

## SEC/CORPORATE

### **NYSE Amends “Late Filer Rule”**

Effective March 2, the New York Stock Exchange amended its rule (commonly referred to as the “late filer rule”) that applies to listed companies that do not timely file their periodic reports with the Securities and Exchange Commission, expanding the circumstances under which a listed company would be deemed a late filer. In amending the late filer rule, the NYSE noted the importance of providing to investors access to accurate and current information about the business and financial position of companies listed on the NYSE.

Prior to the amendment, an NYSE listed company would only be deemed a late filer if it failed to timely file an annual report (on Form 10-K, 20-F, 40-F or N-CSR). Under the new rule, a listed company also will now be deemed a late filer if (1) it does not timely file a quarterly report on Form 10-Q or (2) it files an annual report or Form 10-Q that is defective in certain material respects. The NYSE identified a non-exhaustive list of situations in which a filing would be deemed materially defective under the late filer rule, including the following: (1) an annual report is filed without a financial statement audit report from its independent auditor for any or all periods included in the report, (2) a company’s independent auditor subsequently withdraws its audit report from a previously filed report, and (3) a company discloses that previously filed financial statements should no longer be relied upon. A company in violation of the late filer rule will have a maximum of 12 months to cure a delinquent or defective filing or face delisting.

For more information, see the NYSE release [here](#), or the memo released by the NYSE in connection with the amendment of the late filer rule [here](#).

## CFTC

### **CFTC Responds to District Court’s Remand Order on Certain Cross-Border Swaps Rules**

On March 10, the Commodity Futures Trading Commission released an initial response to the order of the US District Court for the District of Columbia in *SIFMA v. CFTC* remanding eight swaps-related rulemakings to the CFTC. As reported in the [Corporate and Financial Weekly Digest edition of September 16, 2014](#), various trade associations challenged the extraterritorial application of certain swaps-related rules promulgated under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as the CFTC’s Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations. The District Court dismissed the broad challenge to the CFTC’s cross-border guidance, but separately found that the CFTC failed to state whether the costs and benefits identified in the preambles to eight rulemakings applied to overseas swaps activities. The District Court remanded without vacating these rulemakings to the CFTC so that the CFTC could address certain inadequacies in its consideration of the costs and benefits of these rules on swaps activities outside the United States.

In its initial response to the District Court’s ruling, the CFTC stated that it considers the costs and benefits of the remanded rules based on its understanding that the swaps market functions internationally. Accordingly, the CFTC’s initial response supplemented the preambles to the eight remanded rules by clarifying that the costs and benefits identified in these rules apply both to domestic swaps activities and swaps activities outside the United States that are subject to the CFTC’s jurisdiction.

Separately, the CFTC is requesting public comments on whether the costs and benefits arising from extraterritorial application of any of the remanded rules differ from those arising from application of the rules domestically. Following its review of the comments, the CFTC will supplement its initial response to the District Court's ruling, as well as propose potential changes to the substantive requirements of the rules.

The comment period extends through May 11. The CFTC's announcement to solicit comments is available [here](#); the CFTC's initial response published in the *Federal Register* is available [here](#).

## LITIGATION

### **Delaware Chancery Court Addresses Proper Purpose for Inspection Demand**

The Delaware Court of Chancery recently held that a shareholder was not entitled to inspect records concerning alleged violations of the Foreign Corrupt Practices Act (FCPA) because the shareholder was barred from pursuing further derivative litigation, and the documents sought were unnecessary to make a demand on the board.

Between 2007 and 2008, defendant Parker Drilling Company disclosed that the United States Department of Justice (DOJ) and Securities and Exchange Commission were investigating the company for possible FCPA violations. In 2010, Parker disclosed the results of its internal investigation, which led to an initial shareholder demand as well as the filing of various derivative suits in Texas state and federal courts. One of these cases (the Freuler Action) was later dismissed with prejudice for failure to demonstrate demand futility.

Parker announced in 2013 that it had reached a settlement with the DOJ and SEC. The same year, a special committee formed by Parker recommended that the company not pursue action against the individuals mentioned but not identified by name in the settlement papers. Plaintiff Fuchs Family Trust (Fuchs), one of the derivative plaintiffs in Texas state court, then made a demand that Parker reveal who the individuals were whose conduct led to the settlement.

The court found that Fuchs' purposes in making the demand were not proper. First, applying Texas law of issue preclusion, the court held that the dismissal of the Freuler Action barred any new derivative action, so the demand could be denied as a matter of law. Second, the court found that Fuchs had no need for the identities of the individuals described in the settlement to make a demand on the board; Fuchs already had the information provided in the settlement papers, and could "request further action against the wrongdoers without knowing their identities."

