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# SEC/CORPORATE

## SEC Releases Target Dates for Proposed and Final Rulemaking

The Securities and Exchange Commission recently published its agenda with respect to upcoming rulemaking, including rulemaking contemplated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. In setting its agenda, the SEC established target dates for taking various rulemaking actions, including setting an April 2017 target for the following measures:

- adopting final rules regarding incentive-based compensation clawbacks and listing standards for the recovery of erroneously-awarded compensation;
- adopting final rules regarding disclosure of executive pay-for-performance;
- adopting final rules regarding disclosure of hedging transactions;
- adopting final amendments to rules and Form N-PX that require investment managers to disclose their proxy votes on executive compensation and golden parachutes;
- proposing amendments to the proxy rules to allow for universal proxy statements;
- proposing amendments to the proxy rules to require additional disclosure regarding the diversity of board members and nominees; and
- proposing revisions to the "smaller reporting company" definition and related provisions.

As a reminder, the target dates included in the SEC's recently published agenda should be considered as guidelines rather than absolute deadlines.

The SEC Agency Rule List is available here.

# BROKER-DEALER

## SEC Approves Rule Requiring Delivery of an Educational Communication to Customers of a Transferring Representative

The Financial Industry Regulatory Authority recently released Regulatory Notice 16-18, which describes the newly adopted FINRA Rule 2273 (Rule). The Rule requires a firm that hires or associates with a registered representative to provide former customers of the representative an educational communication prepared by FINRA ("Communication") when: (x) the firm, directly or through a representative, contacts such former customers individually to transfer assets to the firm, which includes (i) informing the former customer that he is now associated with the new firm, (ii) informing the former customer that the new firm may offer better or different products and services, or (iii) sending a mass mailing of information about the new firm to former customers; or (y) such former customer, without being individually contacted, transfers his assets to the representative at the firm.

The Communication includes information regarding the implications of transferring assets to the new firm, including: (i) potential conflicts of interest; (ii) that some assets may not be directly transferrable to the firm and such transfer may result in costs to liquidate and move those assets; and (iii) the differences in products and services between the customer's current firm

and the new firm. The Rule requires the Communication to be delivered at the time of the first individualized contact with the former customer regarding his transfer of assets to the new firm.

The Rule becomes effective November 11.

More information about the Rule is available here.

# DERIVATIVES

### CFTC Adopts Final Rule for Cross-Border Application of Swap Margin Requirements

On May 24, the Commodity Futures Trading Commission adopted by a 2-1 vote a final rule that specifies how the CFTC's margin rules for uncleared swaps (adopted late last year and published on January 6, 2016) (the "Margin Rules") apply to swaps involving counterparties from jurisdictions other than the United States. In general, the CFTC requires full compliance with the US Margin Rules for transactions between swap dealers and US persons and allows substituted compliance (i.e., compliance with the "comparable" laws of another jurisdiction) for some trades involving non-US swap dealers. It also excludes from the Margin Rules swaps between non-US swap dealers and other non-US persons, so long as neither counterparty is guaranteed by, or a subsidiary of, a US person.

The final rule is significantly different from the cross-border margin rule originally proposed by the CFTC because the CFTC decided to conform its approach to international swaps to the approach taken by the US prudential regulators in their margin rules for non-cleared swaps that apply to bank swap dealers. That decision was driven by the demographics of the swap dealer population. Currently, there are 106 swap dealers that are provisionally registered with the CFTC. Of those 106 swap dealers, an estimated 54 are subject to the CFTC's Margin Rules, with the remaining 52 entities falling within the scope of the margin rules adopted by the prudential regulators. Of the 54 dealers subject to the CFTC's margin requirements, approximately 33 are affiliated with a prudentially-regulated swap dealer. The CFTC recognized under those circumstances that "substantial differences between the Commission's and prudential regulators' cross-border regulations could lead to competitive disparities between affiliates within the same corporate structure, leading to market inefficiencies and incentives to restructure their businesses in order to avoid the more stringent cross-border margin framework."

The final rule is available here.

Note that the copy of the final rule includes a convenient Table showing the regulatory outcomes for various combinations of parties under the Margin Rules. This copy states that Table A will not be included in the final version of the rule when it is published in the *Federal Register*.

*See "SEC Releases Target Dates for Proposed and Final Rulemaking" in the SEC/Corporate section, and "European Commission Adopts MiFID II Delegated Regulations" in the EU Developments section.*

# BANKING

### FDIC Extends Comment Period on Deposit Account Recordkeeping Proposal

On May 20, the Federal Deposit Insurance Corporation (FDIC) extended the comment period for proposed recordkeeping requirements for FDIC-insured institutions with a large number of deposit accounts. The proposed recordkeeping requirements, "which are designed to facilitate rapid payment of insured deposits to customers if large institutions were to fail," were published in the *Federal Register* on February 26 with a 90-day comment period. All comments must now be received on or before June 25.

