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SEC/CORPORATE

SEC Division of Corporation Finance Issues C&DIs Regarding Inline XBRL

On August 20, the staff of the Division of Corporation Finance (the staff) of the Securities and Exchange Commission released several new Compliance and Disclosure Interpretations (C&DIs) relating to interactive data/eXtensible Business Reporting Language (XBRL), with a focus on items relating to Inline XBRL format requirements.

Inline XBRL requires registrants to embed their XBRL directly into the main filing as opposed to providing a separate accompanying XBRL file. As a reminder, the requirement to provide Inline XBRL is currently being phased-in for registrants on the following schedule:

Filer Status	Compliance Date
Large accelerated filers reporting using US GAAP	Beginning with fiscal periods ending on or after June 15, 2019
Accelerated filers reporting using US GAAP	Beginning with fiscal periods ending on or after June 15, 2020
All other filers	Beginning with fiscal periods ending on or after June 15, 2021

A US domestic form filer is not, however, required to comply with the Inline XBRL requirements for any form other than Form 10-Q until the filing of its first Form 10-Q after the applicable phase-in date. Additionally, once subject to the Inline XBRL requirements, a registrant also will be required to include Cover Page XBRL tagging, pursuant to Rule 406 of Regulation S-T, for any filings on Forms 10-K, 10-Q, 8-K, 20-F and 40-F.

C&DI 101.01

Beginning with new C&DI 101.01, the staff clarified how Inline XBRL should appear in the exhibit index of filings. Interactive Data Files, including Inline XBRL, should appear as exhibit 101 and Cover Page XBRL should appear as exhibit 104. When Inline XBRL is used, the word “Inline” should appear within the title description for the exhibit. Cover Page XBRL files, which are required to be filed as exhibit 104, should be included with other XBRL files as exhibit 101, with exhibit 104 cross referencing to the exhibit 101 file.

C&DI 101.02

The staff confirmed that registrants that voluntarily submit Inline XBRL prior to the applicable compliance date are not required to comply with the Cover Page XBRL tagging requirements. Cover Page tagging is only applicable to registrants “required” to submit Inline XBRL.

C&DI 101.03

Inline XBRL and the related Cover Page XBRL requires tagging the cover pages of Forms 10-K, 10-Q, 8-K, 20-F and 40-F.

Now, following the applicable phase-in period, all Form 8-K filings will require Cover Page XBRL tagging, even if the filing does not include financial statements for which XBRL data is required.

C&DI 101.04

The requirement noted above to list Cover Page XBRL as exhibit 104 also applies in the case of Form 8-Ks. However, the staff will not object if registrants exclude an exhibit index from a Form 8-K filing if the exhibit index would be included solely to identify Cover Page XBRL.

C&DI 101.05

The staff notes that Cover Page XBRL tagging will require a registrant to tag its company name using Inline XBRL. A company's name, as it appears on the cover page of a filing, may differ from its name as it appears in the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) filing system, and for the most part, such differences will not prevent the filing from being accepted and disseminated. The staff notes that in rare cases such variations may result in a notice of suspension for the filing (in which case the registrant should contact EDGAR Filer Technical Support).

Filers should use this as an opportunity to review the way their company name appears in the EDGAR filing system and ensure it matches the company name as it appears on the cover page of SEC filings.

Others — Timing

- Registrants that voluntarily submit Inline XBRL prior to the applicable compliance date may cease such voluntary Inline XBRL submissions until the applicable compliance date. [C&DI 101.06].
- US domestic form filers are required to comply with Inline XBRL beginning with their first Form 10-Q after the applicable compliance date, not necessarily the first filing after the compliance date. Where a Form 8-K is filed earlier on the same day as such first Form 10-Q filing, Inline XBRL will not be required for the Form 8-K. [C&DI 101.07].

