

SEC/CORPORATE

SEC Issues C&DI on Disclosure of Self-Identified Director Diversity Characteristics

On February 6, the staff of the Division of Corporation Finance of the Securities and Exchange Commission released two identical Compliance and Disclosure Interpretations (C&DIs). These C&DIs provide guidance on disclosure required under Items 401 and 407 of Regulation S-K in circumstances where a director or board nominee self-identifies specific diversity characteristics, such as race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background. Item 401(e) requires that companies disclose the “specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director.” Item 407 requires that companies describe how its board (or nominating committee) implements policies that it follows, if any, with regard to the consideration of diversity in identifying director nominees.

In C&DIs 116.11 and 133.13, the staff stated that, to the extent the board or nominating committee considered any such self-identified diversity characteristics of a director in its evaluation of the specific qualifications and attributes applicable to the director’s service on the board, they would expect the company to identify those characteristics in its Item 401 disclosure and describe how they were considered. They also indicated that they expect that any description of diversity policies followed by the company, as required by Item 407, would include a discussion of how the company considers the self-identified diversity attributes of nominees.

The full text of the staff’s new C&DIs are available [here](#) and [here](#).

EU/BREXIT DEVELOPMENTS

UK Guide to Post-Brexit Financial Sanctions Published

On February 1, HM Treasury and the UK Office of Financial Sanctions Implementation (OFSI) published guidance on financial sanctions in preparation for the United Kingdom’s exit from the European Union on March 29 (Exit Day) on the basis of no agreement on transitional arrangements being in place with the EU (no-deal Brexit).

The guidance will only go into effect when statutory instruments (SIs) under the Sanctions and Anti-Money Laundering Act 2018 transfer existing EU sanctions into UK law. The SIs will, in turn, only go into effect on Exit Day if there is a no-deal Brexit. The guidance is designed to ensure that sanctions continue to apply without interruption when the United Kingdom leaves the European Union.

The guidance is available [here](#).

Agreement Reached on EMIR Refit Regulation

On February 5, the Council of the European Union and the European Parliament announced a preliminary agreement on a proposal for a Regulation to amend the European Market Infrastructure Regulation (EMIR Refit). The proposal aims to improve the existing regulatory framework applying to the over-the-counter (OTC) derivative market.

Key elements of the agreed EMIR Refit text highlighted by the Council include:

- The introduction of “small financial counterparties,” which will be exempted from the obligation to clear their OTC derivative transactions through a central counterparty; however they will remain subject to risk mitigation obligations;
- The extension of the temporary exemption from the clearing obligation for pension scheme arrangements for another two years (further extendable twice, each time for an additional year);
- The streamlining of existing rules on reporting requirements for OTC derivatives to improve the quality of the data reported, including removal of the “backloading” requirement and requirements relating to intragroup transactions involving non-financial counterparties; and
- The inclusion of an obligation for clearing members to provide “fair, reasonable, non-discriminatory and transparent” commercial terms, designed to ensure transparency on fees, as well as improved contractual arrangements.

The agreed text will now be submitted to EU ambassadors for endorsement before the Council of the European Union and the European Parliament can adopt the final regulation.

The Council of the European Union’s press release is available [here](#).

BoE and ESMA Agree No-Deal MoUs on Recognition of UK CCPs and CSDs

On February 4, the European Securities and Markets Authority (ESMA) and the Bank of England announced that they have agreed on Memorandums of Understanding (MoUs) surrounding the cooperation and information-sharing arrangements with respect to UK-based central counterparties (CCPs) and central securities depositories (CSDs) in the event of the United Kingdom’s exit from the European Union on March 29 (Exit Day) without an agreement on transitional arrangements being in place with the EU (no-deal Brexit).

The MoUs follow the adoption by the European Commission in December 2018 of temporary equivalence decisions on the future UK legal and supervisory framework for UK CCPs and CSDs (for further information see the December 14, 2018 edition of [Corporate & Financial Weekly Digest](#)). Although the texts of the MoUs have not been published, ESMA has described the MoUs as statements of intent to consult, cooperate and exchange information regarding UK CCPs and CSDs.

