

## SEC/CORPORATE

### **SEC Advisory Committee on Small and Emerging Companies to Discuss Capital Formation Landscape for Small and Emerging Companies**

The Securities and Exchange Commission announced that its Advisory Committee on Small and Emerging Companies (Committee) will hold another public meeting on February 25 to examine the capital formation landscape for small and emerging companies, including data on capital raised in unregistered securities offerings. The Committee serves to provide advice and recommendations to the SEC regarding privately held small businesses and publicly traded companies with a market capitalization of less than \$250 million.

The upcoming Committee meeting will be webcast live on February 25 on the SEC's website.

The SEC's press release can be found [here](#).

### **SEC Issues No-Action Letters With Respect to Rule 14a-8(i)(10)**

On February 12, the Securities and Exchange Commission's Division of Corporation Finance (the Division) posted on its website 18 no-action letters relating to the exclusion of proxy access shareholder proposals under Rule 14a-8(i)(10). Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal from its proxy statement if "the company has already substantially implemented the proposal." In 15 of the 18 letters, the SEC granted issuers requested no-action relief, allowing them to exclude the shareholder proposals. In each case, the shareholder proposal sought adoption of a bylaw amendment that would permit shareholders holding a requisite threshold of shares to nominate board candidates for inclusion in the issuer's proxy statement (i.e., a proxy access bylaw proposal).

The SEC granted issuers requested no-action relief in situations where the shareholder proposals sought adoption of proxy access bylaws that differed from bylaws that have been adopted by the issuers in that (1) the shareholder proposed bylaws would have required the company to include a number of shareholder nominated candidates up to the greater of (a) two nominees and (b) 25 percent of the board, whereas the issuer's bylaws limit such candidates, for example, to only 20 percent or 25 percent of the board, or (2) the shareholder proposed bylaws would have permitted unrestricted aggregation of shareholdings among shareholders to achieve minimum ownership thresholds, whereas the issuer's bylaws allow aggregation, but cap it (e.g., at 20 shareholders). Despite such differences, the SEC did not reject the issuers' positions that the proxy access proposals had been substantially implemented.

In each of the three no-action letters where relief was not granted to the requesting issuers, those issuers included in their bylaws a 5 percent ownership threshold to nominate directors for inclusion in the issuer's proxy statement, rather than the 3 percent ownership threshold reflected in the proxy access bylaw proposals.

See complete copies of each of the 18 no-action letters [here](#).

## DERIVATIVES

See “CFTC Grants Relief to Certain Non-U.S. Intermediaries,” “CFTC Grants Relief for End Users from Trade Option Filing Requirements” and “CFTC Designates NFA as SDR Data Recipient” in the CFTC section.

## CFTC

### **CFTC Grants Relief to Certain Non-U.S. Intermediaries**

The Commodity Futures Trading Commission’s Division of Swap Dealer and Intermediary Oversight (DSIO) has granted no-action relief to certain intermediaries located outside the United States. As background, CFTC Regulation 3.10(c)(3)(i) provides an exemption from registration as a commodity pool operator (CPO), commodity trading advisor (CTA) or introducing broker (IB) to persons located outside the United States that act only on behalf of persons located outside the United States. To avail themselves of this exemption, these non-US persons must submit their commodity interest transactions for clearing through a registered futures commission merchant.

DSIO’s no-action relief extends this exemption to include swaps that are not required to be cleared. As such, non-US persons that act only on behalf of non-U.S. persons may engage in such uncleared swaps without registering as a CPO, CTA or IB.

CFTC Letter No. 16-08 is available [here](#).

### **CFTC Grants Relief for End Users from Trade Option Filing Requirements**

The Commodity Futures Trading Commission’s Division of Market Oversight (DMO) has issued CFTC Letter No. 16-10, which provides temporary no-action relief from certain trade option reporting requirements to market participants that are neither swap dealers nor major swap participants (Non-SD/MSPs). CFTC Letter No. 16-10, taken together with CFTC Letter No. 13-08, provide reporting relief to Non-SD/MSPs as follows:

- With respect to a Non-SD/MSP that has become obligated as a reporting party to comply with the reporting requirements of Part 45 of the CFTC’s Regulations during the preceding 12 months in connection with any non-trade option swap trading activity, CFTC Letters Nos. 13-08 and 16-10 provide that such Non-SD/MSP may report its 2015 trade options on Form TO by April 1, 2016 in lieu of reporting the trade options pursuant to Part 45 of the CFTC’s Regulations. Pursuant to CFTC Letter No. 13-08, any such Non-SD/MSP additionally must notify DMO via email within 30 days of entering into trade options having an aggregate notional value in excess of \$1 billion annually.
- CFTC Letter No. 16-10 provides that all other Non-SD/MSPs are exempt from the requirement to report their trade options for 2015 on Form TO.

