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SEC/CORPORATE

SEC Proposes Rule Amendments to Implement JOBS Act Registration Thresholds

On December 18, 2014, the Securities and Exchange Commission proposed rule amendments that, if adopted, would modify SEC rules governing registration under Section 12(g) of the Securities Exchange Act of 1934 (Exchange Act), termination of registration under Section 12(g) of the Exchange Act and suspension of reporting obligations under Section 15(d) of the Exchange Act to reflect the thresholds enacted by Titles V and VI of the Jumpstart Our Business Startups Act (JOBS Act). Titles V and VI of the JOBS Act, which became effective upon adoption, raised the threshold for registration from 500 holders of record and total assets exceeding $1 million to either 2,000 holders or (except for banks and bank holding companies) 500 holders who are not accredited investors and total assets exceeding $10 million. The JOBS Act also raised the threshold at which a bank or bank holding company (but not other registrants) may terminate or suspend the registration of a class of its securities under the Exchange Act from 300 to 1,200 persons.

The proposal provides that, for purposes of making the determination of whether an issuer is required to register a class of securities, the definition of "accredited investor" contained in Rule 501(a) under the Securities Act of 1933 (Securities Act) would apply, and that the determination of accredited investor status would have to be made as of the last day of the fiscal year (rather than at the time of the sale of the securities). The proposal suggests that the due diligence required to ascertain whether existing holders qualify as accredited investors would be comparable to current requirements applicable to private offerings made in reliance upon Rule 506 under the Securities Act. However, the staff requested comment with respect to whether a different approach for determining accredited investor status would be appropriate for purposes of Exchange Act Section 12(g).

The JOBS Act also amended the definition of the term "held of record" in Exchange Act Section 12(g)(5) to exclude securities that are held by persons who received them pursuant to an "employee compensation plan" in transactions exempted from the registration requirements of Section 5 of the Securities Act. In order to implement that exclusion, the SEC proposed to amend Exchange Act Rule 12g5-1 such that issuers determining whether a person holds securities of record (for purposes of determining whether an issuer is required to register a class of securities pursuant to Exchange Act Section 12(g)) would be permitted to exclude securities that are held by persons who received them pursuant to an "employee compensation plan" in transactions exempt from Securities

Act registration (e.g., pursuant to Securities Act Rule 701, Regulation D or another available exemption) or that did not involve a "sale" (e.g., as may be the case where there is a broad-based grant of equity awards with no specific consideration paid by the recipients). The exclusion would also apply to securities held by employees, directors, officers, certain advisors and other persons specified in Securities Act Rule 701(c) that were issued in exchange for securities that would otherwise be covered by the exclusion contemplated by the proposed rule (e.g., securities issued in restructurings, business combinations and similar transactions that are exempt from Securities Act registration).

The SEC also proposed a non-exclusive safe harbor under proposed Rule 12g5-1(a)(7) that would provide that a person will be deemed to have received securities pursuant to an "employee compensation plan" (as defined in Securities Act Rule 701) if such person received them pursuant to a "compensatory benefit plan" in transactions that met the conditions of Securities Act Rule 701(c). This would be the case even if the securities were not issued in compliance with all requirements Rule 701, but, if they were not, another exemption would need to apply or there must not have been a "sale" of the securities.

The SEC is seeking public comment on the proposed rules and the comment period ends on March 2, 2015.

Click here to view the complete text of the rule proposal.

ISS Releases FAQs on Equity Plan Scorecard and Independent Chair Policy

On December 22, 2014, Institutional Shareholder Services (ISS), a leading proxy advisory firm, released 20 FAQs on its new Equity Plan Scorecard (EPSC) and nine FAQs on its updated Independent Chair Policy, each of which will be effective for meetings on or after February 1, 2015. As discussed previously in the *Corporate and Financial Weekly Digest*, the new EPSC approach evaluates equity incentive programs using a range of positive and negative factors within three pillars: (1) plan cost; (2) plan features; and (3) grant practices, rather than a series of "pass/fail" tests. Also discussed previously in the *Corporate and Financial Weekly Digest*, the updated Independent Chair Policy adds new governance, board leadership and performance factors to its analytical framework and adopts a more holistic approach in determining whether to vote "For" or "Against" independent chair shareholder proposals.