Others — Foreign Private Issuers

- Foreign private issuers that prepare financial statements in accordance with US GAAP are required to comply with the Inline XBRL requirements based on filer status (large accelerated filer, accelerated filer, etc.) as set forth in the compliance phase-in schedule above. Foreign private issuers that prepare financial statements in accordance with IFRS will be required to comply with Inline XBRL for fiscal periods ending on or after June 15, 2021. [C&DI 101.08].
- Filers using Form 20-F and Form 40-F, which have no quarterly filing obligations, will be required to comply with Inline XBRL beginning with the first filing on a form for which Inline XBRL is required after the applicable compliance date. [C&DI 101.09].

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

SEC Issues New Guidance Regarding Proxy Voting Responsibility of Investment Advisers and the Applicability of Proxy Rules to Proxy Voting Advice

Investment Advisers

On August 21, by a vote of 3 to 2, the Securities and Exchange Commission issued interpretive guidance on an investment adviser's fiduciary duties with respect to voting of proxies for client accounts. The guidance makes clear that advisers may agree with their clients that the client, and not the adviser, will vote proxies, but such guidance is generally impractical for advisers to private funds and registered investment companies (because there is no practical way to assign voting power to the funds).

When the adviser retains the obligation to vote proxies, it must do so with care and loyalty to the clients. The SEC stated that this may involve individualized analysis of how to vote in certain cases. It also might be necessary for advisers to adopt different proxy voting procedures for different funds they manage. When an investment adviser has the authority to vote on behalf of its client, the investment adviser is required to have a reasonable understanding of the client's objectives and must make voting determinations that are in the best interest of the client. Accordingly, the SEC noted, investment advisers must form a reasonable belief that its voting determinations are in the best interest of the client and should conduct an investigation reasonably designed to ensure that the voting determination is not based on inaccurate or incomplete information. The adviser must annually review its proxy voting practices and document this review.

If a proxy advisory service is used to help the adviser vote proxies, the adviser must conduct due diligence on the proxy advisory service and adopt policies and procedures relating to monitoring the quality of the proxy advisory service. This could include, for example, considering additional information beyond what the proxy voting service provides, including an issuer's proxy material or other materials provided by stakeholders. An investment adviser also should consider whether a proxy advisory service has adequately disclosed its methodologies for formulating its recommendations. The SEC also observed that use of a third-party proxy advisory service may be beneficial to investment advisers in cases where a conflict of interest may exist. However, the SEC noted that such reliance does not relieve the investment adviser of its obligation to make voting determinations in the client's best interest or its obligation to provide full and fair disclosure of any conflicts of interest.

Proxy Voting Advice

The SEC also issued new interpretative guidance regarding the applicability of the federal proxy rules to proxy voting advice. The SEC noted that the use of proxy advisory firms, which would include Institutional Shareholder Services (ISS) and Glass Lewis, has become more widespread and now includes a broadened array of services.

In particular, the SEC examined whether the proxy voting advice provided by the proxy advisory firms constitutes a "solicitation" within the meaning of the federal proxy rules (concluding that generally, yes, such advice does constitute a solicitation) and outlined the import of Rule 14a-9 (False or Misleading Statements) to such solicitations.

Further, the SEC noted that while such solicitations would generally be exempt from the informational and filing requirements of the proxy rules, the SEC staff is considering recommending that the SEC propose rule amendments that would address proxy advisory firms' reliance on these exemptions contained in the Securities Exchange Act of 1934 Rule 14a-2(b), though nothing in the interpretative guidance challenges the ability of the advisory firms to continue relying on these exemptions.

Solicitation. In deciding that proxy voting advice constitutes a solicitation the SEC noted that the definition of solicitation is broad and includes communications to security holders "under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." It observed that proxy advisory firms provide voting recommendations to their clients, touting their expertise in researching and analyzing the matters submitted for a shareholder vote. Even where a proxy advisory firm provides recommendations based on a client's own tailored voting guidelines, the proxy adviser's analysis and advice generally should be considered a solicitation. Similarly, in circumstances where clients may not follow the advice of the proxy adviser, the recommendations would still constitute a solicitation. The SEC rejected the view that proxy voting advice from advisory firms should be viewed as "unsolicited" voting advice, as the advisory firms invite client inquiries through the marketing of their expertise and the researching and analyzing of proxy issues.

