their proprietary accounts certain interest rate swaps that are specified in an attachment to the no-action letter. The relief further provides that if a US clearing member submits for clearing a swap that has been reported to a CFTC-registered swap data repository (SDR), then Eurex Clearing must report the resulting beta and gamma swaps to an SDR.

Eurex Clearing filed an application for registration as a derivatives clearing organization (DCO) in 2011, and this no-action relief is intended to maintain the status quo with respect to Eurex Clearing's interest rate swaps clearing business pending its registration. The relief will expire at the earlier of January 31, 2016, or the date in which Eurex Clearing becomes registered as a DCO.

CFTC Letter No. 15-54 is available here.

CFTC Permits ICE Trade Vault to Accept Interest Rate and Foreign Exchange Swaps

The Commodity Futures Trading Commission has issued an order to ICE Trade Vault, LLC that adds two additional asset classes of swaps—interest rate and foreign exchange—to the list of asset classes that ICE Trade Vault may accept as a provisionally registered swap data repository. ICE Trade Vault has already been approved to accept swap data for swaps in the credit and other commodity asset classes.

The CFTC's order is available here.

CFTC and Korean Regulators Sign MOU Regarding Cross-Border Clearing Organizations

The Commodity Futures Trading Commission has signed a memorandum of understanding (MOU) with two Korean regulators, the Korean Financial Services Commission and the Korean Financial Supervisory Service to enhance the oversight of clearing organizations operating in both the United States and the Republic of Korea. The MOU emphasizes the importance of working collaboratively as clearing organizations become more globalized and face the ongoing risks associated with financial crises and other emergency events. The MOU seeks to foster increased information exchange through event-triggered notifications, request-based information sharing and periodic meetings.

The MOU is available here. The CFTC press release regarding the MOU is available here.

BANKING

OCC Announces Update to Accounting Interpretations On TDRs, OREO and Pushdown Accounting

On September 29, the Office of the Comptroller of the Currency (OCC) released an update to the Bank Accounting Advisory Series (BAAS). The BAAS covers a variety of topics and promotes consistent application of accounting standards among national banks and federal savings associations. This update includes recent answers to frequently asked questions from the industry and examiners covering areas such as troubled debt restructurings, other real estate owned and pushdown accounting.

The BAAS represents the OCC's office of the chief accountant's interpretations of generally accepted accounting principles and regulatory guidance based on the facts and circumstances presented. National banks and federal savings associations that deviate from these stated interpretations may be required to provide justification to the OCC.

Read more.

Banking Agencies Announce EGRPRA Meeting

On September 28, the Federal Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (FDIC) (collectively, federal banking agencies) announced that they will hold an outreach meeting on Monday, October 19 at the Federal Reserve Bank of Chicago as part of their regulatory review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). The meeting is the fifth in a series of outreach sessions that the federal banking agencies are holding throughout the country. The meeting will feature panel presentations by bankers and consumer and community groups. Interested persons also may present their views on any of the 12 categories of regulations listed here.

FDIC Chairman Martin J. Gruenberg, Comptroller of the Currency Thomas J. Curry and Federal Reserve Governor Lael Brainard are scheduled to attend. Bryan A. Schneider, secretary of the Illinois Department of Financial and Professional Regulation will also attend. Other state banking regulators are invited to participate through the State Liaison Committee of the Federal Financial Institutions Examination Council (FFIEC). The meeting will be webcast live here. Members of the public watching online will be able to submit written comments using the text chat feature at any time during the presentations. In addition to the online option, a toll-free telephone number also will be provided for members of the public who would like only to listen to the meeting, and who may choose later to submit written comments.

EGRPRA requires the agencies, along with the FFIEC, to conduct a review at least every 10 years to identify outdated or otherwise unnecessary regulations. The agencies have divided their regulations into 12 categories and requested comments in the *Federal Register* for nine categories. The agencies will request comment on the remaining three categories later this year. The previously published *Federal Register* notices are available here.

As previously announced, the agencies have expanded the scope of the EGRPRA review to cover newly issued regulations. Comments will be accepted on all rules that have been finalized before the publication of the last in the series of EGRPRA notices.

Details on the Chicago meeting, including registration information and the agenda, are available on the EGRPRA website.

