Katten
# Corporate & Financial Weekly Digest

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## SEC/CORPORATE

### SEC Proposes Modernization of Filing Fee Disclosure and Payment Methods

On October 24, the Securities and Exchange Commission proposed amendments to update filing fee disclosure and payment methods. The proposed amendments would apply to most fee-bearing forms, schedules and statements, including Forms S-1, S-3, S-4, S-8 and S-11, related foreign private issuer forms, proxy statements, information statements, Schedule TO and certain Investment Company Act of 1940 forms.

The SEC has proposed to replace the current fee disclosure structure — which is highly manual, labor intensive and not machine read-able — with a new disclosure regime requiring that the fee table on the cover page of a filing, together with all related explanatory notes, include all required information for the applicable fee calculations and be presented in a structured format using Inline eXtensible Business Reporting Language (Inline XBRL). This Inline XBRL format, with new required accompanying notes, would eliminate the need to include fee data in multiple places within a filing and the related EDGAR submission header, reducing the risk of data input error by the filer or its filing agent and enabling more efficient automated processing of fee calculation information by the SEC.

The proposals are intended to streamline otherwise complicated fee disclosures, which may include fee "carryforwards" or offsets and which may involve multiple transactions by a filer. Amended forms would include new checkboxes for filers to indicate reliance on any carryforwards or offsets and require additional disclosure and notes, including a requirement to include the applicable fee rate and other inputs used to calculate the fee in the fee table. If implemented, the proposed amendments would allow for the SEC staff to use automated tools to review and validate payment information faster and more efficiently, replacing the current system of manual review of all fee information in every fee-bearing filing, and providing more certainty to filers that the proper fees have been paid.

The SEC also proposed to modernize the processing of filing fee payments, by introducing an option for fee payment via ACH (in addition to the current option of using wire transfer) and removing the option to pay fees via physical check.

The full text of the SEC's proposed amendments is available here.

### Another Postponement of Margin Rules for Covered Agency Transactions Under FINRA Rule 4210

On October 25, the Financial Industry Regulatory Authority (FINRA) filed a rule change (SR-FINRA-2019-026) with the Securities and Exchange Commission that postpones for another full year the implementation of mandatory margin for Covered Agency Transactions under FINRA Rule 4210. The scheduled implementation date will now be March 25, 2021 instead of March 25, 2020.

This is the fourth postponement of the effective date of these rules, which were adopted in 2015 and establish margin requirements for (1) To Be Announced transactions, inclusive of adjustable rate mortgage transactions; (2) Specified Pool Transactions; and (3) transactions in Collateralized Mortgage Obligations, issued in conformity with a program of an agency or Government-Sponsored Enterprise, with forward settlement dates (collectively, "Covered Agency Transactions"). The explanation for this postponement is the same as for the last one: "FINRA is

considering, in consultation with industry participants and other regulators, potential amendments to the requirements of SR-FINRA-2015-036. FINRA believes that this is appropriate in the interest of avoiding unnecessary disruption to the Covered Agency Transaction market. As such, FINRA is proposing to extend the March 25, 2020 implementation date by an additional year, to March 25, 2021 while FINRA considers potential amendments."

The text of the rule change is available here.

### ISS Files Suit Against SEC for Proxy Voting Advice Guidance

On October 31, Institutional Shareholder Services Inc. (ISS) filed suit against the Securities and Exchange Commission in the US District Court for the District of Columbia, challenging the guidance that the SEC issued in August 2019 regarding the applicability of the federal proxy rules to proxy advisors such as ISS. The SEC's guidance was previously discussed in the August 23, 2019 edition of *Corporate & Financial Weekly Digest*.

In the complaint, ISS alleges that the guidance is unlawful because it exceeds the authority granted to the SEC under Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act), is procedurally improper because there was no notice-and-comment procedure, and is arbitrary and capricious.

