Katten
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SEC/CORPORATE

Register for Our 2018 Proxy Season Update Webinar

On Thursday, December 14 at 12:00 p.m. (CT), please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Strategic Governance Advisors for a webinar discussion of key developments and trends impacting public companies in the 2018 annual reporting and proxy season.

Further details are available here; click here to register.

BROKER-DEALER

FINRA Requests Further Comments on the Effectiveness and Efficiency of Its Payments for Market Making Rule

On November 28, as part a retrospective rule review, the Financial Industry Regulatory Authority (FINRA) requested comments on Rule 5250 (payments for market makers). FINRA's retrospective rule review process examines significant rulemaking to determine whether the FINRA rule or rule set is meeting its intended objectives by reasonably efficient means and, as necessary, make any amendments to the rules based on these findings.

Rule 5250 prohibits a member or associated person from accepting payment or other consideration, directly or indirectly, from an issuer or its affiliates and promoters, for publishing a quotation, acting as a market maker or in connection with submitting an application. The rule is intended to assure that members act in an independent capacity when publishing a quotation or making a market in an issuer's securities.

FINRA seeks comment on any aspect of the rule together with answers to the following questions:

1. Has the rule effectively addressed the problem it was intended to mitigate?
2. What has been your experience with implementation of the rule, including any ambiguities in the rule or challenges to comply with it?
3. What have been the economic impacts, including costs and benefits, arising from the rule?
4. Can FINRA make the rule, interpretations or attendant administrative process more efficient and effective?

The comment period expires on January 29, 2018.

The FINRA Regulatory Notice is available here.

FINRA Issues Guidance on Reporting Interest Positions Held in Master/Sub-Accounts or Parent/Child Accounts

On December 6, the Financial Industry Regulatory Authority (FINRA) issued a notice to reiterate that firms must report short positions in each individual firm or customer account on a gross basis under FINRA Rule 4560 (Short-Interest Reporting).

FINRA Rule 4560 requires firms to maintain a record of total "short" positions in all customer and proprietary firm accounts and to regularly report such information to FINRA. Under the rule, member firms must record and report all gross short positions existing in each individual firm or customer account, including the account of a broker-dealer, that resulted from either a "short sale" (defined in Rule 200(a) of Regulation SHO), or where the transactions that caused the short position were marked "long" due to the firm's or the customer's net long position at the time of the transaction.

The notice provides that firms must report short interest in each individual firm or customer account—including each sub- or child account—on a gross, as opposed to net, basis, (e.g., not netted against the other sub- or child accounts). Further, the notice provides that regardless of whether sub- or child accounts share the same beneficial owner, or whether the firm has actual or inquiry notice of common ownership, the firm is required to report gross short positions existing in each individual customer account.

The FINRA Regulatory Notice is available here.

FINRA Releases Report on FINRA Examination Findings

On December 6, the Financial Industry Regulatory Authority (FINRA) released a summary of findings from its examinations of broker-dealers (Summary Report). As part of FINRA's mission of investor protection and market integrity, FINRA conducts regular examinations of its broker-dealer members, with each broker-dealer being examined at least once every four years. FINRA prepares a report—which is only available to the examined FINRA member—based upon the examination findings, and the members are required to address issues identified in this report.

FINRA issued the Summary Report in response to member requests that FINRA make available an anonymous summary of observations from the examination program, so that members can further improve their compliance functions based upon the experiences of other members, and better anticipate and address potential areas of concern before their own examinations occur. The Summary Report contains selected observations from recent examinations that FINRA considers worth highlighting due to their potential impact on investors and markets or the frequency with which they occur.