The final outreach meeting will be held in the Washington, DC area on December 2.

CFPB Finalizes Rule to Ease Rules for Small Creditors

On September 21, the Consumer Financial Protection Bureau (CFPB) finalized several changes to its mortgage rules to increase the number of financial institutions able to offer certain types of mortgages in rural and underserved areas, and give small creditors time to adjust their business practices to comply with the rules. The final rule, which takes effect on January 1, 2016, primarily deals with the Ability-to-Repay Rule, and will:

- **Expand the definition of "small creditor":** The loan origination limit for small-creditor status will be raised from 500 first-lien mortgage loans to 2,000 and will exclude loans held in portfolio by the creditor and its affiliates.
- **Include mortgage affiliates in calculation of small-creditor status:** The final rule does not change the current asset limit for small-creditor status, which is set at less than $2 billion (adjusted annually) in total assets as of the end of the preceding calendar year. However, under the new rule the assets of the creditor's mortgage-originating affiliates are included in calculating whether a creditor is under the limit.
- **Expand the definition of "rural" areas:** In addition to counties that are considered to be "rural" under the CFPB's current mortgage rules, today's final rule expands the definition of "rural" to include census blocks that are not in an urban area as defined by the US Census Bureau. The rule adds two new safe harbors for determining whether a property location meets the definition of rural. A creditor will be able to rely on an automated address look-up tool available on the Bureau's website or on a new automated tool that will be provided on the Bureau's website. The rule maintains the current safe harbor for creditors that choose to rely on the county lists available on the Bureau's website.
- **Provide grace periods for small creditor and rural or underserved creditor status:** Creditors that exceed the origination limit or asset-size limit in the preceding calendar year will be allowed to operate, in certain circumstances, as a small creditor with respect to mortgage transactions with applications received prior to April 1 of the current calendar year. The final rule creates a similar grace period for creditors that no longer operated predominantly in rural or underserved areas during the preceding calendar year.

- **Create a one-year qualifying period for rural or underserved creditor status:** The final rule adjusts the time period used in determining whether a creditor is operating predominately in rural or underserved areas, from any of the three preceding calendar years to the preceding calendar year.
- **Provide additional implementation time for small creditors:** Eligible small creditors are currently able to make balloon-payment qualified mortgages and balloon-payment high-cost mortgages regardless of where they operate, under a temporary exemption scheduled to expire on January 10, 2016. The final rule extends that period to include balloon-payment mortgage transactions with applications received before April 1, 2016, giving creditors more time to understand how any changes will affect their status, and to adjust their business practices.

A copy of the final rule is available here.

EU DEVELOPMENTS

ESMA Publishes Final Report and Draft Technical Standards on New EU Market Abuse Rules

On September 28, the European Securities and Markets Authority (ESMA) published a final report (Report) containing draft regulatory technical standards (RTS) and implementing technical standards (ITS) on the new EU Market Abuse Regulation (MAR).

The Report, in line with ESMA's November 2013 consultation/ discussion paper, has nine principal sections covering the main topics on which mandates were given to ESMA (by the European Commission (EC) and set forth in MAR itself) to develop draft RTS and ITS.

The draft RTS and ITS contained in the Report relate to:

- content of notifications to be submitted to EU regulators and the compilation, publication and maintenance of the list of notifications (Annex V);
- the timing, format and template of the submission of notification to EU regulators (Annex VI);
- the conditions that buy-back programs and stabilization measures must meet (Annex VII);
- the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings (Annex VIII);
- systems and notification templates to be used by disclosing market participants conducting market soundings (Annex IX);
- accepted market practices (Annex X);
- the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions (Annex XI);
- the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information (Annex XII);
- the format of the insider lists and format for updating the insider lists (Annex XIII);
- the format and template for notification and public disclosure of managers' transactions (Annex XIV); and
- investment recommendations (Annex XV).