To assist commenters, the FDIC has published a report prepared for the agency on the estimated cost of compliance. The proposed rule would apply to insured depository institutions with at least 2 million deposit accounts. While the FDIC stated that it "is not proposing or considering making these requirements applicable to smaller institutions, including community banks," several community banks with large scale deposit bases will be affected under the proposal.

The FDIC's press release is available here.

The FDIC's report is available here.

### Agencies Issue Guidance on Deposit-Reconciliation Practices

On May 18, the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System (FRB), the Consumer Financial Protection Bureau (CFPB), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) issued guidance outlining joint supervisory expectations regarding deposit-reconciliation practices that may be detrimental to customers. Highlights of the guidance follows:

- The guidance addresses a set of situations in which customers make deposits to accounts and the dollar amount that the financial institution credits to that account differs from the total amount deposited. Such discrepancies may arise in a variety of situations, including inaccuracies on the deposit slip, encoding errors or poor image-capture. The result may be a detriment to the customer and a benefit to the financial institution if not appropriately reconciled.

- Various laws and regulations may be relevant to deposit-reconciliation practices. Among them, the Expedited Funds Availability Act, as implemented by Regulation CC, requires that financial institutions make funds deposited in a transaction account available for withdrawal within prescribed time limits. In addition, a financial institution's deposit-reconciliation practices are subject to Section 5 of the Federal Trade Commission Act, which prohibits a financial institution from engaging in unfair or deceptive acts or practices.

- The Agencies expect financial institutions to adopt deposit-reconciliation policies and practices that are designed to avoid or reconcile discrepancies, or designed to resolve discrepancies such that customers are not disadvantaged.

The joint guidance is available here.

## UK DEVELOPMENTS

### UK Court of Appeal Decision: Certain Administrative Activities Conducted in the UK May Be Regulated Activities

On May 17, 2016, the UK Court of Appeal issued a ruling (the Decision) in the case of *Personal Touch Financial Services v Simplysure*, which significantly broadens the meaning of "arranging deals" and also by consequence, the scope of regulated activities in the United Kingdom.

In its Decision, the Court of Appeal analysed the regulated activity of "arranging deals in investments" under Article 25 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO).
Article 25(1) and (2) of the RAO specify that:

> *(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> > *(a) a security;*
> > *(b) a contractually based investment; or*
> > *(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,*
> > *is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

The Court of Appeal noted that the wording and scope of Article 25 is "deliberately wide." In the Decision, the Court of Appeal found that merely assisting a potential customer to complete a standard form in connection with a specific investment was within the scope of both Articles 25(1) and 25(2) RAO.

The implications of the Decision will be significant for many Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) regulated firms operating in the United Kingdom—and also for unregulated firms who thought that they were outside of the scope of regulation. Firms would be advised to ensure that they understand what their staff is doing for customers and potential customers—since in a business context, simply helping a customer complete an application form or conducting other administrative tasks could now be considered to be a regulated activity.

A copy of the Decision is available here.

# EU DEVELOPMENTS

## European Commission Adopts MiFID II Delegated Regulations

On May 24, the European Commission (EC) adopted two delegated acts to supplement the amended and restated Markets in Financial Instruments Directive (MiFID II). The delegated acts both take the form of a regulation (together, Delegated Regulations) and cover: (1) the admission of financial instruments to trading on regulated markets (Admission Delegated Regulation), and (2) the suspension and removal of financial instruments from trading on regulated markets (Suspension Delegated Regulation).

Under MiFID II, regulated markets are required to have clear and transparent admission rules, to ensure instruments are traded in a "fair, orderly and efficient manner." MiFID II further requires that those rules also ensure transferable securities are freely negotiable. The recently adopted Admission Delegated Regulation sets out specific criteria to determine if transferable securities are freely negotiable and also, criteria to assess whether transferable securities, units and shares in collective investment undertakings, and derivatives, are being traded in a fair, orderly and efficient manner. For example, in relation to derivatives, fair, orderly and efficient criteria include that the terms of the contract establishing the financial instrument are "clear and unambiguous" and "sufficient information of a kind needed to value the derivative is publically available," among others.

MiFID II also contains requirements for operators of regulated markets to suspend or remove financial instruments, and any related or referenced derivatives, that no longer comply with the rules of the regulated market. The Suspension Delegated Regulation supplements this requirement, and further specifies that only derivatives that relate or reference to one financial instrument shall be caught. The Suspension Delegated Regulation does not apply to derivatives which have multiple price inputs, such as indexes or baskets of financial instruments.

As mentioned in previous updates, the European Council and European Parliament will consider the Delegated Regulations, and once formally approved, the Delegated Regulations will go into effect 20 days following its publication in the *Official Journal of the European Union*.

For more information, see the *Corporate & Financial Weekly Digest* edition of May 20, 2016, *Corporate & Financial Weekly Digest* edition of April 29, 2016 and *Corporate & Financial Weekly Digest* edition of April 15, 2016.

The Admission Delegated Regulation is available here and the Suspension Delegated Regulation, here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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