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BROKER-DEALER

FINRA Requests Comment on Revised Price Disclosure Information Standards for Corporate and Agency Debt Securities

The Financial Industry Regulatory Authority issued a regulatory notice requesting comment to revisions on a proposed rule that would enhance information disclosure standards for retail-size customer trades of corporate and agency debt securities. The proposed rule would require a firm engaged in these transactions to disclose on every customer confirmation the price to the customer, the price to the firm of the same-day trade and the difference between those prices.

After receiving 30 comments questioning the burdens and applicability of the original proposal, FINRA proposed several revisions. First, FINRA initially proposed that the new disclosure requirements would apply to transactions involving 100 bonds or less or bonds with a face value of \$100,000 or less. FINRA proposed replacing this qualifying size requirement with a blanket exclusion for transactions involving institutional accounts. Second, FINRA had proposed several methodologies that firms could use to determine the reference price for disclosure when a transaction involved multiple firm trades. FINRA's revised proposal allows for greater flexibility by permitting firms to use reasonable alternative methodologies as long as they are adequately documented and consistently used. Third, the original proposal forced firms to disclose market prices even when certain events, such as a credit downgrade, materially impacted those prices. In response, FINRA's amended proposal would permit firms to avoid disclosing reference prices in these circumstances or allow for clarifying information to be provided. Fourth, the original proposal required firms to disclose price information if a principal trade occurred on the same date as a customer trade. FINRA's revised proposal would exclude firm-side transactions from these disclosure requirements as long as the firm implements policies and procedures that separate and distinguish institutional and retail trading desk activity. Fifth, FINRA decided to distinguish the types of principal trades that would trigger disclosure. In doing so, the revised proposal would exclude principal trades with affiliates involving positions the affiliate acquired on a previous trading day. Sixth, the original proposal did not exempt fixed price offerings from disclosure requirements. The revised proposal would exclude fixed price offering transactions from disclosure obligations but maintain these responsibilities for variable price offerings.

In addition to these changes, FINRA rejected proposals that would relieve firms from disclosure responsibilities if they provided TRACE data to customers. Instead, FINRA emphasized that customers need to receive both the TRACE data and the price disclosure information.

FINRA's regulatory notice is available [here](#). FINRA's related press release is available [here](#).

DERIVATIVES

US Withholding Tax on Dividend Equivalent Payments Under Swaps

The US Department of the Treasury has issued regulations with respect to withholding on "dividend equivalent" payments made to a non-US long party on swaps and other financial instruments that are linked to US equities. These regulations are effective for swaps entered into on or after January 1, 2017, and for payments made on or

after January 1, 2018 on swaps entered into during 2016. The International Swaps and Derivatives Association is currently working on a revised protocol that will permit the short party to withhold US tax on dividend equivalent payments made to a non-US long party as required under the regulations.

See “*CFTC Further Extends No-Action Relief for Certain Package Transaction Swaps*” in the CFTC section.

CFTC

CFTC Further Extends No-Action Relief for Certain Package Transaction Swaps

The Commodity Futures Trading Commission’s Division of Market Oversight (DMO) has issued CFTC Letter No. 15-55, extending until November 15, 2016, time-limited no-action relief for certain swaps executed as part of a package transaction.

A package transaction is a transaction involving two or more instruments: (1) that is executed between two or more counterparties; (2) that is priced or quoted as one economic transaction with simultaneous or near simultaneous execution of all components; (3) that has at least one component that is a swap that is made available to trade and, therefore, subject to the trade execution requirement under section 2(h)(8) of the Commodity Exchange Act (CEA); and (4) where the execution of each component is contingent upon the execution of all other components.

CFTC Letter No. 15-55 extends relief from the requirements of CEA section 5(d)(9) and CFTC Regulation 37.9, permitting swap execution facilities (SEFs) and designated contract markets to continue to offer any method of execution for such component swaps. Additionally, SEFs are not required to offer an order book for any of the swap components of such package transactions, as would otherwise be required by CFTC Regulation 37.3(a)(2).

The relief applies to the swap components of package transactions that include at least one individual swap component that is subject to the trade execution requirement and one or more of the following: (1) at least one individual component that is a bond issued and sold in the primary market; (2) all other components that are contracts for the purchase or sale of a commodity for future delivery; (3) at least one individual swap component that is subject to the CFTC’s exclusive jurisdiction, but not subject to the clearing requirement under CEA section 2(h)(1)(A) and CFTC Regulation 50.4; (4) at least one individual component that is not a swap; or (5) at least one individual swap component that is a swap over which the CFTC does not have exclusive jurisdiction.

This relief granted under CFTC Letter No. 15-55 is set to expire on November 15, 2016.

CFTC Letter No. 15-55 is available [here](#).

National Futures Association Issues Updated Self-Examination Questionnaire

The National Futures Association (NFA) has updated the Self-Examination Questionnaire that all NFA members must complete annually. The revised questionnaire incorporates recent changes to NFA rules and Commodity Futures Trading Commission regulations. In particular, the supplemental questionnaire for CFTC merchants has added a series of questions relating to the CFTC’s enhanced customer protection rules, including: (1) recordkeeping and reporting with respect to customer funds; (2) the development and implementation of a risk management program; (3) recordkeeping with respect to customer transactions; and (4) the development and publication of a firm-specific disclosure document.

The updated questionnaire is available [here](#).

An explanation of the changes made is available [here](#).

BANKING

OCC Rescinds Capital Guidance

On October 14, the Office of the Comptroller of Currency (OCC) formally rescinded capital guidance that it had previously issued. The guidance became outdated or superseded, according to the OCC, due to the issuance of the 2013 capital rule that went into effect in 2015.

