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SEC/CORPORATE

SEC Approves NYSE Rule to Facilitate Listing Without an IPO

On February 2, the Securities and Exchange Commissions approved a New York Stock Exchange (NYSE) rule change that facilitates the listing of companies on the NYSE without a prior registration statement under the Securities Exchange Act of 1934 (Exchange Act) in connection with an underwritten initial public offering. As previously discussed in the May 5, 2017 and June 30, 2017 editions of the *Corporate & Financial Weekly Digest*, the NYSE had previously filed and withdrew the proposed rule change. Thereafter, the NYSE elected to move forward with the rule change and filed amendments, including a final Amendment No. 3. The NYSE noted that the proposed rule change would enable the NYSE to compete for listings of companies that the NYSE believes would be able to list on the Nasdaq Stock Market, but would not be able to list on the NYSE under its then-current rules.

The rule change amends Footnote (E) of Section 102.01B of the NYSE Listed Company Manual. As previously discussed in the May 5, 2017 edition of the *Corporate & Financial Weekly Digest*, the NYSE generally lists companies in connection with a firm commitment underwritten initial public offering (IPO), a transfer from another market or a spin-off. Companies seeking to be listed in connection with an IPO must demonstrate that they have $40 million in market value of publicly held shares. Other companies must demonstrate they have $100 million in market value of publicly held shares. For a company that has not previously had its common equity securities registered under the Exchange Act (and is seeking to list without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements), the current rule provides that the NYSE will, on a case by case basis, exercise discretion to list such company and determine whether it has satisfied the $100 million market value requirement based upon the lesser of (1) an independent third-party valuation of the company; and (2) the most recent trading price of the company's common stock in a trading system for unregistered securities (a so-called "private placement market").

As a result of the rule change, in the absence of any recent trading in a private placement market, the NYSE will determine that a company has met its market value of publicly held shares requirement if the company provides an independent third-party valuation evidencing at least $250 million in market value of publicly held shares (eliminating the requirement of a private placement market trading price). The independent party providing the valuation must have "significant experience and demonstrable competence in the provision of such valuations." The rule change also provides that a valuation agent will not be deemed "independent" if that valuation agent, or any affiliated person, (1) owns in the aggregate 5% of the securities to be listed, or (2) has provided investment banking services to the company in the 12 months prior to the valuation or in connection with the listing.

The SEC's notice approving the rule change is available here.

BROKER-DEALER

SEC Announces Examination Priorities for 2018

The Office of Compliance Inspections and Examinations (OCIE) of the Securities and Exchange Commission has announced its examination priorities for 2018. This year, the OCIE's examination priorities fall within the following categories: examining compliance and risks in critical market infrastructures; protecting retail investors, including seniors and those saving for retirement; continuing oversight over the Financial Industry Regulatory Authority

(FINRA) and the Municipal Securities Rulemaking Board; prioritizing cybersecurity; and reviewing anti-money laundering programs.

OCIE's release on its examination priorities is available here.

FINRA Requests Comment on Rules Applicable to Government Securities

The Financial Industry Regulatory Authority (FINRA) is requesting comment on the applicability of various FINRA rules to government securities. After undertaking a review of its rulebook, FINRA has identified several rules that currently exclude or do not clearly apply to US Treasury securities or other government securities. FINRA has determined that the application of these rules would benefit from additional industry comment. These rules include: FINRA Rule 2242 (Debt Research Analysts and Debt Research Reports); FINRA Rule 5240 (Anti-Intimidation/Coordination); FINRA Rule 5250 (Payments for Market Making); FINRA Rule 5270 (Front Running of Block Transactions); FINRA Rule 5280 (Trading Ahead of Research Reports); FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders); NASD Rule 1032(f) (Securities Trader); NASD Rule 1032(i) (Limited Representative – Investment Banking); and NASD Rule 1050 (Registration of Research Analysts).

FINRA also is seeking comment on whether to apply FINRA Rule 5320 and NASD Rules 1032(f) and 1050 to other types of debt securities, in addition to government securities.

Comments should be sent to FINRA no later than April 9.

FINRA Regulatory Notice 18-05 is available here.

DERIVATIVES

See "FCA Revises List of MiFID II Position Limits" in the UK Developments section.

