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SEC/CORPORATE

Implementation of Pay Ratio Disclosure Requirement Not Expected to Be Delayed

On September 15, at the ABA Business Law Section Annual Meeting, the Securities and Exchange Commission (SEC) Division of Corporation Finance (Division) Director Bill Hinman provided remarks on various matters, including the Division's focus on capital formation-related matters. Of particular note, Director Hinman indicated that he expects that Item 402 of Regulation S-K (the Pay Ratio Disclosure Rule) will take effect as planned and, accordingly, will be effective with respect to compensation paid in fiscal years beginning on or after January 1, 2017 (which would be, for calendar year-end issuers, an issuer's proxy statement for its 2018 annual meeting of stockholders). Also, as indicated by Director Hinman, on September 21, the Division issued further guidance regarding compliance with the Pay Ratio Disclosure Rule, including as to the use of sampling and estimation. We plan to summarize this guidance next week.

SEC Division of Corporation Finance Issues New C&DIs on "Regulation A+"

The Securities and Exchange Commission's (SEC) Division of Corporation Finance (Division) recently issued three new Compliance and Disclosure Interpretations (C&DIs) related to so-called "Regulation A+."

The new C&DIs address the following issues (among others):

C&DI 182.21 provides that a Regulation A issuer that registers a class of its securities pursuant to the Securities Exchange Act of 1934 on a Form 8-A concurrently with (i.e., within five days after) the qualification of a post-qualification amendment to a Form 1-A must include in the post-qualification amendment financial statements that are current at the time the post-qualification amendment is qualified. The full text of this C&DI can be found here.

In C&DI 182.22, the SEC explains that, if a Regulation A issuer's qualified Form 1-A did not contain financial statements for the preceding full fiscal year preceding the fiscal year of effectiveness of the Form 8-A (filed concurrently with the qualification of a post-qualification amendment to the Form 1-A), the staff of the SEC (Staff) would not object if the issuer files the Form 10-K for the fiscal year preceding the fiscal year in which the Form 8-A went effective within 90 calendar days after effectiveness of the Form 8-A. The full text of this C&DI can be found here.

In C&DI 182.23, the SEC explains that, if a Regulation A issuer's qualified Form 1-A did not contain financial statements for one or more quarterly periods following the most recent annual or semi-annual period for which financial statements were included in the Form 1-A and that were completed prior to the Form 8-A becoming effective, the issuer is required to file a quarterly report for each such quarterly period, and the Staff would not object if the issuer files a Form 10-Q for each such quarterly period within 45 days after effectiveness of the Form 8-A. The full text of this C&DI can be found here.

The Division has further updated its C&DIs to reflect updates for the amendments to Rules 147 and 504, the repeal of Rule 505, and non-substantive changes throughout the Rule 147 and Regulation D C&DIs based on the SEC's current rules (e.g., changes to correct outdated rule and statutory references).

BROKER-DEALER

FINRA Delays Rule 4210 Margining of Covered Agency Transactions to June 2018

On September 19, the Financial Industry Regulatory Authority (FINRA) took action to delay until June 25, 2018, the implementation of margin requirements for Covered Agency Transactions under FINRA Rule 4210. As defined in the amendments to FINRA Rule 4210, adopted in 2016, Covered Agency Transactions include (1) To Be Announced (TBA) transactions, inclusive of adjustable rate mortgage (ARM) transactions; (2) Specified Pool Transactions; and (3) transactions in Collateralized Mortgage Obligations (CMOs) issued in conformity with a program of an agency or Government Sponsored Enterprise (GSE), with forward settlement dates.

These margin requirements were scheduled to go into effect on December 15. However, at the request of industry participants seeking additional time to make necessary systems changes and update margining agreements and related documentation (including Master Securities Forward Transaction Agreements), FINRA has agreed to postpone the margin requirement effective date until June 25, 2018 and filed a proposed rule change with the Securities and Exchange Commission (SEC) to that effect. The text of the proposed rule change is available here.

FINRA has also made available SEC FAQs regarding Exchange Act Rules 15c3-1 and 15c3-3 in the context of Covered Agency Transactions, as well as its own FAQs regarding Covered Agency Transactions under FINRA Rule 4210.

The SEC FAQs are available here and the FINRA FAQs are available here.

DERIVATIVES

See "CFTC Provides No-Action Relief From CPO and CTA Registration to a Private University" and "CFTC Provides No-Action Relief From Commission Regulation 4.7(b)(2) Reporting Requirements" in the CFTC section.

CFTC

CFTC Provides No-Action Relief From CPO and CTA Registration to a Private University

On September 13, the Division of Swap Dealer and Intermediary Oversight (DSIO or Division) of the Commodity Futures Trading Commission (CFTC or Commission) granted no-action relief from commodity pool operator (CPO) and commodity trading advisor (CTA) registration to a private university, subject to certain conditions. At issue was (1) the university's collective management of an endowment fund that includes the funds of multiple organizations affiliated with the university (Affiliated Organizations); and (2) the offering, solicitation and operation of multiple planned giving arrangements for donors to the university, which generally provided for a periodic income stream to identified beneficiaries for a specified period of time before the donation reverted wholly to the university's benefit (Planned Giving Accounts).

In granting relief, the DSIO noted (without addressing the university's alternative request for an interpretation that it was not a "commodity pool") that CPO and/or CTA registration could be implicated by these arrangements, because the university's investments office was managing "commingled assets of multiple sources, with direct or indirect exposures to commodity interests." Nonetheless, the DSIO granted no-action relief in respect of amounts contributed by the Affiliated Organizations, noting that:

- The interests of the university and the Affiliated Organizations are very closely aligned, in that both desire to further the mission of the university as a whole;

- The relationship between the Affiliated Organizations and the university is the reason why Affiliated Organizations commit their assets to the endowment fund; and

- The university does not engage in solicitation of the Affiliated Organizations in respect of their investments, and its sole clients are the Affiliated Organizations and Planned Giving Accounts.

