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SEC / CORPORATE

SEC Updates to Form ADV FAQs

On June 12, the staff of the Securities and Exchange Commission's Division of Investment Management updated its Frequently Asked Questions on Form ADV and IARD. Much of the additional guidance relates to amendments to Part 1A of Form ADV made by the SEC in 2016. Investment advisers will need to comply with these amendments beginning on October 1.

The staff revised an FAQ relating to Item 1.O, and added FAQs relating to Items 1.I, 1.J, 5.D, 5.K, 7.B and Schedule R. Notably, the staff added six FAQs relating to new Item 5.K, which requires reporting related to separately managed accounts. Additionally, in an FAQ relating to new Schedule R, the staff provided that it is withdrawing its response to Question 4 of its January 18, 2012, letter addressed to the American Bar Association, which stated that the staff would not recommend enforcement action against an investment adviser that files a single Form ADV on behalf of itself and each "relying adviser" under certain circumstances (Umbrella Registration). This response has been withdrawn, as it has been superseded by the SEC's Form ADV amendments, which codify Umbrella Registration for certain advisers to private funds.

The updated Form ADV FAQs are available here.

BROKER / DEALER

FINRA Proposes Rule Change to Extend the Implementation of Margin Requirements for Credit Default Swaps

On June 14, the Financial Industry Regulatory Authority filed with the Securities and Exchange Commission a proposed rule change extending to July 18, 2018, the interim pilot program with respect to margin requirements for certain credit default swaps. The interim pilot program, which was implemented by FINRA Rule 4240, had been set to expire on June 18. (For additional information related to Rule 4240, please see the June 17, 2016 edition of *Corporate and Financial Weekly Digest*).

The text of the rule change is available here.

FINRA Proposes Rule Change Regarding Trade Modifiers and the Reporting of Transactions in US Treasury Securities

On June 12, the Financial Industry Regulatory Authority filed with the Securities and Exchange Commission a proposed rule change establishing February 5, 2018, as the date when member firms must begin using new transaction modifiers in connection with reporting transactions in certain US Treasury securities. In October 2016 the SEC approved changes to the FINRA Transaction Reporting and Compliance Engine (TRACE) rules to require reporting of transactions in certain US Treasury securities and to introduce the use of two new modifiers in connection with such reporting: "B" on a trade report if the transaction being reported is part of a series of transactions where at least one of the transactions involves a futures contract (e.g., a "basis" trade), and "S" on a trade report if the transaction being reported is part of a series of transactions and may not be priced based on the

current market (e.g., a fixed-price transaction in an "on-the-run" security as part of a transaction in an "off-the-run" security). (For additional information regarding the TRACE rule changes, please see the October 21, 2016 edition of *Corporate and Financial Weekly Digest*). Under the newly filed rule change, member firms may begin using the new trade modifiers as of the July 10effective date for the amended TRACE rules, but will not be required to do so until February 5, 2018.

The text of the rule change is available here and a FINRA Trade Reporting Notice addressing the rule change is available here.

FINRA Issues Interpretive Letter Regarding Related Performance Information in Institutional Communications

On June 12, staff of the Financial Industry Regulatory Authority published an interpretive letter (Letter) regarding the inclusion of certain related performance information in a FINRA member firm's "institutional communications" (as such term is defined in FINRA Rule 2210 (Communications with the Public)) regarding a continuously offered closed-end fund. Rule 2210 subjects institutional communications to certain supervisory and content standards (e.g., institutional communications must be fair and balanced and may not include false, exaggerated or misleading statements).

Citing past interpretive letters, FINRA noted that communications provided solely to institutional investors do not raise the same investor protection concerns as sales materials shared with retail investors. The Letter concluded that the use of actual performance of separate or private accounts or funds that have (1) substantially similar investment policies, objectives and strategies; and (2) are currently managed or were previously managed by the same adviser or sub-adviser that manages the fund in question, would be consistent with the standards set forth in FINRA Rule 2210(d) under the circumstances and subject to the conditions set forth in the Letter. FINRA reiterated that the inclusion of related performance information, other than performance of a predecessor private account or fund, in a retail communication would not comply with Rule 2210(d).

The Letter is available here.

DERIVATIVES

See "FINRA Proposes Rule Change to Extend the Implementation of Margin Requirements for Credit Default Swaps" in the Broker/Dealer section.

CFTC

Market Risk Advisory Committee to Host Public Meeting

On June 20, the Commodity Futures Trading Commission Market Risk Advisory Committee will hold a meeting at the CFTC's headquarters in Washington, DC. CFTC Commissioner Sharon Bowen is the committee's sponsor.