The FAQs with respect to the EPSC include guidance as to the following:

- Each factor within the EPSC is assigned a maximum number of potential points, and a score of 53 or higher (out of a total of 100 possible points) will generally result in a positive recommendation for a proposal. The EPSC factors are not weighted equally. Furthermore, equity plans are subject to different weights and factors depending on the company's size or status: (1) S&P 500; (2) Russell 3000 index (excluding S&P 500 companies); (3) Non-Russell 3000; or (4) Recent IPO or Bankruptcy Emergent company (or any company that does not disclose at least three years of grant data).
- Notwithstanding this new EPSC approach, certain egregious features of equity plans will continue to result in a negative recommendation, regardless of other EPSC factors. For example, a plan (1) with a liberal change-of-control definition that could result in vesting other than upon a full "double trigger;" or (2) that permits repricing or cash buyouts of underwater options without shareholder approval will receive an "Against" recommendation from ISS.

The FAQs with respect to the Independent Chair Policy include guidance as to the following:

- Under the new holistic approach, any single factor that may have previously triggered a "For" or "Against" recommendation may now be mitigated by other positive or negative factors. For example, a company's performance and other governance factors could mitigate concerns about a less-than-robust lead director role. Conversely, a robust lead director may not mitigate concerns raised by other factors.
- Board tenure may be a contributing factor in determining a vote recommendation, but will be considered in the aggregate with other factors, and all factors will be considered in the context of the overall leadership structure.
- In evaluating a company's performance, ISS will consider one-, three-, and five-year total shareholder return, or TSR, and will more heavily weight long-term performance over short-term performance.

Certain governance practices will be viewed negatively in any holistic review of independent chair proposals, including, but not limited to: (1) problematic compensation practices; (2) issues that put independence of directors at risk (e.g., multiple related-party transactions); (3) failures of risk oversight; (4) adoption of shareholder unfriendly bylaws without shareholder approval; (5) failure to adequately respond to majority-supported shareholder proposals or directors who do not receive majority support; and (6) flagrant actions by management with potential or realized negative impacts on shareholders.

BROKER-DEALER

FINRA Issues Annual Regulatory and Examination Priorities Letter for 2015

One January 6, the Financial Industry Regulatory Authority issued its annual letter to FINRA member firms outlining FINRA's regulatory and examination priorities for the coming year.

In the letter, FINRA indicated that it has identified challenges in the following five general areas that have contributed to compliance and supervisory issues at member firms: (1) putting customer interests first; (2) firm culture; (3) supervision, risk management, and controls; (5) product and service offerings; and (4) conflicts of interest. FINRA suggested that addressing these challenges will enable its member firms to get ahead of many of the concerns raised in the letter.

FINRA's 2015 priorities will focus on key sales practices—both financial and operational—and market integrity matters. With respect to sales practices, FINRA raised product-related concerns regarding features of the products themselves as well as sales or distribution practices. FINRA specified the following products that have raised sales practice concerns: (1) interest rate-sensitive fixed income securities; (2) variable annuities; (3) alternative mutual funds (or liquid alts); (4) non-traded real estate investment trusts; (5) exchange-traded products tracking alternatively weighted indices; (6) structured retail products; (7) floating-rate bank loan funds; and (8) securities-backed lines of credit. FINRA indicated that its 2015 surveillance and examination activities that include product-related risk reviews will routinely focus on due diligence, suitability, disclosure, supervision and training. FINRA also highlighted its new supervision rules (FINRA Rules 3110, 3120, 3150 and 3170) that modify requirements relating to, among other things: (1) supervising offices of supervisory jurisdiction and inspecting non-branch offices; (2) managing conflicts of interest in a firm's supervisory system; (3) performing risk-based reviews of correspondence and internal communications; (4) conducting risk-based reviews of investment banking and securities transactions; (5) monitoring for insider trading, conducting internal investigations and reporting related information to FINRA; and (6) testing and verifying supervisory control procedures.