Some highlighted observations set forth in the Summary Report include:

Cybersecurity: FINRA identified various areas in which member firms could improve their cybersecurity programs, such as enhancing system access management controls, implementing a formal risk assessment process and strengthening data loss prevention measures (such as prohibiting transmission of social security numbers and establishing thresholds to flag or block large file transfers to outside or untrusted recipients);

Outside Business Activities (OBA) and Private Securities Transactions (PST): Problems observed by FINRA in this area include individuals failing to notify the member firm of their OBAs and PSTs and weaknesses in certain firms' OBA and PST reviews (such as failing to collect/maintain supporting documents or failure to execute reviews in sufficient depth);

Anti-Money Laundering (AML) Compliance Program: Problems observed by FINRA in this area include failure to maintain adequate AML policies and procedures (such as failing to expand the AML program with a business or as the business evolved), placing AML program responsibilities with inadequately trained personnel, lack of adequate resources provided to AML departments and failure to ensure the independent testing required under FINRA Rule 3310(c) included a review of how the firm's AML program was implemented;

Best Execution: FINRA found that some firms failed to implement and conduct an adequate regular and rigorous review of the quality of the executions of their customers' orders (such as failing to compare the quality of order routing obtained by a firm's order routing and execution arrangements with competing markets, failing to conduct reviews of certain types of orders and failing to consider factors, such as speed of execution, price improvement and the likelihood of execution, when conducting regular and rigorous review); and

Market Access Controls: Problems observed by FINRA in this area include failure to establish reasonable pre-trade financial thresholds or perform adequate due diligence to substantiate firm-assigned thresholds; failure to

consider capital and credit usage in the aggregate; failure to tailor erroneous or duplicative order controls to particular products, situations or order types; failure to consider the character of the market at the time of order entry; and allowance of an alternative trading system to set capital thresholds for fixed income orders (with some firms unsure of what their thresholds are and no means of monitoring their usage during the trading day).

In addition to the highlighted observations, FINRA also observed problems relating to product suitability, unit investment trusts, multi-share class and complex products, training and several other areas. FINRA expects that the Summary Report will evolve over time as it works to support members' compliance and supervisory efforts.

The report is available here.

DERIVATIVES

See "UK FCA, Dutch AFM and French AMF Publish Position Limits for Commodity Derivative Contracts" in the UK Developments section and "EU and CFTC Implement Mutual Recognition of Derivatives Trading Venues" and "ESMA Publishes Transitional Transparency Calculations for Equity and Bond Instruments" in the EU Developments section.

CFTC

NFA Proposes to Amend NFA Registration Rule 802

On November 30, the National Futures Association (NFA) submitted proposed amendments to NFA Registration Rule 802 to the Commodity Futures Trading Commission. The amendment is intended to ensure the language of Rule 802 is consistent with that in recently amended registration forms. Specifically, the amendments reflect changes in the language of Forms 7-R; 8-R; and 3-R.

The proposed amendments remove from the Rule the specific agreements and certifications contained in the forms. The new language instead provides that the filing of a registration form (e.g., the Form 7-R) will constitute the applicant's applicable certifications, representations, acknowledgements, authorizations and agreements contained within the form. This change will allow NFA to make changes to the forms in the future without having to amend Rule 802.

NFA's Board of Directors unanimously approved the proposed amendment on November 16. NFA is invoking the "ten-day" provision of Section 17(j) of the Commodity Exchange Act to allow the amendments to be effective 10 days after receipt of the proposal by the CFTC.

NFA's rule submission rule is available here.

NFA Proposes to Amend NFA Compliance Rules 2-36 and 2-43

On December 4, the National Futures Association (NFA) submitted proposed amendments to NFA Compliance Rule 2-36 and Rule 2-43 to the Commodity Futures Trading Commission.

The amendment to NFA Compliance Rule 2-36 will require forex dealer members (FDM) to disclose to customers on a per-trade basis: (1) any commissions or other fees charged; (2) for FDMs using a straight-through processing (STP) model, any mark-up or mark-down imposed on the price received from the liquidity provider for the offsetting position; and (3) for FDMs using a non-STP model, the mid-point spread cost. Further, the amendment will require FDMs not using the STP model to provide customers with a description of the mid-point spread cost in a form and manner acceptable to the NFA.

The amendment to NFA Compliance Rule 2-43 clarifies that the prohibition on price adjustments does not include when an FDM favorably adjusts all customer orders that were adversely affected by circumstances beyond the customer's control (e.g., issues with third-party vendors, including liquidity providers, trading platforms and related connectivity providers). The rule currently provides relief from the prohibition only when a customer's order is adversely affected by technical problems with the platform or similar factors beyond the customer's control.

NFA's Board of Directors unanimously approved the proposed amendments on November 16.

