Katten
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SEC / CORPORATE

SEC Issues New C&DI Relating to Submission of Annual Reports to SEC

On November 2, the Division of Corporation Finance (Division) of the Securities and Exchange Commission issued a new Compliance and Disclosure Interpretation (C&DI) regarding a registrant's submission to the SEC of its annual report that it must send to shareholders with its annual meeting proxy statement (or information statement) under Securities Exchange Act of 1934 Rule 14a-3(c) or 14c-3(b) (Exchange Act Rules).

Under the current Exchange Act Rules, a registrant must mail to the SEC, "solely for its information," seven copies of the annual report to its security holders (or submit such report to the SEC via the SEC's online EDGAR filing system). Such reports must be mailed (or submitted electronically) to the SEC no later than the date on which preliminary copies (or definitive copies, if preliminary filing was not required) of solicitation material are filed with the SEC, whichever date is later. A similar provision in Form 10-K requires certain Section 15(d) registrants to furnish to the SEC "for its information" four copies of any annual report to security holders. It should be noted that the annual report to shareholders requirement is now commonly satisfied by use of the Form 10-K that has already been filed with the SEC, sometimes with a "10-K wrap," rather than through a separate "glossy annual report," so the mailing to the SEC of the annual report in such cases is superfluous.

The new C&DI explains that the "Division will not object if a company posts an electronic version of its annual report to its corporate website" by the dates specified in the applicable rules and Form 10-K, respectively, in lieu of mailing paper copies to the SEC or submitting the report via EDGAR. As long as the annual report remains accessible for at least one year after its initial posting, the Division staff will consider it "available for its information" (satisfying the "solely for its information requirement" in the Exchange Act Rules).

The complete C&DI can be found here.

ISS Announces Updates to Its Pay-for-Performance Evaluation for US and Canadian Companies

On November 8, Institutional Shareholder Services (ISS), a leading proxy advisory firm, announced a number of updates to its 2017 pay-for-performance evaluation process for US and Canadian companies. The updates include the following:

- **Relative Financial Performance Evaluation for U.S. and Canadian Companies.** For shareholder meetings held on or after February 1, 2017, ISS will supplement its total shareholder return metric (TSR) with an analysis of six additional financial measures to evaluate performance in the context of its executive compensation assessment. Specifically, ISS will compute a company's three-year performance, relative to its ISS peer group, of: (1) return on equity, (2) return on assets, (3) return on invested capital, (4) revenue growth, (5) growth in earnings before interest, taxes, depreciation and amortization; and (6) growth in cash flow from operations. These metrics, along with relative compensation levels and an overall weighted financial performance metric (which reflects the alignment between three-year financial performance and three-year granted pay), will be displayed in a new standardized table in ISS's proxy research report for the applicable company. In 2017, these calculations will be used solely in ISS's qualitative pay-for-performance evaluations and will not affect quantitative analysis of a company's performance. ISS has left open the possibility that such metrics will be extended to quantitative evaluations in 2018 or beyond.

- **Relative Degree of Alignment Test.** ISS's (existing) "relative degree of alignment" test (which measures long-term alignment of CEO compensation and TSR relative to peers) will only apply to companies with at least two full years, rather than one full year, of trading data and financial results as a public company.

- **Peer Groups for Canadian Companies.** For Canadian companies subject to ISS's quantitative pay-for-performance screens, ISS will change the way it constructs company-specific peer groups. When creating an ISS peer group for a specific Canadian company, ISS will now incorporate the company's self-determined peer group (much like it has for US companies since 2013).

- **Peer Submission Window for U.S. and Canadian Companies:** US and Canadian companies that hold shareholder meetings between February 1, 2017 and September 15, 2017 may submit self-determined peer groups for the most recently completed fiscal year during the period from November 28 to December 9.

Also on November 8, ISS announced changes to its pay-for-performance and peer group construction methodologies for European companies.

For the full text of ISS's announcement of the above-described updates, click here. ISS has indicated that it will publish additional information regarding the announced updates in the coming weeks.

Register for Our 2017 Proxy Season Update Webinar

On Thursday, December 8 at 12:00 p.m. (CT), please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Sard Verbinnen & Co. for a webinar discussion of key developments and trends impacting public companies in the 2017 annual report and proxy season.

Click here to register.

CFTC

CFTC Approves Supplemental Proposal to Regulation AT

The Commodity Futures Trading Commission has approved a supplemental proposal to Regulation Automated Trading (Regulation AT), which was initially proposed in November 2015. In the initial proposal, the CFTC proposed a comprehensive set of rules affecting futures traders that use algorithmic trading systems.

A Katten client advisory, "Proposed CFTC Regulation To Impact Algorithmic Trading and Traders," describing the initial proposal, is available here.

In the supplemental proposal, the CFTC seeks to address feedback it received in response to its initial proposal. Specifically, the supplemental proposal introduces a volume threshold test with respect to "AT persons" and amends the definition of "direct electronic access." The supplemental proposal also revises the requirements regarding pre-trade risk controls, establishes new procedures by which the CFTC may request access to AT Persons' source code, and addresses obligations of AT Persons that use third-party algorithms, among other things.

Katten's recently published client advisory, "CFTC Approves Supplemental Proposal to Regulation AT," on the supplemental proposal, is available here.

The CFTC's supplemental proposal is available here.

CFTC Amends Filing Requirements for FCM and SD CCO Annual Reports

The Commodity Futures Trading Commission has approved a final rule that amends certain filing requirements for futures commission merchant (FCM) and swap dealer (SD) chief compliance officer (CCO) annual reports. Most notably, the CFTC extended the filing deadline to 90 days after the registrant's fiscal year-end. (The previous filing deadline had been 60 days after fiscal year-end, which had been extended to 90 days through various no-action letters). The CFTC also revised the CCO annual report filing requirements to clarify that the report does not need to be filed simultaneously with the relevant FCM's or SD's financial report.