CFTC Letter No. 16-10 is available [here](#). CFTC Letter No. 13-08, which also provides relief with respect to trade option recordkeeping requirements, is available [here](#).

### **CFTC Designates NFA as SDR Data Recipient**

The Commodity Futures Trading Commission has issued an order authorizing National Futures Association (NFA) as a designee of the CFTC for purposes of receiving direct electronic access to swap data repository (SDR) data. All registered SDRs are required to provide NFA with direct electronic access to their respective data.

As conditions to the order, NFA must safeguard from public disclosure any information contained in the SDR data and refer to the CFTC any requests for SDR data information. NFA may access and use the SDR data solely to facilitate NFA’s functions as a registered futures association.

The CFTC’s order is available [here](#).

## **NFA's Interpretive Notice on Information Systems Security Programs Becomes Effective on March 1**

National Futures Association (NFA) has issued a reminder that its interpretive notice on information systems security programs becomes effective on March 1. The interpretive notice, which was discussed in detail in the September 4, 2015 edition of [Corporate & Financial Weekly Digest](#), applies to all membership categories.

More information is available [here](#).

## **EU DEVELOPMENTS**

### **ESMA Publishes Discussion Paper on European Benchmarks Regulation**

On February 15, the European Securities and Markets Authority (ESMA) published a discussion paper (ESMA/2016/288) (Discussion Paper) regarding implementation of the regulation on indices used as benchmarks in financial instruments and financial contracts (Benchmarks Regulation).

The Discussion Paper is designed to inform ESMA's work on draft regulatory technical standards and technical advice to the European Commission, in relation to the Benchmarks Regulation. The Discussion Paper seeks stakeholder feedback on:

- definition of benchmarks;
- oversight function requirements for benchmark administrators;
- input data requirements;
- transparency of methodology requirements for benchmark administrators;
- codes of conduct for benchmarks based on contributions from contributors;
- governance and systems and control requirements for supervised contributors;
- critical benchmarks;
- significant benchmarks;
- authorization and registration of administrators; and
- recognition and endorsement of third country administrators and benchmarks.

ESMA notes that the Discussion Paper is based on the Benchmarks Regulation as of December 2015 (following the European Parliament and Council reaching a preliminary political agreement on the text of the Benchmarks Regulation on November 24, 2015). The Benchmarks Regulation is yet to be published.

Responses to the Discussion Paper must be received by ESMA by March 31. ESMA has scheduled an open hearing on the Discussion Paper for February 29 and expects to publish a further Consultation Paper later in 2016.

The text of the Benchmarks Regulation can be found [here](#).

A copy of the Discussion Paper can be found [here](#).

ESMA's accompanying Press Release can be found [here](#).

### **ESMA Publishes First Supervisory Convergence Work Programme**

On February 11, the European Securities and Markets Authority (ESMA) published its first Supervisory Convergence Work Programme for 2016 (SCWP). The SCWP supplements ESMA's 2016 Annual Work Programme and sets out the initiatives ESMA will undertake to further supervisory convergence across the European Union (EU), in the context of ESMA's Strategic Orientation for 2016–2020.

The SCWP confirms ESMA's shift from single rulebook to supervisory convergence work and sets out the four key priorities for ESMA for 2016. These priorities include work to prepare for the implementation of the Markets in Financial Instruments Directive and the Markets in Financial Instruments Regulation (together, MiFID II) (among other things), and work to ensure data and IT infrastructure necessary for MiFID II is in place. Other priorities also include advancing consistent supervision of over-the-counter derivatives markets, with a particular focus on EU central counterparties, and assisting the European Commission's Capital Markets Union (CMU) initiatives (see the [Corporate & Financial Weekly Digest](#) edition of October 9, 2015 for further information on the CMU).

ESMA's supervisory convergence initiatives and priorities aim to achieve consistent approaches between EU national competent authorities and "comparable regulatory outcomes," particularly in the context of new EU legislation soon to come into effect (such as MiFID II). ESMA notes that the SCWP is an "ambitious plan" and that other important topics such as developing a consistent approach to enforcement and sanctions will be considered when forming the 2017–2018 programme.

Work towards the SCWP priorities will be monitored (and adjusted where needed) throughout 2016.

ESMA's Strategic Orientation for 2016-2020 can be found [here](#).

ESMA's 2016 Annual Work Programme can be found [here](#).

A copy of the SCWP can be found [here](#).

ESMA's accompanying Press Release can be found [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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EU DEVELOPMENTS

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