Katten
Katten Muchin Rosenman LLP

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SEC/CORPORATE

Register for Our 2019 Proxy Season Update Webinar

Please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Meridian Compensation Partners on Thursday, December 13 at 12:00 p.m. (CT) for a webinar discussion of key developments and trends impacting public companies in the 2019 annual reporting and proxy season.

Further details are available here; click here to register.

BROKER-DEALER

FINRA Proposes Rule Change Relating to Rule 4512 (Customer Account Information)

On November 28, the Financial Industry Regulatory Authority filed a proposed change to Rule 4512(a)(3) (Customer Account Information) with the Securities and Exchange Commission. FINRA Rule 4512(a)(3) currently requires member firms to obtain the "wet" signature of each named, natural person authorized to exercise discretion in an account. Members have stated that the requirement to obtain a "wet" signature raises operational costs without providing meaningful investor protections and that the requirement puts members at a competitive disadvantage to investment advisers (who are allowed to obtain electronic signatures).

Accordingly, FINRA is proposing to amend the Rule to also provide members with the option of obtaining an electronic signature. Further, FINRA also is proposing to amend the Rule to clarify that it is limited to discretionary customer accounts maintained by a member for which associated persons of the member are authorized to exercise discretion.

If the SEC approves the proposed rule change, FINRA will announce its effective date in a Regulatory Notice within 60 days of such approval, and the effective date of the rule change will be no later than 30 days following such Regulatory Notice.

The proposed Rule change is available here.

SEC Proposed Rule Change To Amend Nasdaq Rule 4756(c)(2)

The Nasdaq Stock Market LLC (Nasdaq) has filed a proposed change to Nasdaq Rule 4756(c)(2) with the Securities and Exchange Commission. Rule 4756(c)(2) provides that, for each security listed on Nasdaq, the aggregate size of all quotes and orders at the best price to buy and sell will be transmitted for display to the appropriate network processor, unless the aggregate size is less than one round lot.

The proposed amendment to Rule 4756(c)(2) provides that Nasdaq will be allowed to aggregate odd-lot-sized displayed orders at multiple price points that equal at least a round lot for purposes of transmitting Nasdaq's best ranked displayed order(s) to the appropriate processor. Although the amendments to Rule 4756(c)(2) were effective upon filing, Nasdaq has designated the proposed amendments to be operative in the first quarter of 2019, and will announce the exact date at least 30 days prior to such effective date.

On November 28, the SEC issued a notice regarding the proposed amendment to Nasdaq Rule 4756(c)(2) and requested comments regarding such rule change, including whether the proposed rule change is consistent with the Securities Exchange Act of 1934. All comments should be submitted on or before December 26.

The proposed Rule change is available here.

The SEC request for comments is available here.

SEC Adopts Securities Act Rule 139b To Promote Research Reports on Investment Funds

On November 30, the Securities and Exchange Commission adopted new Rule 139b under the Securities Act of 1933. Rule 139 currently provides a safe harbor for the publication or distribution of research reports concerning one or more issuers by a broker-dealer participating in a registered offering of a covered issuer's securities. However, Rule 139's safe harbor does not extend to the publication or distribution of research reports by a broker-dealer with respect to registered investment companies or business development companies.

New Rule 139b extends the current safe harbor available under Rule 139 to "covered investment fund research reports." "Covered investment fund research reports" include research reports published or distributed by a broker-dealer relating to a covered investment fund or any securities issued by such a covered investment fund. However, research reports published or distributed by the covered investment fund or any affiliate thereof, or any research report published or distributed by a broker-dealer that is an investment adviser of such covered investment fund, are not covered under the new safe harbor contained in Rule 139b. A "covered investment fund" includes registered investment companies, business development companies, and certain commodity- or currency-based trust funds. Rule 139b is intended to promote research on mutual funds, exchange-traded funds, registered closed-end funds, business development companies and similar investment funds.

Rule 139b will become effective 30 days following the publication of the notice in the *Federal Register*.

The final Rule is available here.

DERIVATIVES

See "CFTC Proposes To Amend Annual Privacy Notice Requirement" and "CFTC Grants Exemption From SEF Registration to Four Additional MTFs" in the CFTC section.

CFTC

CFTC Proposes To Amend Annual Privacy Notice Requirement

The Commodity Futures Trading Commission has proposed to amend its regulations to eliminate the requirement for registered firms to provide annual privacy notices to their customers, under certain conditions, consistent with amendments made to the Gramm-Leach-Bliley Act in late 2015. If adopted, the proposed amendments would provide an exemption to registered futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, major swap participants and swap dealers from the requirement to deliver an annual privacy notice. To qualify for the exemption, a registrant must meet the following conditions:

> (1) The instances in which the registrant provides nonpublic personal information to unaffiliated third parties must be limited to certain specified exceptions set forth in CFTC Regulations and any other exceptions adopted by the CFTC; and
>
> (2) The registrant must not have changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were previously disclosed to the customer.