A press release from ESMA (which also covers the contemporaneous release of draft RTS and ITS under Markets in Financial Instruments Directive II) states that ESMA has sent the Report to the EC, which now has three months to decide whether to endorse the draft RTS and ITS. Once the EC endorses the Report, the next stage of the EU legislative process is for the Council of the European Union and the European Parliament to assess the RTS and ITS and, if necessary, to raise any objections. If there are no objections, then the RTS and ITS may be finalised, which may be anticipated in January 2016. While MAR is itself directly applicable in all EU member states, the governments of all 28 EU member states are required to take necessary measures to amend their local securities laws so as to bring the new market abuse RTS and ITS into effect on a country by country basis. The new rules will be applicable across all the European Union from July 3, 2016.

The Report is available online here.

ESMA's press release is also available online here.

ESMA Publishes Final Report and Draft Regulatory and Implementing Technical Standards on MiFID II and MiFIR

On September 28, the European Securities and Markets Authority (ESMA) published a final report (Report) containing draft regulatory and implementing technical standards (Standards) on the revised EU Markets in Financial Instruments Directive (MiFID II) and the EU Markets in Financial Instruments Regulation (MiFIR).

The Standards set out in the Report were the subject of a series of prior publications, including a Discussion Paper from May 2014 and two Consultation Papers from December 2014 and February 2015, respectively. In the Report, ESMA sets out Standards covering 28 topic areas; the Report does not, however, cover all the Standards required by MiFID II and MiFIR, which will be published in due course.

The Standards set out in the Report address the following areas:

- pre-trade and post-trade transparency for equity and non-equity financial instruments, including the trading obligation for over-the-counter derivatives subject to mandatory clearing (Standards 1–5);
- so-called "micro-structural issues," including algorithmic trading, market making, direct market access and co-location (Standards 6–12);
- transaction data reporting and non-discriminatory access to clearing, trading and benchmarks (Standards 13–16);
- requirements applying on and to trading venues (Standards 17–19);
- commodity derivatives, including the "ancillary exemption" from investment firm authorisation and commodity derivative position limits (Standards 20 and 21);
- market data reporting (Standards 22–25);
- straight-through processing requirements for derivatives (Standard 26); and
- best execution and investor protection requirements (Standards 27 and 28).

A press release from ESMA (which also covers the contemporaneous release of draft regulatory and implementing technical standards under the EU Market Abuse Regulation) states that ESMA has sent the Report to the European Commission (EC), which now has three months to decide whether to endorse the Standards. Once the EC endorses the Report, the next stage of the EU legislative process is for the Council of the European Union and the European Parliament to assess the Standards and, if necessary, to raise any objections. If there are no objections, then the Standards may be finalized, which may be anticipated in January 2016 alongside the corresponding MAR standards. The new rules will be applicable across all the European Union from January 3, 2017.

The Report is available here and the accompanying Annex containing the text of the Standards is available here. ESMA's press release is available here.

New Greek Ban on Shorting Shares of Five Greek Banks

On September 30, the Greek national financial regulator, the Hellenic Capital Markets Commission (HCMC), announced that is has imposed an extended ban on the short-selling of Greek bank shares—by any persons anywhere in the world—as a means of stabilizing their share prices.

A prohibition on short-selling Greek-listed shares was imposed by the HCMC in June 2015 at the same time as a number of capital controls were put in place when concerns about Greece being pushed out of the Eurozone caused a run on bank deposits. Since June, Greece has subsequently agreed a €86 billion (approximately $96 billion) bail-out with Germany and its other creditors, €25 billion of which is earmarked for bank recapitalization. Greek banks are due to be recapitalized before December, in advance of new pan-EU bank rescue regulations coming into effect in 2016.

Discussing the new ban on shorting Greek banks, the HCMC said in a statement that the measure will be in force from October 1 to November 9, noting that "any additional pressure on the listed stocks of credit institutions could have consequences." Alluding to the recent elections and government changes in Greece, which many hope will provide more stability to Greece's recent volatile situation, the HCMC went on to say that recent political developments didn't merit an ongoing broad prohibition on short-selling, and consequently it had "decided to prohibit only the short-selling of shares of the credit institutions."

The ongoing ban applies to the shares of the country's four largest banks and one smaller bank: National Bank of Greece, Alpha Bank, Eurobank Ergasias SA and Piraeus Bank, as well as Attica Bank.

For the HCMC statement please click here.

For the European Securities and Markets Authority's official opinion agreeing to the HCMC's measures please click here.

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