NFA's rule submission is available here.

CFTC Releases Rule Enforcement Review of the Chicago Board of Trade, Chicago Mercantile Exchange, Commodity Exchange, Inc. and New York Mercantile Exchange, Inc.

On December 4, the Commodity Futures Trading Commission released a report of the results of its Division of Market Oversight's (Division) Rule Enforcement Review of the Chicago Board of Trade, Chicago Mercantile Exchange, Commodity Exchange, Inc. and New York Mercantile Exchange, Inc. (collectively the CME Group).

The review covered a one-year target period and evaluated the exchanges' compliance with Core Principal 13 and related regulations. Core Principle 13 requires each designated contract market (DCM) to "establish and enforce disciplinary procedures that authorize [DCM] to discipline, suspend, or expel members or market participants that violate" its rules. In connection with the review, the Division interviewed compliance officials and staff from the CME Group's Market Regulation Department (MRD). Further, the Division also analyzed responsive documents produced by the exchanges' staff.

The Division found that the exchanges maintain experienced enforcement staff and a generally adequate disciplinary program to demonstrate compliance with Core Principal 13 and CFTC regulations 38.700-709 and 38.711. However, the Division did make four recommendations relating to compliance with CFTC regulation 38.710 (two regarding improved documentation, one regarding the monitoring of suspensions and one regarding warning letters) and one recommendation relating to improved documentation for compliance with CFTC regulation 38.712. The report clarifies that a recommendation concerns an area where the CFTC believes the exchange should improve its compliance program.

The report is available here.

UK DEVELOPMENTS

FCA's Changes to Connect Impact MiFID Passport Notifications

On December 4, the UK Financial Conduct Authority (FCA) announced changes, effective from the same date, to Connect, its online system that is used by firms to make various applications and notifications to the FCA. The changes reflect the revised Markets in Financial Instruments Directive legal framework (MiFID II), in anticipation of the implementation of MiFID II on January 3, 2018.

Firms may still submit MiFID passport notifications using Connect but, because of the changes, firms must submit one passport notification for each country in which they intend to provide cross-border services. However, it will not be possible to select certain activities/ instruments that are specific to MiFID II, such as operating an organized trading facility or emission allowances, until January 3, 2018, as previously reported in the *Corporate & Financial Weekly Digest* edition of October 20, 2017.

As part of the FCA's transitional arrangements, firms that wish to passport new MiFID II activities or firms that will become newly authorized under MiFID II, will be able to submit MiFID II passporting forms via email to MiFID.Passport@fca.org.uk. The FCA will monitor their mailbox until January 2, 2018, but cannot guarantee that any passport notifications received after December 3 will be processed by January 3, 2018.

Further information is available here.

PRIIPs Regulations Published on the UK's Statute Law Database

On December 5, the Packaged Retail and Insurance-based Investment Products Regulations 2017 (Regulations) were published on legislation.gov.uk website, the UK Statute Law Database, together with an explanatory memorandum (Explanatory Memorandum).

The Regulations implement, in part, certain provisions of the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation. They will go into effect on January 1, 2018. Thereafter, Her Majesty's Treasury will have to review the operation and effect of the Regulations and publish a report by January 1, 2023, and within every five years thereafter.

Among other things, the Regulations:

- Designate the FCA as the competent authority for the purposes of the PRIIPs Regulation; and
- Provide the FCA with the power to prohibit or suspend the marketing of a PRIIP, prohibit the provision of a key information document (KID), or require the publication of a new version of a KID where certain requirements of the PRIIPs Regulation have been infringed.

The website is available here; and the Explanatory Memorandum is available here.

HM Treasury Publishes Renewed Investment Management Strategy

On December 6, Her Majesty's Treasury published a report setting out the UK government's renewed long-term investment management strategy. This follows the announcement by the UK Chancellor of the Exchequer, Philip Hammond, in his Autumn 2017 Budget on November 22, that the government would be publishing its new strategy to "ensure that the UK asset management industry continues to thrive and deliver the best outcomes for investors and the UK economy."

The government originally launched its strategy in May 2013, focusing on enhancing the UK's attractiveness as a center for fund domicile. Having delivered the policy initiatives promised by the 2013 strategy, the UK government has revisited its objectives and plans for achieving them.