FINRA also is focused on the controls that firms have in place related to wealth events (such as an inheritance, life insurance payout, sale of a business or other major asset, divorce settlement or an IRA rollover), with an emphasis on firms' compliance with their supervisory, suitability and disclosure obligations. IRAs were specifically cited in the letter as a part of FINRA's focus.

Additionally, FINRA stated in the letter that private placements will continue to be an area of focus in 2015 and, in particular, inadequate due diligence and suitability analysis by member firms with respect to private placements. Other areas of focus raised in the letter deal with excessive trading and concentration controls, sales charge discounts and waivers, senior investors, and anti-money laundering, among others. In 2015, FINRA examiners will also be focused on reviewing firms' approaches to cybersecurity risk management, including their governance structures and processes for conducting risk assessments and addressing the output of those assessments. Furthermore, FINRA continues to be concerned with trading technology and is adapting its surveillance program to identify potentially violative conduct made possible by advances in technology and changes in market structure.

In the letter, FINRA also highlighted an issue regarding responses to FINRA information requests. Specifically, FINRA has experienced an increasing number of situations where some firms have repeatedly failed to provide timely responses to information requests made in connection with examinations and investigations. FINRA reiterated firms' obligation to respond to FINRA inquiries in a full and timely fashion, and cautioned firms that production failures expose firms to disciplinary action.

FINRA's letter is available here.

SEC Approves FINRA Rule Proposal Regarding Responsibilities of FINRA Member Firms to Investigate Applicants for Registration

The Securities and Exchange Commission has granted accelerated approval of a Financial Industry Regulatory Authority proposal to adopt FINRA Rule 3110(e) concerning the responsibility of FINRA member firms to investigate applicants for registration.

The new rule seeks to clarify the language of National Association of Securities Dealers Rule 3010(e) relating to background investigations. In addition, FINRA Rule 3110(e) includes a new requirement for member firms to adopt and implement written procedures that are reasonably designed to verify the accuracy and completeness of the information contained in the applicant's Form U4 no later than 30 calendar days after filing with FINRA. The new rule also requires member firms to adopt and implement written procedures that, at a minimum, provide for a national search of reasonably available public records to verify the accuracy and completeness of the information contained in the applicant's Form U4. The requirement to conduct a public records search also must be satisfied no later than 30 calendar days after the initial or transfer Form U4 is filed with FINRA.

FINRA will announce the effective date of the new rule within 90 days of the SEC's December 30, 2014 approval.

Click here for the SEC's approval notice.

SEC Approves Amendments to NASD Rule 2340 and FINRA Rule 2310 to Address Values of Direct Participation Program and Unlisted Real Estate Investment Trust Securities

The Financial Industry Regulatory Authority has issued Regulatory Notice 15-02 regarding the Securities and Exchange Commission's approved amendments to National Association of Securities Dealers (NASD) Rule 2340 (and corresponding amendments to FINRA Rule 2310) to modify the requirements relating to the reporting of per share estimated values of shares of direct participation programs (DPPs) and unlisted real estate investment trusts (REITs) on a customer's account statements.

NASD Rule 2340 currently requires a member firm to include on account statements an estimated value of a DPP or unlisted REIT security from the annual report, an independent valuation service or any other source, unless the member firm can demonstrate that the estimated value is inaccurate. The SEC has approved amendments to NASD Rule 2340(c) to require, among other things, that member firms include on customer account statements a per share estimated value for a DPP or unlisted REIT security developed in a manner reasonably designed to ensure that the per share estimated value is reliable. The amended rule describes two methodologies for calculating the per share estimated value for a DPP or unlisted REIT security that are deemed to have been developed in a manner reasonably designed to ensure that it is reliable: (1) the net investment methodology; and (2) the appraised value methodology. In addition, new NASD Rule 2340(c)(2)(A) requires member firms that use the net investment methodology to provide, if applicable, enhanced disclosure relating to the return of investors' capital (commonly referred to as "over distributions").