Substantively, ISS concedes that proxy advisers are subject to regulation as investment advisers under the Investment Advisers Act of 1940 and that they owe clients fiduciary duties of care and loyalty. However, ISS objects to the SEC's determination that proxy voting advice provided by firms such as ISS constitutes a "solicitation" within the meaning of the federal securities laws and is subject to the anti-fraud provisions of Rule 14a-9 of the Exchange Act. ISS argues that providing proxy advice is different from proxy solicitation in that a firm providing proxy advice is disinterested with respect to the outcome of the vote and does not seek to achieve a certain result. ISS contends that a proxy adviser, unlike a proxy solicitor, offers research and analysis to clients to help inform their evaluation of voting matters, but is indifferent to how clients ultimately choose to vote.

ISS is seeking both a ruling that the SEC's guidance is procedurally invalid and a declaratory judgment that proxy voting advice provided in the course of a fiduciary relationship does not constitute a proxy solicitation.

The full text of ISS's complaint is available here.

## BROKER-DEALER

### FINRA Issues 2019 Report on Examination Findings and Observations

On October 16, the Financial Industry Regulatory Authority (FINRA) published its 2019 Report on Examination Findings and Observations (Report). Unlike previous years, the Report delineates between examination "findings" and examination "observations." "Findings" describe violations of a rule or regulation, whereas "observations" refer to suggestions regarding how firms can improve controls and mitigate risk. The annual Report summarizes various findings and observations from recent examinations of its member firms on a range of topics, including the following:

- Supervision: some firms failed to adequately update their written supervisory procedures to address new or amended rules in addition to the inadequate supervision of specific accounts, accounts statements and internal inspections.
- Suitability: some firms lacked adequate systems of supervision to ensure that financial recommendations were suitable in light of a customer's individual investment profile factors.
- Digital Communication: some firms encountered challenges complying with supervision and recordkeeping requirements for digital communication.
- Anti-Money Laundering (AML): FINRA flagged inadequate AML transaction monitoring and overreliance on clearing firms as issues.
- Uniform Transfers to Minors Act (UTMA) and Uniform Grants to Minors Act (UGMA) Accounts: some firms failed to implement effective practices to verify the authority of custodians when the account beneficiary reaches majority age.

- Cybersecurity: FINRA highlighted that effective cybersecurity practices include branch controls, documented policies on vendor and third-party management, and incident response planning.
- Business Continuity Plans (BCPs): the BCPs of some firms did not reflect certain market conditions, business models or other circumstances.
- Fixed Income Mark-up Disclosure: FINRA noted exam findings related to disclosures, unclear or inaccurate labels for sales credit, incorrect Prevailing Market Price determinations and inaccurate time of execution.
- Best Execution: FINRA identified issues with some firms' execution quality reviews, as well as conflicts of interest and related disclosures.

FINRA also highlighted issues regarding direct market access controls, short sales, liquidity and credit risk management controls, segregation of client assets and net capital calculations.

For complete coverage of the topics covered in the Report, the full version is available here.

### FINRA Issues Regulatory Notice on the Annual Compliance Meeting Requirement

On October 18, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 19-34 (Notice) regarding the annual compliance meeting (ACM) requirement in Rule 3110(a)(7) and corresponding Supplementary Material .04 (SM .04). The rule requires each registered representative and registered principal to participate, at least once per year, in an interview or meeting at which compliance matters relevant to their particular activities are discussed with the firm, ensuring that registered persons remain current on applicable regulatory developments or changes in firm policies. In April 2018, FINRA launched a retrospective review of this requirement to assess its effectiveness and efficiency.

Based on the assessment, FINRA determined to maintain the requirement without change.

The Notice is available here.

### SEC Approves CBOE's Proposed Rule Change Regarding the Off-Floor Transfer of Options Positions

On October 17, the Securities and Exchange Commission approved a rule proposal filed by Cboe Exchange, Inc. (CBOE) allowing the off-floor transfers of options positions by Trading Permit Holders (TPHs) under a new circumstance.