*Fuchs Family Trust v. Parker Drilling Co.*, C.A. No. 9986-VCN (Del. Ch. Mar. 4, 2015).

### **Study Finds Whistleblowers Increase Penalties of Regulatory Enforcement Actions**

A recent academic paper found that whistleblower involvement in financial misrepresentation enforcement actions tends to increase (1) penalties against firms by an average of \$77 million, (2) penalties against employees by an average of \$39 million, (3) prison sentences by an average of 22 months, and (4) the duration of the enforcement action by roughly ten months.

The study authors reviewed more than 1,000 financial misrepresentation enforcement actions brought by the Securities and Exchange Commission and Department of Justice between 1978 and 2012. Of those, 145 actions involved at least one whistleblower. After controlling for various factors, such as the number and type of violations alleged, the authors concluded that whistleblowers provide significant benefits to regulators at a slight cost.

On average, whistleblowers assisted regulators in obtaining firm and employee penalties of more than \$16 billion beyond what they would have obtained without whistleblowers' involvement. However, whistleblowers prolong the investigation and enforcement process by an average of ten months. The authors suggest that, rather than streamline the enforcement process by providing a "roadmap" of violations, whistleblowers may provide additional information that must be investigated.

Andrew C. Call et al., *The Impact of Whistleblowers on Financial Misrepresentation Enforcement Actions* (Dec. 2014), available [here](#).

## UK DEVELOPMENTS

### MiFID II – UK Regulator Announces Dates For New UK Rules

On March 10, the UK Financial Conduct Authority (FCA) updated its webpage relating to the review of and forthcoming changes to the European Union’s Markets in Financial Instruments Directive (MiFID). MiFID sets forth the legal framework governing regulatory requirements applicable to investment firms, trading venues, data reporting service providers and third-country firms providing investment services or conducting investment activities within the 28 member states of the European Union.

The European Union has been reviewing MiFID in recent years and has announced that a new “MiFID II” Directive and a new regulation (which will harmonize rules throughout the European Union), known as the Markets in Financial Instruments Regulation (MiFIR) will repeal and recast the original MiFID Directive effective January 3, 2017.

The FCA’s revised webpage announces that:

- the FCA will publish its main consultation paper on implementing MiFID II and MiFIR in December 2015; and
- the FCA will publish its final policy statement (incorporating detailed final rules) in June 2016 (leaving only one month before the statutory deadline of July 3, 2016, by which all EU member states must have transposed MiFID II into national rules).

These timeframes will allow firms six months from July 3, 2016, until MiFID II and MiFIR take effect across the European Union to implement any necessary changes (including, for some firms, becoming licensed appropriately (or re-licensed in the case of some firms already operating under MiFID)). The deadline of January 3, 2017, is a hard deadline for implementation of MiFID II and MiFIR, which EU member states have no scope to extend.

For more information, please see the FCA’s new MiFID II webpage [here](#).

## EU DEVELOPMENTS

### ESMA Issues Report Finding Tense EU Securities Market Conditions

On March 11, the European Securities and Markets Authority (ESMA) published its Report No. 1, 2015, on trends, risks and vulnerabilities in the European Union securities markets, covering the time period from July to December 2014. The Report concludes that the EU securities market remains tense, characterized by high asset valuations. Although asset prices were generally stable over the period, strong price movements occurred in foreign exchange rates and commodity prices. Corporate funding in the capital markets, however, increased overall during the time period. The Report cited the following factors as contributing to the continued tense EU securities markets: (1) the low-interest rate environment; (2) public debt policies in the EU member states; (3) high volatility in both exchange rates and the commodity markets; and (4) political and geopolitical risks.

The Report identifies three areas of potential future vulnerabilities for the EU securities markets: (1) fund investments in loans; (2) increased investments in alternative indices; and (3) monitoring systemic risk in the hedge fund industry. Fund investments in loan assets raises concern due to perceived increased exposure to credit and liquidity risk. Investments in alternative indices is viewed as having limited transparency regarding the underlying indices’ constituents, weights, methodology and simulated past performance as well as increasing exposure to sector volatility. Systemic risk in the hedge fund industry remains an issue for ESMA and the Report discusses new indicators for its monitoring by comparing individual hedge fund performance rates against those of the entire industry.

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

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\* [Click here](#) to access the *Corporate and Financial Weekly Digest* archive.

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