Conforming Amendments Proposed for Bank Swap Margin Rules

On February 5, the Prudential Regulators—the five federal banking regulators for swap dealers that are banks—proposed technical amendments to their margin rules for uncleared swaps. The amendments aim to harmonize the definition of Eligible Master Netting Agreement (EMNA) in the margin rules with recent changes made to the definition of "Qualifying Master Netting Agreement" (QMNA) in the capital and liquidity rules applicable to banks.

The proposed amendments make two key changes to the swap margin rules. First, the definition of an EMNA is changed so that any agreement that qualifies as a QMNA for capital purposes also will constitute an EMNA for margin rule purposes. Second, the amendments will allow parties to amend their master agreements to conform to banking law requirements without affecting the legacy status of swaps executed before the swap margin rule compliance date. (Without that second change, such an amendment would convert legacy trades into new trades subject to the margin rules.)

The Commodity Futures Trading Commission is likely adopt to similar conforming amendments to its swap margin rules for non-bank swap dealers in order to keep the playing field level for all swap dealers.

The proposal is available here.

UK DEVELOPMENTS

FCA Revises List of MiFID II Position Limits

The UK Financial Conduct Authority (FCA) has reviewed the bespoke position limits set for a number of commodity derivatives traded on UK venues.

Following its review and as a result of strong growth in some commodity derivative contracts, the FCA has increased the limits of approximately 20 commodity derivative contracts as of February 8.

There has been one reduction in the position limit for UK Feed Wheat, which will take effect from April 8, giving market participants an adjustment period of two months.

The FCA also has marked a number of commodity derivative contracts as “TBA,” where they believe the current 2,500 limit would not be appropriate and could have the adverse effect of constraining activity and growth in those contracts. The FCA intends to review position limits that now appear to be out of date and calculating new ones as soon as possible. In the meantime, no limit is applicable to contracts marked as “TBA.”

The FCA’s webpage on position limits for commodity derivatives contracts is available here.

FCA and ICO Publish Joint Update on GDPR

On February 8, the UK Financial Conduct Authority (FCA) and the UK Information Commissioner’s Office (ICO) published a joint statement on the EU General Data Protection Regulation (GDPR).

GDPR will go into effect in the UK on May 25. The GDPR is designed to strengthen the rules governing data protection across the European Union and will be regulated and enforced in the UK by the ICO, as part of its continuing mandate for the responsibility of data protection regulation.

The FCA believes that the GDPR does not impose any requirements that are incompatible with the rules already detailed in the *FCA Handbook*.

The FCA goes on to state that compliance with GDPR is now a board-level responsibility, and firms must be able to produce evidence to demonstrate the steps that they have taken to comply. The requirement to treat customers fairly is also central to both data protection law and the current financial services regulatory framework.

While it is the ICO that will regulate the GDPR, the FCA notes that complying with the GDPR requirements also is something the FCA will consider under their Senior Management Arrangements, Systems and Controls (SYSC) rules. As part of their obligations under SYSC, firms should establish, maintain and improve appropriate technology and cyber resilience systems and controls.

The FCA acknowledges in the statement, however, that there are still ongoing discussions to ensure specific details of the GDPR can be implemented consistently within the wider regulatory landscape. Discussions also are ongoing relating to the UK’s Data Protection Bill, which is progressing through Parliament. Although the GDPR directly impacts EU Member States, the GDPR also gives Member States limited opportunities to make provisions for how it applies in their country, and, therefore, the Data Protection Bill is required in the UK. As an aside, this scope for Member States to make additional provisions means that data protection rules across the European Union could vary slightly.

The statement indicates that the FCA and ICO are working closely together in preparation for the GDPR and, since 2014, the FCA and ICO have had a Memorandum of Understanding in place, laying out the formal relationship for the cooperation and coordination of their activities.

The statement is available here.

EU DEVELOPMENTS

ESMA Publishes Updated Version of Its Q&As on Short Selling Regulation

On February 5, the European Securities and Markets Authority (ESMA) updated its set of Questions and Answers (Q&As) on the implementation of Regulation (EU) 236/2012 (the Short Selling Regulation). The aim of the Q&As is to promote common supervisory approaches and practices in the application of the Short Selling Regulation by regulators across the European Union. The last version of the Q&As was published in January 2013.

In updated Q&A 10.6, ESMA’s answer has been expanded to explain that rights to subscribe for new shares cannot be used to cover a short sale, if, at the time of entering into the short sale, there is uncertainty as to whether the new shares subscribed for will be available for settlement in due time. The answer also provides examples of when this would be the case.

A copy of ESMA's updated Q&As 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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