Rule 14a-9 (False or Misleading Statements). While any solicitation by a proxy advisory firm may be exempt from the informational and filing requirements of the proxy rules, any such solicitation is still subject to the anti-fraud provisions of Rule 14a-9, which prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact. Any proxy voting adviser, must not make any materially false or misleading statements or omit material facts, such as information underlying the basis of the advice or which would affect the proxy adviser's analysis and judgments. In particular, the SEC identified several specific items that may require disclosure in the context of proxy voting advice, including:

- an explanation of the methodology used by the advisory firm to formulate its voting advice;
- the extent that any advice is based on information other than what has been publicly disclosed by the subject company; and
- any material conflicts of interest in connection with providing the advice.

The SEC's full release is available [here].

SEC Announced Charges for Regulation FD Violations

On August 20, the Securities and Exchange Commission announced it had charged Florida-based TherapeuticsMD Inc. with Regulation FD violations stemming from alleged sharing of material non-public information with research analysts without also publicly disclosing the information, in what appears to be the first such Regulation FD enforcement case brought by the SEC in the last six years.

Regulation FD generally prohibits public companies, or persons acting on their behalf, from selectively disclosing material, nonpublic information to certain covered persons, including institutional investors, securities analysts and other securities professionals. Under Regulation FD, material, nonpublic information may not be disclosed to these covered persons unless the information is contemporaneously disclosed to the public.

The SEC alleged two instances of selective disclosure of material information in violation of Regulation FD relating to the company's interactions with the FDA. First, in June 2017, the company publicly disclosed it was holding meetings with the FDA about a new drug approval but also sent a separate, private message to research analysts in which the meetings were further described as "very positive and productive." The following day, the company's stock price closed up 19.4 percent, on heavy trading volume. Similarly, the following month, the company provided additional details to analysts via email about supplemental information submitted to the FDA. This information was not publicly disclosed.

Importantly, the SEC's order found that, at the time of these disclosures, the company did not have policies or procedures in place regarding compliance with Regulation FD.

TherapeuticsMD consented to the SEC's order, without admitting or denying the findings and agreed to pay a $200,000 penalty.

This enforcement action serves as a reminder that public companies should ensure that their corporate policies include appropriate procedures for the dissemination of material information and interactions with analysts, in compliance with Regulation FD, and that company personnel are properly trained as to compliance with these policies.

Additional information on the SEC's order is available here.

DERIVATIVES

See "FDIC Approves Amendments to the Volcker Rule" in the CFTC section.

CFTC

FDIC Approves Amendments to the Volcker Rule

On August 20, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) approved their version of a set of amendments intended to simplify some of the requirements of the regulations implementing Section 13 of the Bank Holding Company Act of 1956 (the "Volcker Rule"), which was enacted as Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Volcker Rule generally prohibits banking entities from engaging in proprietary trading and from owning or controlling hedge funds or private equity funds subject to numerous qualifications and exemptions set forth in the Volcker Rule regulations, which are identical sets of rules adopted by each of the Volcker Rule regulators (the FDIC, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Federal Reserve), the Commodity Futures Trading Commission (CFTC), and the Securities and Exchange Commission). These final amendments incorporate the responses of the Volcker Rule regulators to the numerous comments they received when they initially proposed a set of amendments in 2018.