Comments on the proposal may be submitted up to 60 days after publication in the *Federal Register*.

More information is available here.

CFTC Grants Exemption From SEF Registration to Four Additional MTFs

The Commodity Futures Trading Commission has amended its order granting an exemption from swap execution facility (SEF) registration to include four additional multilateral trading facilities: Creditex Brokerage LLP; Currenex; FX Connect; and Thomson Reuters. The order, which was originally issued by the CFTC in December 2017 and discussed in the December 15, 2017 edition of *Corporate and Financial Weekly Digest*, has the effect of allowing the exempted trading facilities to execute transactions that are subject to the CFTC's trade execution requirements, and to offer trading in swaps that are not subject to the CFTC's trade execution requirement to US person counterparties, without registration as a SEF.

More information on the amendment is available here.

NFA Proposes To Amend Interpretive Notice on Information Systems Security Programs

National Futures Association (NFA) has proposed to amend its interpretive notice on information systems security programs (ISSPs) to further clarify each member's obligations relating to its ISSP, including training, approval and incident reporting.

With respect to ISSP training, the amended interpretive notice will require members to train their employees upon hiring and on at least an annual basis thereafter. Members also must identify the specific topics covered by the training program.

With respect to approval of the ISSP, the interpretive notice currently requires that a member's ISSP be approved in writing by the member's chief executive officer, chief technology officer or other executive level official. The amendment will remove the term "executive level official" and replace it with "senior level officer with primary responsibility for information security or other senior official who is a listed principal and has the authority to supervise the Member's execution of its ISSP."

With respect to incident reporting, the amended interpretive notice will require members (other than futures commission merchants for which NFA is not the designated self-regulatory organization) to notify NFA of cybersecurity incidents resulting in a loss of a member's capital or a loss of customer or counterparty funds. Members also must notify NFA of any cybersecurity incident for which the member is required to notify its customers or counterparties pursuant to state or federal law.

Finally, NFA has proposed to remove from the interpretive notice references to various cybersecurity best practice and standard setting organizations.

Absent any objection by the Commodity Futures Trading Commission, the proposed amendments will become effective on December 14.

The proposed amendments are available here.

UK DEVELOPMENTS

UK Securitization Regulations 2018 Published

On December 4, the UK Securitization Regulations 2018 (UK Regulations) were published, together with an explanatory memorandum.

The UK Regulations reflect the application of the EU Securitization Regulation in the UK. The EU Securitization Regulation harmonizes and reforms existing rules on due diligence, risk retention and disclosure for securitizations, securitizing entities and EU regulated institutional investors. It also creates a new framework for simple, transparent and standardized securitizations and asset-backed commercial paper programs.

Among other things, the UK Regulations designate the UK Financial Conduct Authority and Prudential Regulation Authority as the competent authorities in relation to the EU Securitization Regulation. The UK Regulations amend

the Financial Services and Markets Act 2000 and other UK legislation, to create the new supervisory, investigative and sanctioning powers required by the EU Securitization Regulation.

The UK Regulations will become effective on January 1, 2019, to coincide with the EU Securitization Regulation.

The UK Regulations are available here.

The accompanying explanatory memorandum is available here.

EU/BREXIT DEVELOPMENTS

ECON Votes To Adopt Draft Reports on Cross-Border Distribution of Collective Investment Funds

On December 4, the European Parliament's Economic and Monetary Affairs Committee (ECON) published a press release announcing that it has voted to adopt draft reports on the European Commission's legislative proposals for a Regulation and a Directive on the cross-border distribution of collective investment funds. ECON initially published the draft reports in September 2018 (for further details, see the September 28 edition of *Corporate & Financial Weekly Digest*).

The proposed Regulation sets out a harmonized framework concerning certain aspects of the cross-border distribution of funds, such as marketing communications and member states' marketing requirements. The proposed Directive contains amendments to the Undertaking for the Collective Investment in Transferable Securities (UCITS) Directive and the Alternative Investment Fund Managers Directive relating to, among other things, pre-marketing and the discontinuation of marketing. (For further details on the Regulation and Directive proposals, see the March 16 edition of *Corporate & Financial Weekly Digest*.)