In addition, the CFTC adopted a separate timeline for FCMs and SDs that are subject to a substituted compliance regime. Pursuant to the new filing requirements, substituted compliance registrants generally are required to file the comparable annual report with the CFTC 15 days after the date in which the report must be completed under the requirements of the applicable substituted compliance regime. If the substituted compliance regime does not specify a date, then the annual report must be filed with the CFTC within 90 days after fiscal year-end.

The CFTC's adopting release is available here.

NFA Increased the Required Minimum Security Deposit for Forex Transactions

National Futures Association (NFA) has increased the minimum security deposit that forex dealer members must collect and maintain for currency pairs involving the British pound to 5 percent. (The previous minimum security deposit for currency pairs involving the British pound was 2 percent). The increase went into effect on November 7.

NFA also has reminded members that the minimum security deposit for currency pairs involving the Mexican peso remains at 6 percent.

More information is available here.

UK/BREXIT DEVELOPMENTS

FCA Publishes Consultation on Future Mission

On October 26, the UK Financial Conduct Authority (FCA) published a consultation (Consultation) on its "future mission"—which are the FCA's priorities and approaches to regulation for the coming years. The Consultation invites feedback on several key topics, including:

- the functioning of markets;
- meeting the FCA's policy objectives;
- balancing conduct regulation and public policy;
- consumer protection, redress and vulnerable consumers;
- transparency and disclosures;
- FCA intervention;
- competition;
- supervision of firms; and
- the FCA's approach to enforcement.

Responses to the Consultation must be submitted to the FCA by January 26, 2017.

A copy of the Consultation is available here, and the FCA's accompanying press release is available here.

UK Treasury Committee Publishes FCA Letter on Asset Management, Financial Services and Passporting in a Post-Brexit Environment

On November 8, the House of Commons Treasury Committee published a letter (Letter) it had received from Andrew Bailey, Chief Executive of the UK Financial Conduct Authority (FCA) (dated October 28). The Letter had been prepared in response to a number of questions raised at a Treasury Select Committee hearing held on July 20 (which focused on the regulatory landscape for financial services and passporting regimes post-Brexit).

The Letter covers a number of topics including: (1) cross-border trade in financial services; (2) the role of passporting; (3) equivalence frameworks for so-called third countries (meaning non-EU and non-EEA countries); (4) asset management under the World Trade Organization framework; (5) asset management and third-country passporting; (6) what the optimal outcome for UK financial services from the UK's exit negotiations might look like; (7) potential advantages of the United Kingdom operating outside of the European Union; and (8) the FCA's ongoing role in improving global standards through participation in international organizations such as the International Organization of Securities Commissions (IOSCO).

The Letter likely will be of interest to UK asset managers and other financial services firms in the United Kingdom that use their single-market passport rights to provide services cross-border within the European Union.

A copy of the Letter is available here.

EU DEVELOPMENTS

ESMA Publishes Updated Q&A on MiFID II and MiFIR Transparency Topics

On November 4, the European Securities and Markets Authority (ESMA) published an updated question and answer (Q&A) document on a range of transparency topics under the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR).

The updated Q&A likely will be particularly relevant to brokerage firms as it clarifies key assessment and compliance dates for investment firms with respect to the systematic internalizer regime (SIs).

Under MiFID II, SIs are investment firms that, on an organized, frequent, systemic and substantial basis, deal on own account when executing client orders outside a trading venue (being, a regulated market, a multilateral trading facility or an organized trading facility) without operating a multilateral system. MiFIR contains a transparency regime for SIs, and sets out a number of requirements for SIs, including obligations to publish quotes in respect of equity and non-equity instruments where there is a liquid market (subject to conditions), among others. In order to determine if an investment firm falls within the definition of an SI, they must assess whether their trading activities meet pre-defined trading thresholds, indicating frequent systematic and substantial activities.

The updated Q&A confirms that:

- ESMA will publish data on the total number and volume of transactions executed in the European Union by August 1, 2018.
- Investment firms will subsequently need to: (1) assess their trading activities to confirm if they within the definition of an SI; and (2) comply with those requirements under MiFID II and MiFIR (where applicable) by September 1, 2018.

This means that SIs effectively have a “reprieve” or delay of nine months after MiFID II and MiFIR take effect before they have to determine whether or not they fall into the new SI regime.

ESMA intends to publish information for subsequent assessments by the first calendar day of February, May, August and November of each year. Investment firms that meet the definition of an SI are expected to comply with the SI regime no later than two weeks after each publication (by the 15th calendar day of February, May, August and November of each year).

For more information, see the *Corporate & Financial Weekly Digest* edition on October 14.

A copy of the Q&A is available here, and ESMA’s accompanying press release is available here.

ESMA Publishes Updated MAR Q&A

On October 26, the European Securities and Markets Authority (ESMA) issues an updated question and answer (Q&A) document on the implementation of the EU Market Abuse Regulation (MAR). The latest Q&A includes additional questions and guidance with respect to managers' transactions, investment recommendations and recommendations for investment strategies.

Questions included cover: (1) whether communications such as telephone calls, chat functions or sales notes constitute an investment recommendation under MAR; (2) communications that do not refer to one or several financial instruments; (3) whether firms producing investment recommendations would fall within the scope of MAR, where such recommendations are not part of their main business; and (4) whether including statements

describing financial instruments as “undervalued”, “fairly valued” or “overvalued” fall within the definition of investment recommendation under MAR.

The updated Q&A is available here, and ESMA’s accompanying press release 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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