Items on the meeting agenda include: (1) a presentation by the CFTC's Division of Clearing and Risk on how it conducts risk surveillance of central counterparties (CCPs); (2) a discussion on how to better inform the CCP regulatory framework through academic research and economic analysis; and (3) a discussion of the potential effects of Brexit on financial markets.

The meeting is open to the public. Members of the public may also listen to the meeting via conference call using a domestic toll-free telephone or international toll or toll-free number to connect to a live, listen-only audio feed.

The full agenda is available here.

BREXIT/EU DEVELOPMENTS

MiFID II Delegated Regulation and Implementing Technical Standards Published

The revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) call for multiple implementing technical standards (ITS) and delegated regulations to provide legislative details not contained within the text of MiFID II and MiFIR. Several of these were recently published:

- On June 12, the European Commission (EC) adopted a Delegated Regulation (C(2017) 3890 final) (available here) supplementing MiFIR relating to the exemption for certain third country central banks from pre- and post-trade transparency requirements. This delegated regulation specifies that the central banks of Australia, Brazil, Canada, Hong Kong SAR, India, Japan, Mexico, Singapore, the Republic of Korea, Switzerland, Turkey and the United States benefit from the exemption, together with the Bank for International Settlements. If neither the Council of the European Union nor the European Parliament objects, it will become effective 20 days after being published in the Official Journal of the EU (OJ) on July 3.
- On June 10, Commission Implementing Regulation (EU) 2017/980 (available here)—laying down ITS in relation to standard forms, templates and procedures for cooperation between national competent authorities (NCAs) in supervisory activities for on-site verifications, and investigations and exchange of information between competent authorities under MiFID II—was published in the OJ. The ITS cover the submission of requests for cooperation or exchange of information, acknowledgements of receipt and replies to these requests.
- On June 10, Commission Implementing Regulation (EU) 2017/981 (available here)—laying down ITS in relation to standard forms, templates and procedures for the consultation of other NCAs prior to an NCA granting an authorization under MiFID II—was published in the OJ.
- On June 13, Commission Implementing Regulation (EU) 2017/988 (available here)—laying down ITS in relation to standard forms, templates and procedures for cooperation arrangements between NCAs with respect to a trading venue whose operations are of substantial importance in a host member state under MiFID II—was also published in the OJ.

European Commission Publishes Proposed EMIR Amendments Impacting the Relocation of Euro Clearing

On June 13, the European Commission (EC) published a proposed amendment (Proposal) to the European Market Infrastructure Regulation (EMIR) aimed at enhancing the supervision of EU and non-EU based or "third-country" central counterparties (CCPs). The Proposal follows the suggested reforms to EMIR published in May 2017 (for further information, please see the *Corporate & Financial Weekly Digest* edition of May 5) and the announcement of the Futures Industry Association's opposition to relocation requirement s for non-EU CCPs (for further information, please see the *Corporate & Financial Weekly Digest* edition of June 9).

In relation to third-country CCPs, the Proposal introduces a new two-tier system, assigning each third-country CCP a classification based on its systemic importance to EU financial stability. Details as to how the classification will be determined will be published in a delegated act, due to be finalized six months after the Proposal is adopted. Non-systemically important, or "tier 1" CCPs, will continue to operate under the existing EMIR supervisory framework. Systemically important CCPs, or "tier 2" CCPs, will be subject to stricter requirements including:

- compliance with the necessary prudential requirements for EU-based CCPs, while taking into account third-country rules;
- confirmation from the relevant EU central banks that the CCP complies with any additional requirements set by those central banks; and
- the agreement by the CCP to provide the European Securities and Markets Authority (ESMA) with relevant information and allow for on-site inspection of the CCP in the third country.

If ESMA and the relevant central banks deem the above requirements insufficient for the supervision of a third-country CCP due to its systemic importance to the EU, a "tier 2" CCP can be further defined as a "substantially systemically important CCP." The EC can then, on a recommendation by ESMA and any relevant central banks, adopt an implementing act declaring that such CCP can only provide services in the EU if it is established and

authorized in the EU in accordance with EMIR. This provision of the Proposal will likely be of particular significance in the upcoming Brexit negotiations due to London's strength in Euro clearing; following Brexit the United Kingdom will be a third country, and the UK CCPs will be third-country CCPs for purposes of the Proposal.

The Proposal also introduces a more integrated EU-level approach to EU CCP supervision by creating a new CCP Executive Session within ESMA. The CCP Executive Session will be responsible for ensuring consistent supervision of EU CCPs in different member states, as well as those in third countries.

The Proposal 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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BREXIT/EU DEVELOPMENTS

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