ESMA has previously made public statements of support for continued access to UK CCPs and CSDs, in order to limit the risk of disruption in central clearing and to avoid any negative impact on the financial stability of the European Union.

While the MoUs satisfy only one of four requirements for the recognition of UK CCPs and CSDs under the European Market Infrastructure Regulation and Central Security Depositories Regulation, respectively, ESMA aims to complete the remaining necessary steps and adopt recognition decisions “well ahead” of Brexit. In the event of a no-deal Brexit, the recognition decisions will take effect the day after Exit Day.

ESMA’s press release is available [here](#).

The Bank of England’s statement is available [here](#).

ESMA Updates MiFIR Data Reporting Q&As

On February 4, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers document (Q&As) on data reporting under the Markets in Financial Instruments Regulation (MiFIR).

The updated Q&A includes four new questions that cover reporting the legal entity identifier (LEI) of issuers to the financial instruments reference database system (FIRDS) where an issuer has a branch with an LEI, as well as how to report maturity, expiry and termination dates to FIRDS.

The update also includes an amendment to an existing question that provides further clarity on the use of the trading venue transaction identification code when reporting transactions on complex trades.

The updated Q&A is available [here](#).

ESMA Updates EMIR Implementation Q&As

On February 4, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers document (Q&As) on the implementation of the European Market Infrastructure Regulation (EMIR).

The amendments include:

- An amended question in relation to trade repositories (TRs) to confirm how counterparties should report a derivative with no maturity date;
- An amended question to clarify the reporting of derivatives that are terminated before the reporting deadline and when these should be submitted; and
- A new question on TRs to clarify the approach counterparties should take for reporting field “confirmation means.”

The updated Q&A is available [here](#).

ESMA Publishes Statement on the Impact of a No-Deal Brexit on Its Databases

On February 5, the European Securities and Markets Authority (ESMA) issued a statement on the impact the UK’s exit from the European Union on March 29 (Exit Day) without an agreement on transitional arrangements being in place with the European Union (no-deal Brexit) would have on ESMA’s databases.

In the scenario of a no-deal Brexit, from March 30, ESMA will stop receiving data from the UK Financial Conduct Authority, which will no longer have access to ESMA’s IT applications and databases, meaning no new UK-related data will be received, processed or published on ESMA’s website.

ESMA’s statement particularly focuses on the implications for transparency calculations (under the revised Markets in Financial Instruments Directive and the Markets in Financial Instruments Regulation) performed using the various ESMA databases, including:

- The obligation to submit reference data;
- Reporting transaction data to home competent authorities and routing relevant transactions to the relevant competent authority;
- Changes to annual transparency calculations for equity instruments;
- Transparency calculations for non-equity instruments;
- Adjusting calculations for the determination of systematic internalizers;
- Double volume cap reporting; and
- Ancillary activity calculations.

In the event that the timing and conditions of Brexit change, ESMA comments that it will modify its approach for its IT applications and databases and will inform the public of this as soon as possible.

The full statement is available [here](#).

ESMA Publishes Revised Draft Technical Standards and Q&A on Disclosure Requirements

On January 31, the European Securities and Markets Authority (ESMA) published an opinion containing a revised set of draft regulatory and implementing technical standards (RTS/ITS) under the Securitization Regulation, which require certain information to be reported about securitizations by the originator, sponsor or special purpose entity. The opinion includes the format for making the required information available and reporting templates for different types of securitization.

ESMA had published a final report in August 2018, which contained the original draft RTS/ITS. The European Commission (EC) subsequently asked ESMA to make certain amendments in order to reduce the likely administrative burden on reporting entities.

In a press release accompanying the opinion, ESMA stated that it agreed with the EC's request, and has accordingly amended the disclosure RTS/ITS to, among other things:

- Expand the ability for reporting entities to use the “No Data” options in the respective disclosure templates, in particular, in the templates for asset-back commercial paper securitizations;
- Adjust the content of certain fields in the templates; and
- Clarify the templates to be used to provide any inside information and significant events information affecting a securitization.