The SEC also approved corresponding changes to FINRA Rule 2310, which currently provides that a member firm may not participate in a DPP or unlisted REIT offering unless the general partner or sponsor will disclose a per share estimated value in each annual report. Industry practice generally is to use the offering price (or par value) of DPP and unlisted REIT securities as the per share estimated value during the offering period. As amended, FINRA Rule 2310(b)(5) prohibits a member firm from participating in a public offering of the securities of a DPP or unlisted REIT unless the issuer of the DPP or unlisted REIT has agreed to disclose a per share estimated value of the DPP or unlisted REIT security, developed in a manner reasonably designed to ensure its reliability, along with an explanation of the method by which the valuation was developed and the date of the valuation.

Click here to read Regulatory Notice 15-02.

CFTC

CME Strikes Revisions to Wash Trade Advisory Notice Regarding Block Trades

On January 6, the CME Group Exchanges (CME Group) issued an amended Advisory Notice on wash trades, which removes language prohibiting block trades between accounts with the same beneficial ownership. As reported in the December 19, 2014 edition of the *Corporate and Financial Weekly Digest*, CME Group had revised portions of the frequently asked questions section of its wash trades Advisory Notice. Among other things, the December 17, 2014 Advisory Notice expressly prohibited block trades between accounts with identical (same) ownership. This restriction has now been removed from the amended Advisory Notice.

Consistent with CME Group guidance prior to the issuance of the December 17, 2014 Advisory Notice, the answer to Question 9 in the newly amended Advisory Notice only addresses block trades between commonly owned accounts. Under the amended Advisory Notice, CME Group will permit block trades between accounts with "common beneficial ownership," which include accounts with the same ownership, provided that (1) the block trade is executed at a fair and reasonable price; (2) each party to the transaction has a legal and independent bona fide business purpose for engaging in the trade; and (3) each party's decision to enter into the transaction is made by an independent decision-maker. Other revisions reported in the December 19 edition of the *Corporate and Financial Weekly Digest* remain unchanged.

The amended Advisory Notice makes other minor revisions to Questions 8 (freshening of positions) and 11 (self-match prevention). The January 6 wash trade Advisory Notice is available here.

CFTC Staff Extends No-Action Relief for Certain FCMs from Receipt of Depository Acknowledgment Letters

On December 29, 2014, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) granted an extension of previous no-action relief for certain futures commission merchants (FCMs) to comply with requirements to obtain acknowledgment letters from depositories. CFTC Regulations 1.20(d), 1.26, 22.5 and 30.7(d) require FCMs to deposit customer funds only with depositories that have provided an acknowledgment letter granting DSIO direct, read-only electronic access to transaction and account balance information for FCM customer accounts. Certain depositories require the CFTC to enter into a standard online access agreement before they will provide the acknowledgment letter. Because DSIO has not completed its review of, and has not executed, such agreements, certain depositories have not provided the acknowledgment letters required by CFTC Regulations. DSIO is extending no-action relief until April 30 for FCMs that are unable to obtain an acknowledgement letter solely due to the lack of an executed online access agreement between the FCM's depository and DSIO.

The no-action letter is available here.

CFTC Staff Grants No-Action Relief to Entities Operating Insurance-Linked Securities Issuers

On December 18, 2014, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued a letter granting relief from commodity pool operator (CPO) registration to certain entities that operate insurance-linked securities (ILS) issuers. In response to a letter from the Securities Industry and Financial Markets Association, DSIO confirmed that certain risk transfer contracts in ILS transactions may constitute swaps under the Commodity Exchange Act. To the extent that the risk transfer contract would be considered a swap, the ILS issuer may fall within the definition of a commodity pool and the entity operating the ILS issuer would be required to register as a CPO, absent an exemption.