CFTC Letter No.17-43 allowed the university to "grandfather" existing arrangements with Affiliated Organizations, but imposed certain conditions on the types of Affiliated Organizations that could invest in the endowment fund prospectively, as further discussed in the letter.

In granting relief with respect to the Planned Giving Accounts, the Division noted that the same aligned interests between the university and Planned Giving Accounts distinguish this structure from typical CPO-CTA arrangements. Moreover, the Division concluded that the university is soliciting donations to support its academic goals and university mission through the Planned Giving Accounts, rather than offering investment management or advisory services, notwithstanding certain tax benefits and income streams accruing to the donors and their beneficiaries. Finally, the Division concluded that alternative regulation under the Uniform Prudent Investor Act and Uniform Prudent Management of Institutional Funds Act was sufficient and appropriate to govern the university's management of assets for the Affiliated Organizations and the Planned Giving Accounts, without also applying the Commodity Exchange Act and CFTC regulations to these arrangements.

The full CFTC Letter No.17-43 is available here.

CFTC Provides No-Action Relief From Commission Regulation 4.7(b)(2) Reporting Requirements

The Division of Swap Dealer and Intermediary Oversight (DSIO or Division) of the Commodity Futures Trading Commission (Commission or CFTC) recently granted no-action relief from the reporting requirements of CFTC Rule 4.7(b)(2) to a commodity pool operator (CPO) of two commodity pools, subject to certain conditions. CFTC Rule 4.7(b)(2) places a reporting requirement on a CPO that relies on such rule to distribute quarterly account statements to commodity pool participants within 30 days after the end of each quarter.

The CPO, in its letter requesting relief, stated that each commodity pool for which it was requesting relief was a "fund of funds," and that it was not administratively feasible for such pools to meet the 30-day deadline for distributing their own account statements, due to their reliance upon information from the account statements received from the underlying funds in which such pools invest (which the CPO indicated were often received only a few days prior to the deadline under the rule). The Commission accepted the CPO's position, and granted exemptive relief conditioned upon the following:

- The CPO must distribute to its participants account statements within 45 days after the end of each month, containing all of the information required to be included in a quarterly statement under CFTC Rule 4.7(b)(2) (and affirmed in accordance with CFTC rules); and

- The CPO must inform current and prospective participants that such account statements will be provided within 45 days after the end of each month.

CFTC Letter No. 17-44 is available here.

UK DEVELOPMENTS

FCA Publishes *Market Watch* Newsletter 53 on LEIs, Market Data and SIs under MiFID II

On September 18, the UK Financial Conduct Authority (FCA) published the latest edition (Number 53) of its periodic newsletter *Market Watch*. In it the FCA has included articles and guidance on the following:

MiFID II Legal Entity Identifiers (LEIs): The FCA has reiterated its previous guidance that starting January 3, 2018 (when MiFID II comes into full effect across the European Union and European Economic Area), all firms subject to MiFID II transaction reporting obligations must have an LEI, as must all eligible clients of these firms. The eligibility criteria include those 'persons' that are a legal entity or structure, including a company, charity or trust. The FCA reminds firms that there is a requirement to renew their LEIs annually.

Market data obligations: The FCA has commented that FCA-regulated firms will be required to use its market data processor (MDP) to meet their MiFID II market data obligations beginning January 3, 2018. Firms will have to submit market data to the MDP in the form of transaction reports, instrument reference data, transparency reports, double volume cap reports and commodity derivative position reports. Firms that want to be able to submit such reports need to sign and return a confidentiality agreement (available on the FCA website), so as to request a copy of the market interface specification (MIS)—which sets forth various technical details required to format and submit market data to the FCA.

MDP entity portal and the data extracts facility: The FCA has also reminded firms that its MDP portal is currently in its testing phase and will be 'live' beginning January 3, 2018. From January 3, firms will have to use the MDP entity portal if they want to request extracts of transaction reports from the FCA (which would be required for the purposes of reviewing and reconciling data submitted to it). There is a limit of one daily request per firm, regardless of how many users the firm has. There is also a 10 million record limit, when a request is based on a date range.

Systematic internalizers (SIs) and the instrument reference data obligation: The FCA has noted that, under Article 27(1) of MiFIR, SIs must submit instrument reference data to the FCA for financial instruments falling under the scope of the transaction reporting regime that are traded on its system, as opposed to those instruments admitted to trading on a trading venue.

Market Watch 53 is available here.

EU DEVELOPMENTS

FCA Gives Firms Breathing Room on MiFID II Compliance

On September 20, a senior official in the UK's Financial Conduct Authority (FCA) opened the door to an informal conformance period for market participants following the implementation of the revised Markets in Financial Instruments Directive (MiFID II), which takes effect on January 3, 2018. The breadth and scope of the new regulatory and compliance requirements under MiFID II have posed serious challenges to market participants and their clients to be ready in time, even following a one-year delay in implementation from January 2017.

In recognition of the uphill battle facing market participants over the next three months, Mark Steward, executive director of enforcement and market oversight at the FCA, confirmed at a conference hosted by the Association for Financial Markets in Europe that the FCA would act "proportionately" in recognition of the significant investments of time and effort already undertaken by firms. Implicitly acknowledging that not all firms will be ready in time, he stated that the test would be whether a firm had taken "sufficient steps" to meet the new MiFID II requirements. By contrast, firms that "have made no real or genuine attempt to be ready or where key obligations are deliberately flouted" would receive "different" treatment.

The drafted version of Mr. Steward's speech is available here.

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

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UK/EU DEVELOPMENTS

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