Under proposed Rule 6.9, positions in options listed on CBOE would be permitted to be transferred outside CBOE by a TPH in connection with transactions to purchase or redeem creation units of exchange-traded fund (ETF) shares between an "authorized participant" and the issuer of such ETF shares. An "authorized participant" is defined as an entity that has a written agreement with the issuer of ETF shares or one of its service providers that allows the authorized participant to place orders for the purchase and redemption of creation units. Such transfers would occur at the price used to calculate the net asset value of such ETF shares.

The order approving the rule proposal is available here.

### SEC Issues Order Instituting Proceedings Regarding CBOE's Proposed Rule Change on Off-Floor Position Transfers

On October 21, the Securities and Exchange Commission (SEC) issued an Order Instituting Proceedings (the Order) to determine whether to approve a proposed rule change filed by Cboe Exchange, Inc. (CBOE) regarding off-floor position transfers.

Generally, CBOE requires a Trading Permit Holder (TPH) to effect transactions in listed options on an exchange. Notwithstanding that provision, CBOE does permit certain types of transfers involving a TPH's positions to be effected off the exchange. The proposed rule change would specify several additional types of permitted off-floor transfers. The rule proposal and additional types of permitted off-floor transfers were discussed in greater detail in the July 26 edition of *Corporate & Financial Weekly Digest*.

The SEC is soliciting comments from interested persons prior to deciding whether to approve or disapprove of the proposed rule change.

The Order is available here.

## DERIVATIVES

*See "CFTC's Global Markets Advisory Committee Seeking Nominations for New Subcommittee" in the CFTC section.*

## CFTC

### CFTC's Global Markets Advisory Committee Seeking Nominations for New Subcommittee

The Commodity Futures Trading Commission announced the creation of a new Subcommittee on Margin Requirements for Non-Cleared Swaps under the Global Markets Advisory Committee (GMAC). The subcommittee will be responsible for examining the implementation of margin requirements for non-cleared swaps and recommending actions to the CFTC to mitigate any related challenges.

Commissioner Dawn Stump, sponsor of the GMAC, is requesting nominations for the new subcommittee. All nominations must be submitted no later than November 12.

More information is available here.

### CFTC to Hold Open Commission Meeting on November 5

The Commodity Futures Trading Commission will hold an open meeting on Tuesday, November 5 at 10:00am EST to discuss (1) the CFTC's proposed amendment to CFTC Regulation 160.30 (Privacy of Consumer Financial Information); (2) the foreign board of trade applications of Euronext Amsterdam, Euronext Paris and European Energy Exchange; and (3) other CFTC business.

The meeting is open to the public on a first-come, first-served basis, as well as via live webcast and via conference call.

More information, including viewing and listening instructions, is available here.

## UK DEVELOPMENTS

### FCA Publishes Cryptoasset AML/CFT Webpage

On October 25, the Financial Conduct Authority (FCA) published a new webpage setting out important information for UK cryptoasset businesses in the context of anti-money laundering (AML) and counter terrorist financing (CFT).

As announced in July 2019, the FCA will be the AML/CFT regulator for certain cryptoasset activities starting January 10, 2020. However, the scope of 'cryptoasset activities' is still to be determined by Her Majesty's Treasury (HMT), whose consultation on the matter closed on June 10. The final report has not yet been published but the activities in the consultation paper included:

- cryptoasset exchange providers;
- cryptoasset ATMs;
- custodian wallet providers;
- peer to peer providers who facilitate the exchange of fiat currencies and cryptoassets; and
- issuers of new cryptoassets e.g. ICOs.

As a result, all existing UK businesses in scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs) who currently conduct any of such cryptoasset activities must be registered with the FCA by January 20, 2021 in order to continue trading. The application deadline will be October 10, 2020. Any UK cryptoasset businesses that intend to conduct relevant cryptoasset activity after January 20, 2020 will have to wait until they are registered before they can start.

In addition, from January 10, 2020, UK businesses involved in these cryptoasset activities must comply with the MLRs. This is regardless of the registration status of the business. The FCA has supervisory and enforcement powers under the MLRs and these will be available for use by the FCA from January 10, 2020.

The new webpage 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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