DSIO's no-action relief allows an entity that operates such an ILS issuer to claim an exemption from CPO registration pursuant to Commodity Futures Trading Commission (CFTC) Regulation 4.13(a)(3), subject to certain conditions. In particular, the relief requires an entity operating such an ILS issuer to: (1) restrict collateral investment by the ILS issuer to cash or cash equivalent, highly liquid assets; (2) observe corporate formalities to ensure that the insurance company and the ILS issuer remain separate; (3) restrict the operations and activities of the ILS issuer to only those necessary or appropriate for engaging in an ILS transaction; (4) limit the ILS issuer's investment in commodity interests to only the swaps necessary and appropriate to support one or more ILS transactions; (5) subject the collateral to legal security arrangements that protect the parties to the transaction in the event the ILS issuer becomes insolvent; (6) provide notice of certain collateral deficiencies to DSIO; and (7) comply with certain requirements pertaining to the maintenance and priority of collateral payments. The operator of an ILS issuer must file a notice of exemption with the National Futures Association pursuant to CFTC Regulation 4.13(b).

The no-action letter is available here.

ICE Futures U.S. Adopts Disruptive Trading Practices Rule

On December 29, 2014, ICE Futures U.S. (ICE) proposed a new rule to prohibit certain disruptive trading practices. The proposed rule broadly prohibits any manipulative or disruptive trading practice as defined by the Commodity Exchange Act and Commodity Futures Trading Commission Regulations. In addition, the ICE Rule specifically prohibits the following trading practices: (1) orders entered with the intent to cancel the order before execution or to modify the order to avoid execution; (2) orders entered with the intent to overload, delay or disrupt ICE's systems or the systems of other market participants; (3) orders entered with the intent to disrupt the orderly conduct of trading, the fair execution of transactions or mislead other market participants; and (4) orders entered with reckless disregard for the adverse impact of the order or message. ICE's proposed rule also prohibits market participants from knowingly entering orders for the purpose of creating an artificial market price and knowingly entering orders other than in good faith for the purpose of executing bona fide transactions. ICE supplemented the proposed rule with a frequently asked questions section on disruptive trading practices.

Pending regulatory review, the proposed rule will become effective January 14. The notice of rule change is available here. The frequently asked questions guidance is located here.

CFTC Staff Issues Guidance Regarding Chief Compliance Officer Annual Reports

On December 22, 2014, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued guidance regarding the annual reports that must be filed by the chief compliance officer (CCO) of a swap dealer, major swap participant or futures commission merchant pursuant to CFTC Regulation 3.3. Although compliance with the guidance is not mandatory, DSIO expects CCOs to make an effort to incorporate this guidance into their annual reports for 2014.

The guidance sets forth DSIO's recommendations for complying with the provisions of CFTC Regulation 3.3(e), which require the CCO annual report to: (1) describe the firm's written policies and procedures; (2) review the applicable requirements of the Commodity Exchange Act and CFTC Regulations and identify the written policies and procedures designed to ensure compliance with each; (3) assess the effectiveness of those policies and procedures, which assessment must be completed on a requirement by requirement basis and not as an overall or general indication of effectiveness; (4) discuss areas for improvement, which, the guidance clarified, should include a discussion of improvements suggested in a prior report; (5) list material changes to the compliance policies and procedures; (6) describe the compliance resources and deficiencies in those resources; and (7) identify material non-compliance issues. DSIO suggested that a CCO provide the definition of the term "material" that it applied when it determined whether there were any material changes to policies and procedures or material non-compliance issues. The guidance also acknowledged that a chart is an appropriate mechanism for conveying the large amount of information that is presented in the annual report and provided a sample chart.

The DSIO guidance is available here.

CFTC Staff Issues No-Action Relief Extending the Deadline for Certain CCO Annual Reports

On December 22, 2014, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued a no-action letter that extends the deadline for submitting the annual report that must be filed by the chief compliance officer (CCO) of a swap dealer, major swap participant or futures commission merchant. Under the no-action relief, the CCO of a swap dealer, major swap participant or futures commission merchant with a fiscal year that ends on or before January 31, 2015 will have an additional 30 days (90 days total) following the end of their firm's fiscal year to file the CCO's annual report. In addition, a CCO may obtain another 30-day extension (120 days total) by notifying DSIO of any material non-compliance events that occurred during the fiscal year covered by the annual report within 90 days of the end of the firm's fiscal year.