Six core principles underpinned the government's approach to the 2013 strategy. They have been reviewed and updated to reflect the current economic environment and focus on the following six areas for growth:

1. **Skills:** Establishing an asset management taskforce to enhance dialogue between government, regulator and industry.
2. **Tax and regulatory environment:** Promoting the UK's tax and regulatory environment with a view to facilitating innovation and growth within the industry.
3. **Skills:** Strengthening the UK talent pipeline, such as by working with firms to build a diverse talent pool and supporting the investment management industry in establishing asset management centers of excellence at UK universities.
4. **Financial innovation:** Using financial innovation to develop solutions such as a blockchain-enabled digital fund and the Asset Management Cyber Security Strategy.
5. **Innovative investment strategies:** Providing support to UK asset managers to develop innovative investment strategies when meeting changing investor demands.
6. **International engagement:** Working with international partners to attract overseas firms to locate in the UK and enhance market access for UK firms overseas.

Alongside the government's investment strategy, the FCA has conducted an asset management market study to understand how UK asset managers compete to deliver value to retail and institutional investors, as previously reported in the *Corporate & Financial Weekly Digest* edition of June 30, 2017.

HM Treasury's report is available here and Annex A to the report sets out details of the 2013 strategy.

HM Treasury's Autumn Budget 2017 is available here.

UK FCA, Dutch AFM and French AMF Publish Position Limits for Commodity Derivative Contracts

Under the revised Markets in Financial Instruments Directive (MiFID II), limits are required to be established on the size of a net position a person can hold (at all times) in commodity derivatives traded on EU/European Economic Area (EEA) trading venues and economically equivalent over-the-counter contracts.

On December 7, the UK Financial Conduct Authority (FCA) updated its website in connection with indicative position limits for commodity derivative contracts. The FCA website lists the commodity derivative contracts that the FCA has currently identified as trading on a UK trading venue and in respect of which, beginning January 3, 2018, there will be a bespoke position limit set.

The Dutch regulator (the Autoriteit Financiële Markten, or AFM) also published a website on indicative position limits for Dutch and Belgian power and Dutch gas contracts.

Finally, the French regulator (the Autorité des marchés financiers, or AMF) also published two documents on its website containing, respectively, indicative position limits for commodity derivatives traded on Euronext and commodity derivatives traded on Powernext.

Each of the lists of the FCA, AFM and AMF will be subject to changes and updates from time to time, and firms are encouraged to check them regularly.

The FCA website, AFM website and AMF website are available here, here (in English) and here (in French), respectively.

EU/BREXIT DEVELOPMENTS

Many EU Countries Have Not Yet Adopted MiFID II

On December 5, Valdis Dombrovskis, the vice-president of the European Commission (EC), recognized that most European Union (EU) Member States have not yet fully adopted the provisions set out under the revised Markets in Financial Instruments Directive (MiFID II). In a public session of a meeting of EU finance ministers in Brussels, Mr. Dombrovskis urged Member States to adapt national legislation before the rules go into effect on January 3, 2018.

The EC said that 17 of the 28 EU Member States had not fully transposed MiFID II into national law and further noted that to apply the rules in time could result in investment firms and market operators facing disruptions to their activities.

The EC's status on the transposition of MiFID II in the EU, which was last updated on October 6, is available here. Please note that it has not been updated to reflect that there are now 17 Member States that have yet to fully transpose MiFID II.

EU and CFTC Implement Mutual Recognition of Derivatives Trading Venues

As contemplated by announcements last month, the European Commission (EC) and the Commodity Futures Trading Commission (CFTC) took action this week to implement mutual recognition of derivatives trading venues in advance of the January 3, 2018 compliance date for the Markets in Financial Instruments Directive (MiFID II) requirement that the most liquid derivative instruments that are subject to mandatory clearing must be traded on regulated trading venues.