As summarized by the FDIC, the final rule will:

- base compliance under the Volcker Rule on the size of a banking entity's trading assets and liabilities. Banking entities with total consolidated trading assets and liabilities of at least $20 billion would be subject to a six-pillar compliance program, annual CEO attestation, and metrics requirements. Banking entities with total consolidated trading assets and liabilities between $1 billion and $20 billion would be subject to a simplified compliance program. Banking entities with total consolidated trading assets and liabilities of less than $1 billion would be subject to a presumption of compliance. The final rule also simplifies the trading activity information that banking entities are required to provide to the relevant government agencies;
- no longer subject a banking entity to the short-term intent prong if the banking entity is already subject to the market risk capital prong;
- eliminate the rebuttable presumption that financial instruments held for fewer than 60 days are within the short-term intent prong and replace it with a new rebuttable presumption that financial instruments held for 60 days or longer are not within the short-term intent prong;
- revise the definition of "trading desk" to provide for consistent treatment across different regulatory regimes, including the market risk capital prong;
- allow for a banking entity, under certain conditions, to elect to be subject to the market risk capital prong as an alternative to the short-term intent prong, even if the banking entity is not already subject to the market risk capital prong;
- modify the liquidity management exclusion from the definition of "proprietary trading" to allow for banking entities to use a wider range of financial instruments to manage liquidity. In addition, new exclusions will be added for error trades, certain customer-driven swaps, hedges of mortgage servicing rights, and purchases or sales of instruments that do not meet the definition of "trading assets and liabilities" under the applicable reporting form;
- add a presumption of compliance with the reasonably expected near-term demand requirement for trading within certain internal limits for underwriting and market making-related activities; but banking entities will now be required to maintain and make available upon request records of any such breaches or increases and follow certain internal escalation and approval procedures in order to remain qualified for the presumption of compliance;
- streamline the criteria that applies when a banking entity seeks to rely on the hedging exemption of the proprietary trading prohibition; and
- limit the impact of the Volcker Rule on the foreign activities of foreign banking organizations.

The OCC has already taken identical action to amend their regulations and the Federal Reserve, CFTC and SEC are expected to do so imminently. The amendments will have an effective date of January 1, 2020, and a compliance date of January 1, 2021. However, a banking entity may voluntarily comply, in whole or in part, with the changes to the rule prior to January 1, 2021.

A copy of the FDIC's press release is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

See "ESMA and EBA Respond to Letter From European Commission on Cryptoassets Work" in the EU Developments section.

EU DEVELOPMENTS

ESMA and EBA Respond to Letter From European Commission on Cryptoassets Work

On August 20, the European Securities and Markets Authority (ESMA) published a letter written jointly with the European Banking Authority (EBA) and addressed to the European Commission (EC) relating to cryptoassets. The letter responds to a letter from the EC dated July 19.

The letter begins by welcoming the EC's work responding to issues identified in the January 2019 reports by ESMA and the EBA on cryptoassets and initial coin offerings (for more information, see the January 11, 2019 edition of *Corporate & Financial Weekly Digest*). ESMA and the EBA agree that it is vital that further work progresses urgently to inform any actions taken by the new EC.

The letter goes on to state that, as well as continuously monitoring market developments, ESMA and the EBA have a number of work streams underway relating to cryptoassets. At the international level, they are engaging with the Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS), the Financial Action Task Force (FATF), the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO). This work is intended to help inform a common approach at international level, for example, on matters such as the prudential treatment of banks' exposures to cryptoassets, as well as the regulatory treatment of cryptoasset exchanges and trading platforms.

At the EU level, ESMA and the EBA will shortly launch a new stock-taking exercise of national regimes applicable to cryptoassets. This will include questions relating to the regulatory treatment of stablecoins, in the light of their increasing prominence. The letter adds that stablecoins also will be discussed at an event of the European Forum for Innovation Facilitators (EFIF) in September, along with a range of other financial technologies. The discussions at the EFIF level are intended to enhance national competent authorities' understanding of the underlying technologies and their application in the financial services sector, and to promote a common regulatory and supervisory approach.

The letter 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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