The no-action letter is available here.

CFTC Allows Swap Dealer's CCO to Report to the Governing Body

On November 25, 2014, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued a no-action letter permitting the chief compliance officer (CCO) of a provisionally registered swap dealer to consult and meet with the swap dealer's governing body, in lieu of its board of directors or senior officer as required by CFTC Regulations 3.3(a) and 3.3(d). While the CCO is not required to meet annually with the board of directors or senior officer under the terms of the no-action relief, the CCO must retain the ability to meet with the board or senior officer at his or her discretion.

Among other things, the no-action letter additionally requires the swap dealer's board of directors or senior officer to retain responsibility for appointing the CCO and approving his or her compensation. In addition, the CCO must continue to prepare and provide his or her annual report to the board of directors or senor officer under CFTC Regulations 3.3(e) and 3.3(f). A summary of the CCO's consultations with the governing body also must be included in the CCO's annual report.

The no-action letter is available here.

LITIGATION

Supreme Court Clarifies Class Action Removal Pleading Standard

The US Supreme Court recently held that under the Class Action Fairness Act (CAFA), a defendant need not provide proof of the amount in controversy in its notice of removal to federal court. Only a plausible allegation is required that the amount in controversy meets or exceeds CAFA's $5 million jurisdictional requirement. This decision clarifies that there is no higher pleading standard to remove a class action under CAFA than in an individual action.

Plaintiff, Brandon Owens, filed a class action in a Kansas state court alleging defendants, Dart Cherokee Basin Operating Company, LLC, and Cherokee Basin Pipeline, LLC (Dart), underpaid royalties owed to class members under oil and gas leases. The complaint did not allege a specific amount in controversy. Dart removed to federal court under CAFA, which permits federal jurisdiction for certain class actions if the amount in controversy exceeds $5 million. In its notice of removal, Dart stated the alleged underpayments totaled more than $8.2 million. Owens moved to remand to the state court arguing the removal was deficient because it included no evidence of Dart's $8.2 million estimate. The district court accepted Owens's argument, reading Tenth Circuit precedent to require proof of the amount in controversy in the notice of removal itself. The Tenth Circuit denied review.

The Supreme Court held that evidence of the amount in controversy is not required because the removal statute expressly requires only a short plain statement of the grounds for removal. The majority reasoned that the defendant's pleading burden in a notice of removal is the same as the plaintiff's in its complaint, and that an amount-in-controversy allegation should be accepted if plausible, made in good faith and not contested by the plaintiff or the court. The Court also rejected any notion of a presumption against removal in CAFA cases. Thus, evidence establishing the amount in controversy is not required to remove under CAFA. Rather, evidentiary submissions will only be required post-removal if the plaintiff or the district court questions the defendant's allegations. The case was remanded for further proceedings.

Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S.Ct. (2014).

SEC Charges Chilean Citizens With Insider Trading Concerning Tender Offer for Chilean Pharmaceutical Company

The Securities and Exchange Commission recently filed suit in the US District Court for the Southern District of New York, alleging that defendants, Juan Cruz Bilbao Hormaeche and Thomas Andres Hurtado Rourke, both Chilean citizens, illegally traded on material non-public information that Abbott Laboratories was interested in purchasing CFR Pharmaceuticals, S.A., a pharmaceutical company headquartered in Chile.