The list of rescinded guidance is available [here](#).

The 2013 capital rule issuance is available [here](#).

EU DEVELOPMENTS

ESMA Update to the European Parliament on the Extension of the AIFMD Passport to Non-EU AIFMs

On October 13, the European Securities and Markets Authority (ESMA) published the text of a speech made by its chairman, Steven Maijor, to the European Parliament regarding ESMA's ongoing work involving potentially providing non-EU managers (i.e., non-EU AIFMs) and non-EU funds with access to the cross-border passport under the Alternative Investment Fund Managers Directive (AIFMD).

As reported in the [July 31 edition of Corporate & Financial Weekly Digest](#), on July 30, ESMA provided its advice on the proposed extension of the AIFMD cross-border passport to the Parliament, Council of the EU (Council) and European Commission (EC), having assessed six non-EU jurisdictions (Hong Kong, Singapore, the United States, Jersey, Guernsey and Switzerland) for their readiness to be able to comply with the AIFMD passporting rules. At that time ESMA concluded that there were no obstacles to extending the passport to Guernsey and Jersey, and that once certain amendments were made to Swiss legislation later this year, that Switzerland would also have no obstacles and should also be considered for the passport. ESMA was unable to reach a definitive view on Hong Kong, Singapore or the United States.

In his speech, Chairman Maijor commented that:

- Overall, ESMA felt that there was insufficient evidence to indicate that the AIFMD passport had raised major issues in terms of the functioning and implementation of the AIFMD framework.
- ESMA sees merit in the preparation of another opinion on the functioning of EU private placement rules once the AIFMD has been in place for a longer period—and that any such opinion would take into account the decisions to be taken by the Parliament, the Council and the EC on whether to extend the AIFMD passport to any non-EU countries in the interim.
- Although AIFMD itself did not require it to do so, ESMA decided to apply the passport-eligibility criteria (including (1) removing obstacles to inter-jurisdictional cooperation on investor protection, (2) tackling the risk to the EU fund industry of market disruption and distortion of competition, and (3) ensuring the adequacy of systemic risk monitoring) on a non-EU country jurisdiction-by-jurisdiction basis—rather than as a single block (as AIFMD itself had envisioned). Chairman Maijor stated that ESMA did so because it was felt that was the only way to carry out a proper assessment of the various criteria set out in the AIFMD. In particular, factors such as the demand for the passport, the access to the market of these non-EU countries for EU funds and managers, and their regulatory framework as compared to the AIFMD will be assessed this way.
- The selection of Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States in the first “tranche” of non-EU countries was made taking into account a number of criteria, including the amount of activity already being carried out by entities from these countries under EU private placement rules, the existing knowledge and experience of EU regulators with respect to their counterparts in these jurisdictions and, significantly, the efforts made by stakeholders from these countries to engage with ESMA's review process.

- ESMA will continue its assessment of Hong Kong, Singapore and the United States with a view to reaching a definitive conclusion on whether to extend the AIFMD passport to them.
- ESMA is beginning to assess a second “tranche” of non-EU countries: Australia, Canada, Japan, the Cayman Islands, the Isle of Man and Bermuda. These countries were selected using the same criteria as for the first set of advice.
- ESMA is making preparations for itself to have a significant role in the functioning of the AIFMD passporting system and strengthened supervisory cooperation that will be necessary if the passport is to be extended to one or more non-EU countries.

The passport can only be extended to non-EU countries if the Parliament, the Council and the EC jointly agree to make it more widely available (since it is only currently available to EU managers and EU funds). What is uncertain, however, is whether, under AIFMD itself, it is possible to extend the passport on a country by country basis or, if as was originally intended, the passport should only be extended in circumstances where it is made available to all non-EU jurisdictions.

Chairman Maijoor’s speech is available [here](#).

European Commission Launches Call for Evidence on Financial Services Regulation

On September 30, simultaneously to its publication of the Capital Markets Union (CMU) Action Plan (see the [October 9 edition of Corporate & Financial Weekly Digest](#) for further information on the CMU), the European Commission (EC) launched a Call for Evidence on the EU Regulatory Framework for Financial Services (Consultation).

Given the significant amount of legislation directed at the financial services industry in recent years, including the plethora of new rules aimed at financial institutions and markets as well as market infrastructures, the objective of the Consultation is to assist the EC in understanding the combined impact of all these new rules and whether they give rise to any unintended consequences, in particular with respect to diminishing competition by the creation of barriers to entry by new market participants, and identifying areas where further action is needed to support the promotion of jobs and growth.

In pursuing its objective, as part of the Consultation, the EC is specifically wishing to gather feedback on the following:

- **rules affecting the ability of the European economy to finance itself and grow** – to ensure that rules put in place to provide financial stability and investor protection do not unduly discourage long-term investment and sustainable economic growth;
- **unnecessary regulatory burdens** – to ensure that new rules are not overly complex or duplicative, or disproportionate when the associated policy objectives are considered;
- **interactions, inconsistencies and gaps** – to ensure that rules, when taken together, do not result in, for example, duplications, inconsistencies or regulatory gaps or loopholes; and
- **rules giving rise to unintended consequences** – to remove the possibility of regulatory arbitrage.

The responses to the Consultation will provide the EC with a clearer understanding of the cumulative impact of all the rules, together with important guidance when the EC is preparing, if considered appropriate, a formal EC proposal.

The Consultation can be accessed [here](#). Responses to the Consultation must be made by January 6, 2016 at the latest via the online questionnaire only (which can be accessed [here](#)). All feedback provided should be supported by relevant and verifiable empirical evidence and concrete examples (with underlying assumptions being clearly set out).

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EU DEVELOPMENTS

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