In the press release containing the latest announcement, ECON highlights changes that it proposes to make to the EC's proposal, including:

- **Marketing**: communications targeted at small investors in funds should present a detailed account of risks, a summary of investors' rights and information about national collective redress mechanisms in case of litigation.

- **Pre-marketing**: pre-marketing of a fund, used to test the waters in a new country before it starts marketing activities, should not lead to any sales of investment units or shares. Moreover, prior to such activities, the manager should notify both its home Member State and the Member State in which the pre-marketing will take place.

- **De-notification**: an investment fund should be able to cease its activities in a host Member State under certain conditions. The fund should make an offer to repurchase all UCITS units held by investors in such Member State, as well as make clear the consequences for investors, if they choose to continue to hold the units.

The press release is available here.

Provisional Political Agreement Reached on CRR II Regulation and CRD V Directive

On December 4, the European Parliament published a press release announcing that it reached provisional political agreement with the Council of the European Union on the proposed revisions to the Capital Requirements Regulation (CRR), or CRR II, and to the Capital Requirements Directive (CRD) IV, or CRD V. The European Parliament also published a separate press release setting out the details of the agreement.

The latter press release highlights amendments made to the proposals relating to, among other things:

- In the spirit of proportionality, simplified requirements for banks that are "small and non-complex institutions," particularly in relation to reporting;

- The binding three percent leverage ratio and an additional 50 percent buffer for global systematically important institutions;

- Refined Net Stable Funding Ratio rules for ascertaining whether an institution holds sufficient stable funding to meet its funding needs during a one-year period under both normal and stressed conditions; and

- The extension of reduced capital requirements for small and medium enterprise exposures beyond €2.5 million;

The European Parliament states that the plenary will have to officially adopt the agreement and that the vote should take place early in 2019.

The European Parliament press releases are available here and here.

EU Council Agrees to Approach on EMIR 2.2

On December 3, the EU Permanent Representatives Committee (COREPER) endorsed the EU Council's general approach on a revision of the European Market Infrastructure Regulation (EMIR 2.2), as well as a decision on a revision to the statute of the EU system of central banks and the European Central Bank (ECB), specifically taking into account the effects of the United Kingdom's withdrawal from the European Union on the EU financial system.

The European Commission (EC) proposal, published in June 2017, aims to strengthen the supervision of central counterparties (CCPs) in order to take into account the growing complexity and cross-border dimension of clearing in the European Union. For further details, see the June 16, 2017 edition of the *Corporate & Financial Weekly Digest*.

The EU Council's press release includes links to the regulation on the authorization of CCPs and requirements for the recognition of non-EU CCPs, as well as the modification of article 22 (on payment systems and clearing systems for financial instruments) of the statute of the ECB.

By approving the EU Council's general approach, the COREPER is mandating trilogue negotiations between the EU Council, the European Commission and the European Parliament, which can now commence.

The EU Council's press release is available here.

LMA Publishes Paper on Impact of a No-Deal Brexit on the European Loan Market

On December 3, the Loan Market Association (LMA) published a paper on the consequences of a scenario in which the United Kingdom withdraws from the European Union (Brexit) without concluding a withdrawal agreement, commonly referred to as a "no-deal Brexit." The paper focuses on the impact of a no-deal Brexit on lending by UK lenders to borrowers located in the remaining 27 member states of the European Union (EU27), and the wider negative impact on the EU economy.

In its paper, the LMA states that it is vital that transitional arrangements are put in place as soon as possible so that borrowers are adequately protected, irrespective of the manner in which Brexit is affected. The LMA sets out a number of issues which arise when considering the need for transitional arrangements in the context of a syndicated loan market, along with proposed solutions, such as:

- Licensing and the ability to conduct cross-border business with respect to both new and existing customers in the EU27;

- Ensuring the continuing validity, effectiveness and enforceability of the loan contract itself, including the extent to which courts of the EU27 will continue to give effect to judgments of English courts;

- Ancillary issues beyond the scope of core lending activity, but which might impact the decision or ability of an institution to lend.

The LMA's paper also notes that, as part of many syndicated loan arrangements, borrowers require access to not only the syndicated loan itself, but also an integrated, so-called "package" of products and services provided by both syndicate lenders and potentially other specialist providers. Without appropriate transitional arrangements in place to ensure ongoing access to the full range of products and services, the LMA states that many borrowers may find themselves in a difficult situation if a particular product becomes illegal to provide by a particular party post-Brexit.

The LMA concludes by advocating the imposition of transitional arrangements as a matter of urgency, as any gap or delay in such arrangements becoming effective could significantly negatively impact EU borrowers, as well as the wider EU economy.

The LMA paper 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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