According to the complaint, on March 10, 2014, CFR's Board of Directors met to consider Abbott's offer to purchase CFR; Bilbao, then a member of the board, participated by telephone. After the meeting, between March 12, 2014 and May 7, 2014, Bilbao allegedly directed his business associate, Hurtado, to place trades purchasing more than $14 million in American Depository Shares (ADSs) of CFR in a US brokerage account maintained in the name of a British Virgin Islands company for the benefit of Bilbao. The SEC further alleges that based on knowledge of confidential information, Hurtado purchased 35,000 ADSs of CFR for $707,710. On May 16, 2014, Abbott announced a definitive agreement to acquire CFR, and on September 23, 2014, Abbott completed the tender offer. According to the SEC, Bilbao tendered his ADSs to Abbott on or before September 23, 2014, and saw a profit of more than $10.1 million. The SEC further alleges Hurtado tendered his ADSs to Abbott for a profit of about $495,000.

The SEC sued defendants for illegally trading on insider information. The SEC alleges that the nexus to the United States is the initial purchase of the ADSs through US-based brokerage accounts. The SEC seeks an order freezing defendants' assets, an order requiring defendants to repatriate funds obtained from the alleged illegal activities, a final judgment that defendants violated the securities laws, and an order directing defendants to disgorge any illegal gains and to pay civil penalties.

Complaint, SEC v. Hormaeche, No. 14-cv-10036-RJS (S.D.N.Y. Dec. 22, 2014).

BANKING

Agencies Release Annual CRA Asset-Size Threshold Adjustments for Small and Intermediate Small Institutions

On December 19, 2014, the federal bank regulatory agencies announced the annual adjustment to the asset-size thresholds used to define small bank, small savings association, intermediate small bank and intermediate small savings association under the Community Reinvestment Act (CRA) regulations. The annual adjustments are required by the CRA rules. Financial institutions are evaluated under different CRA examination procedures based upon their asset-size classification. Those meeting the small and intermediate small asset-size threshold are not subject to the reporting requirements applicable to large banks and savings associations. Annual adjustments to these asset-size thresholds are based on the change in the average of the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million. As a result of the 1.60 percent increase in the CPI index for the period ending in November 2014, the definitions of small and intermediate small institutions for CRA examinations will change as follows:

- "Small bank" or "small savings association" means an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.221 billion.
- "Intermediate small bank" or "intermediate small savings association" means a small institution with assets of at least $305 million as of December 31 of both of the prior two calendar years, and less than $1.221 billion as of December 31 of either of the prior two calendar years.

These asset-size threshold adjustments are effective January 1.

Click here to read the press release.

FDIC Releases Guidance on Brokered Deposits in the Form of FAQs

On January 5, in its second Financial Institution Letter of 2015, the Federal Deposit Insurance Corporation (FDIC) released guidance in the form of frequently asked questions (FAQs) with respect to identifying, accepting and reporting brokered deposits.

- "Section 29 of the Federal Deposit Insurance Act (12 U.S.C. § 1831f) and Section 337.6 of the FDIC's regulations (12 C.F.R. § 337.6) restrict the acceptance of brokered deposits by FDIC-insured depository institutions (IDIs) that are not well capitalized. All insured depository institutions (including those that are well capitalized) must report brokered deposits in their Consolidated Reports of Condition and Income."
- "The FDIC has explained the requirements for identifying, accepting, and reporting brokered deposits in published advisory opinions and in the *Study on Core Deposits and Brokered Deposits* issued in July 2011. Nevertheless, questions continue to arise regarding whether certain types of deposits are considered brokered deposits….These FAQs (with answers) will be periodically updated on the FDIC's Web site."
- "The FAQs cover various topics, such as identifying brokered deposits, accepting deposits, listing services, interest rate restrictions, and other brokered deposit-related matters."

In its cover to the FAQs, the FDIC explained that "[t]he term 'deposit broker' is broadly defined as 'any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties.' If a deposit is accepted through a 'deposit broker,' the deposit is a brokered deposit."

Click here to read more.

UK DEVELOPMENTS

FCA to Regulate Seven Additional Financial Benchmarks

On December 22, 2014, the UK Financial Conduct Authority (FCA) issued a consultation paper with respect to extending the FCA's regulation of the London Interbank Offered Rate (LIBOR) benchmark to seven additional major UK-based financial benchmarks in the fixed income, commodity and currency markets.