On December 5, 2017, the EC adopted an equivalence decision (Equivalence Decision) recognizing 14 US Designated Contract Markets (DCMs) and 23 US Swap Execution Facilities (SEFs) as eligible for compliance with the EU trading obligation for derivatives, which will shortly be introduced for certain interest rate swaps and index credit default swaps. On December 8, the CFTC issued an exemption order from the CFTC's SEF registration requirement with respect to multilateral trading facilities (MTFs) and organized trading facilities (OTFs) authorized in the EU.

These actions permit EU counterparties to satisfy the EU trading obligation for derivatives through trading on the DCMs and SEFs that the EC has recognised as equivalent, which is now possible due to the Equivalence Decision. Equally, once the Exemption Order becomes effective from January 3, 2018, it will permit US counterparties to satisfy the CFTC's trade execution requirement through trading on MTFs and OTFs, which will

represent the first time that the CFTC will have permitted US persons to transact in swaps on non-US trading venues.

Valdis Dombrovskis, EC Vice-President in charge of Financial Stability, Financial Services and Capital Markets Union, remarked that, “European firms can continue trading in derivatives on US trading platforms and effectively hedge against risk, setting conditions for stronger growth in Europe. On the other hand, US firms can hedge their exposures on platforms, facilitating trade and exchange between the EU and the US.”

J. Christopher Giancarlo, Chairman of the CFTC, said, “These decisions, including all of their relevant conditions, are significant achievements, which should be enduring as they are essential to ensuring a strong and stable trans-Atlantic derivatives market that supports economic growth both in the European Union and the United States.”

The joint statement by the EC and the CFTC is available here.

The final text of the EC’s Equivalence Decision, and its annex setting out the enumerated DCMs and SEFs, is available here.

The joint statement by the EC and CFTC on the common approach is available here.

The text of the CFTC’s exemption order is available here.

EBA Closes Breach of EU Law Investigation Relating to Dutch Prudential Regime for Proprietary Traders

On December 6, the Breach of Union Law Panel of the European Banking Authority (EBA) published a press release relating to a breach of European Union (EU) law (BUL) investigation against the Dutch central bank, De Nederlandsche Bank (DNB), relating to the latter’s prudential framework for proprietary traders.

Since January 2014, the DNB had designated investment firms licensed to perform the investment activity of proprietary trading (that is, dealing on own account) with the status of “local firms”, according to the DNB’s interpretation of Article 4(1)(4) of the Capital Requirements Regulation (CRR). This therefore exempted such firms from the scope of the EU’s framework of capital requirements under the CRR (including, significantly, the bonus cap rules (restricting bonuses to no more than 2 x the individual’s salary), which apply to banks and investment firms subject to the CRR). Instead, the DNB had historically imposed a national framework of capital requirements that reflected the risk exposure of the relevant firms—and exempted Dutch “local firms” from the bonus cap.

Exercising its power under Article 17 of the EBA Regulation, on November 3, 2017, the EBA initiated a BUL investigation into the DNB’s prudential framework for proprietary traders, as the EBA took the view that DNB’s application of the definition of “local firm” was incompatible with EU law. The EBA considered that a “local firm,” as defined in the CRR, may be active as a proprietary trader, both on the derivatives and cash markets, but that this investment activity in the cash markets must be limited “exclusively to transactions performed to hedge positions in the derivatives markets.” As a result under the new requirements, transactions in the cash markets, such as proprietary trading in units in collective investment undertakings, that do not have the purpose of hedging previous and directly related derivatives transactions, fall outside the scope of the activities that may be conducted by a “local firm.”

Having conducted its own analysis of the term “local firm,” the DNB concluded on November 13, that the current Dutch national prudential regime is “appropriate and proportional,” but that its interpretation of “local firm” was legally untenable and decided to discontinue its prudential regime for “local firms.” Following the DNB’s decision, the EBA has now closed its investigation.

The main effects on firms impacted by the DNB’s decision are the following:

1. Such firms will have until March 31, 2018 to meet applicable CRR capital requirements; and
2. Such firms will no longer be exempt from the bonus cap under the revised Capital Requirements Directive (CRD IV).

The DNB also wrote a letter, dated November 13, to the 13 investment firms affected by the amended prudential regime. In its letter, the DNB noted that the Dutch Minister of Finance will consult the Dutch national financial services regulator, the Autoriteit Financiële Markten, and the investment services sector in the period leading up to March 2018 to discuss the new remuneration regulations for the sector.