ESMA also published a related questions and answers document (Q&A). The Q&A covers technical issues on how to complete template fields. Since they are being provided before adoption of the RTS/ITS by the EC, ESMA states that they are subject to change.

The opinion has been submitted to the EC for endorsement.

The opinion is available [here](#).

The Q&A is available [here](#).

ESMA's accompanying press release is available [here](#).

FCA and PRA Publish Direction on Reporting Private Securitizations Under Securitization Regulation

On January 31, the UK Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) published a direction under the UK Securitization Regulations 2018 (a statutory instrument that implements the EU Securitization Regulation) setting out how relevant parties must report certain information to the FCA or PRA.

The requirements relate to private securitizations, which are securitizations where no prospectus has to be drawn up in compliance with the Prospectus Directive. The direction sets out when and in what manner relevant information must be sent to the FCA or PRA (as the case may be) for:

- Private securitizations that are non-asset backed commercial paper (ABCP) securitizations, where the originator, sponsor or securitization special purpose entity (SSPE) is established in the United Kingdom;
- Private ABCP programs, where the sponsor or SSPE of the ABCP program is established in the United Kingdom; and
- Private ABCP transactions under an ABCP program, where neither the sponsor nor the SSPE of the ABCP program is established in the United Kingdom, but an originator, sponsor or SSPE of an ABCP transaction within that ABCP program is established in the United Kingdom.

In each case, notification templates are prescribed, which are annexed to the direction.

The direction became immediately effective on January 31. The direction also applies beginning January 1, where notification would otherwise have been required; any such notifications need to be made as soon as reasonably possible from January 31.

The direction is available [here](#).

For more information, contact:

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| | | |
|----------------------|-----------------|--------------------------|
| Mark J. Reyes | +1.312.902.5612 | mark.reyes@kattenlaw.com |
| Mark D. Wood | +1.312.902.5493 | mark.wood@kattenlaw.com |

FINANCIAL SERVICES

| | | |
|-------------------------------|------------------|-----------------------------------|
| Janet M. Angstadt | +1.312.902.5494 | janet.angstadt@kattenlaw.com |
| Henry Bregstein | +1.212.940.6615 | henry.bregstein@kattenlaw.com |
| Wendy E. Cohen | +1.212.940.3846 | wendy.cohen@kattenlaw.com |
| Guy C. Dempsey Jr. | +1.212.940.8593 | guy.dempsey@kattenlaw.com |
| Gary DeWaal | +1.212.940.6558 | gary.dewaal@kattenlaw.com |
| Kevin M. Foley | +1.312.902.5372 | kevin.foley@kattenlaw.com |
| Mark D. Goldstein | +1.212.940.8507 | mark.goldstein@kattenlaw.com |
| Jack P. Governale | +1.212.940.8525 | jack.governale@kattenlaw.com |
| Arthur W. Hahn | +1.312.902.5241 | arthur.hahn@kattenlaw.com |
| Christian B. Hennion | +1.312.902.5521 | christian.hennion@kattenlaw.com |
| Carolyn H. Jackson | +44.20.7776.7625 | carolyn.jackson@kattenlaw.co.uk |
| Fred M. Santo | +1.212.940.8720 | fred.santo@kattenlaw.com |
| Christopher T. Shannon | +1.312.902.5322 | chris.shannon@kattenlaw.com |
| Robert Weiss | +1.212.940.8584 | robert.weiss@kattenlaw.com |
| Lance A. Zinman | +1.312.902.5212 | lance.zinman@kattenlaw.com |
| Krassimira Zourkova | +1.312.902.5334 | krassimira.zourkova@kattenlaw.com |

UK/EU/BREXIT DEVELOPMENTS

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|---------------------------|------------------|----------------------------------|
| John Ahern | +44.20.7770.5253 | john.ahern@kattenlaw.co.uk |
| Carolyn H. Jackson | +44.20.7776.7625 | carolyn.jackson@kattenlaw.co.uk |
| Neil Robson | +44.20.7776.7666 | neil.robson@kattenlaw.co.uk |
| Nathaniel Lalone | +44.20.7776.7629 | nathaniel.lalone@kattenlaw.co.uk |

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