Benchmarks historically have not been regulated in the United Kingdom. However, following the much-publicized recent conduct concerning the fixing of LIBOR, in April 2013 the FCA was granted powers to regulate LIBOR together with other benchmarks as specified from time to time by the UK government. Based on the initial recommendations as part of the Fair and Effective Markets Review—a review established to reinforce confidence in the fairness and effectiveness of the wholesale financial market activity in the United Kingdom and conducted by a body led by the Bank of England, HM Treasury and the FCA—in addition to LIBOR, the following seven UK-based financial benchmarks now are also to be brought into the regulatory scope of the FCA (the Additional Benchmarks**)**:

- Sterling Overnight Index Average (SONIA);
- Repurchase Overnight Index Average (RONIA);
- International Swaps and Derivatives Association (ISDAfix);
- WM/Reuters London 4pm Closing Spot Rate;
- London Gold Fixing (soon to be replaced by the London Bullion Market [LBMA] Gold Price);
- LBMA Silver Price; and
- ICE Brent Index.

The purpose of the consultation paper is to seek views on how the current generic approach to regulating benchmarks could be applied beyond LIBOR to those firms that administer and, where appropriate, contribute data or information (submitters) with respect to the aforementioned benchmarks. This is consistent with the FCA's overall objectives to ensure that markets work well and to enhance market integrity generally.

In the consultation paper, the FCA recognizes that there are differences as to how benchmarks are administered. Nonetheless, the consultation paper makes it clear that regardless of administration techniques used, benchmark administrators and submitters will be required to be authorized and regulated by the FCA and therefore adhere to all rules and guidance set out in the FCA Handbook applicable to them in conducting their activities. Moreover, benchmark administrators will be required to:

- implement credible governance and oversight measures, including an oversight committee and establish practice standards to ensure robust arrangements are in place to administer the relevant benchmark(s);
- monitor, scrutinize and keep records of benchmark submissions to identify breaches of practice standards and/or potentially manipulative behavior and ensure there is a proper audit trail of submissions;
- maintain sufficient financial resources to ensure that the administrator can cover operating costs for six months, plus a buffer period of three months to ensure the viability and continuity of the relevant benchmark(s); and
- appoint a senior individual, approved by the FCA, to oversee and ensure the firm's compliance with the requirements of the FCA for benchmark administration.

Interested parties are invited to provide responses to the consultation paper by January 30.The FCA expects to publish its final rules in the first quarter of 2015 that will apply to the Additional Benchmarks from April 1.

The full text of the consultation paper is available here.

EU DEVELOPMENTS

New Fund Marketing Rules in Switzerland

Although Switzerland is not a European Union (EU) country, it implemented new fund marketing rules effective as of March 1, 2013, which operate in parallel to the EU's Alternative Investment Fund Managers Directive rules, which now cover fund marketing in EU jurisdictions. Many non-Swiss managers (including many in the United States and the United Kingdom) have been eligible for a two-year transitional period, meaning that the new rules become fully effective as of March 1.

Non-Swiss managers who wish to continue marketing their funds in Switzerland from March 1, 2015 must assess their target market in Switzerland, since different rules will apply to marketing to different classes of investors in Switzerland. The rules are outlined below.

- If it is intended to market to Swiss pension funds, family offices, family trusts and other high net-worth individuals it will be necessary to ensure that new Swiss service providers (Swiss representative and paying agent) are appointed by those funds to be marketed in Switzerland.
- No changes need to be implemented if it is only intended to market to Swiss regulated qualified investors, including: Swiss authorized and Financial Market Supervisory Authority (FINMA)-regulated banks, securities dealers, fund managers or asset managers, insurance companies, or the Swiss central bank.
- If it is intended to market to Swiss retail investors, registration by the fund with FINMA will be required, as will the appointment of a Swiss representative and paying agent.

For more information on the new Swiss rules, please see Katten's January 2015 client briefing here.

For more information on the EU's AIFM Directive, please see Katten's October 2014 client briefing here.

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