The amended prudential regime will not affect investment firms licensed by the DNB to perform the investment activity of "proprietary trading" only, but the CRR capital requirements will be applicable to them.

The EBA's press release is available here.

The DNB press release is available here; and its letter to affected firms is available here.

The CRR is available here.

UK and EU Reach Agreement on the First Phase of Brexit Negotiations

Following months of, at times, protracted negotiations, the UK and European Union (EU) negotiating teams have published the text of an agreement on the terms of the UK's withdrawal from the EU.

These negotiations have focused on three primary topics:

1. the settlement of the UK's existing liabilities to the EU, known in Brussels as the *reste à liquider* or, more prosaically, the "divorce bill;"
2. the treatment of EU nationals in the UK and UK nationals in the remaining 27 EU Member States ("EU27") following Brexit; and
3. the border between the Republic of Ireland and Northern Ireland, which forms part of the UK.

Generally speaking, the agreed terms reflect to a significant degree the negotiating position set out by the EU27.

What does it mean?

The Agreement paves the way for the European Council to determine next week that "sufficient progress" has been made on the terms of the UK's exit, which is the necessary preliminary step in opening the negotiations on the future relationship between the UK and the EU27.

What does it *not* mean?

The Agreement does *not* mean:

1. the wider set of negotiations are over;
2. the terms of the UK's exit are formally settled ("nothing is agreed until everything is agreed"); or
3. the form of the UK's future relationship with the EU27 has been decided.

There is therefore still no greater clarity on the legal, regulatory or judicial relationship that will exist between the UK and the EU following the UK's departure.

What happens next?

The European Council—which includes the heads of state and government of the EU Member States—will hold a summit in Brussels on December 14 and 15, where they are expected to confirm that, on the basis of today's agreement, "sufficient progress" on the terms of the UK's exit has been made.

Following the summit, the negotiations are expected to move onto two inter-related areas: (1) a "transition period" following the UK's formal departure from the EU on March 29, 2019; and (2) the future relationship between the UK and the EU. Earlier this year, the UK requested a two-year transition period to prevent a "Brexit cliff-edge" for businesses; the EU will need to determine the conditions on which it will agree to this request. The EU will also need to establish its negotiating guidelines for the future relationship, which are expected to be endorsed at the next following European Council summit in February or March 2018.

Should this next set of negotiations only begin in earnest after March 2018, it will leave very little time for the substance of the negotiations to occur. It is generally expected that any agreement on the transition period and/or future relationship must be in place by October 2018 at the latest to provide enough time for the ratification mechanics in each of the EU Member States to be completed in time for Brexit.

Regardless of the existence of a trade and transition agreement, or the status of its ratification, the UK will formally depart the EU on March 29, 2019. The only way this deadline can be extended is with the unanimous agreement of the EU27, which is considered to be unlikely.

The text of the agreement is available here.

ESMA Publishes Transitional Transparency Calculations for Equity and Bond Instruments

On December 7, the European Securities and Markets Authority (ESMA) published transitional transparency calculations (TTC) for equity and bond instruments for the purposes of the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR). MiFID II and MiFIR introduce transparency requirements for equities, bonds, structured finance products, emission allowances and derivatives.

The implementing measures on transparency for financial instruments require national competent authorities (NCAs) to compute and publish transparency calculations on financial instruments, including transitional calculations prior to the date of application of MiFIR, January 3, 2018. NCAs from the European Economic Area (EEA), with the exception of Poland, delegated the compilation of the TTC to ESMA. The relevant NCAs have approved the final published results.

The TTC includes equity instruments available for trading in September 2017 and bonds available for trading in October 2017. The TTC for instruments listed after these dates will be performed by NCAs and ESMA will publish that information in January 2018, as well as reference data, transparency calculations and double volume cap information on a regular basis.

ESMA states that it has compiled the TTC with considerable care and to the best of its ability. However, it warns that given the scope and complexity of the calculations, including the various underlying data sources, future corrections of the TTC cannot be ruled out. ESMA expects to continuously supplement and update the information provided, where necessary.

The TTC 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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UK/EU/BREXIT DEVELOPMENTS

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