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SEC/CORPORATE

SEC Approves Amendments to Implement Provisions of the JOBS Act and FAST Act

On May 3, the Securities and Exchange Commission approved amendments to revise certain rules under the Securities Exchange Act of 1934 (Exchange Act). A detailed discussion of the proposals on which these rule amendments are based can be found in the *Corporate & Financial Weekly Digest* edition of January 9, 2015. These final rule amendments, which implement provisions of the Fixing America's Surface Transportation Act (FAST Act) and the Jumpstart Our Business Startups Act (JOBS Act):

- Amend Rules 12g-1 through 12g-4 and 12h-3 of the Exchange Act (relating to the procedures for registration and termination of registration under Section 12(g) and suspension of reporting obligations under Section 15(d)) to reflect the new thresholds established by the JOBS Act and the FAST Act. Titles V and VI of the JOBS Act raised the threshold for registration from 500 holders of record and total assets exceeding $1 million to either 2,000 holders of record or (except for banks and bank holding companies) 500 holders of record who are not accredited investors and total assets exceeding $10 million. The JOBS Act also raised the threshold at which a bank or bank holding company (but not other registrants) may terminate or suspend the registration of a class of its securities under the Exchange Act from 300 to 1,200 persons. The FAST Act raised the threshold for registration as well as termination and suspension of registration for savings and loan holding companies to match the thresholds applicable to bank and bank holding companies.

- Apply the definition of "accredited investor" used for purposes of private placements pursuant to Regulation D under the Securities Act of 1933 (Securities Act) to determinations of which record holders are accredited investors for purposes of whether an issuer is required to register a class of securities under Section 12(g) of the Exchange Act, and provide that an issuer must make the accredited investor determination as of the last day of its fiscal year.

- Amend the definition of "held of record" to provide that, when determining whether an issuer is required to register a class of equity securities with the SEC under Section 12(g) of the Exchange Act, an issuer may exclude securities held by persons who received such securities (1) under an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act; and (2) in certain circumstances, in exchange for securities received under an employee compensation plan.

The final rule amendments also establish a non-exclusive safe harbor under Rule 12g5-1(a)(8) for determining holders of record for purposes of evaluating an issuer's registration obligations under Section 12(g), that permits an issuer to:

- deem a person to have received the securities under an employee compensation plan if the plan and the person who received the securities under the plan met the conditions of Securities Act Rule 701(c); and

- solely for the purposes of Section 12(g), deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

The final rules will become effective 30 days following their publication in the *Federal Register.*

The full text of the final rules can be found here.

DERIVATIVES

ISDA Launches Protocol Regarding Cross-Border Enforceability of Stays on Contractual Termination Rights

On May 5, the International Swaps and Derivatives Association, Inc. (ISDA) launched the ISDA Resolution Stay Jurisdictional Modular Protocol (Protocol), which is designed to assist market participants in complying with new regulations governing the cross-border enforceability of stays on contractual termination rights. The Protocol was developed in reaction to new regulatory changes, such as a framework established by the Financial Stability Board, whereby various national regulators are requiring certain banks in their jurisdiction to obtain counterparty consent for statutory stays on early termination rights, regardless of the contract's governing law. These changes are designed to reduce the uncertainty regarding the cross-border enforceability of such stays.

To assist market participants in complying with the requirements of various national regulators, the Protocol includes separate "Jurisdictional Modules" that contain the operative provisions necessary to adhere to a particular jurisdiction's requirements. The Protocol is available to all market participants and ISDA anticipates launching additional Jurisdictional Modules in the future.

The Protocol is available here.

See "CFTC Amends Its Swap Portfolio Reconciliation Requirements" in the CFTC section and "ESMA Publishes Opinions on Amendments to MiFID II Non-Equity Transparency and Position Limits RTS" in the EU Developments section.

CFTC

CFTC Amends Its Swap Portfolio Reconciliation Requirements

On May 2, the Commodity Futures Trading Commission approved an amendment to CFTC Regulation 23.500(i) (Amendment) that modifies the definition of "portfolio reconciliation" such that swap dealers and major swap participants only need to exchange the "material terms" of their swaps with their counterparties. In addition, the Amendment revises the definition of "material terms" in CFTC Regulation 23.500(g) by limiting it to the minimum primary economic terms of a swap and specifically excluding certain data elements, including: (1) an indication that the swap will be allocated; (2) block trade indicator; (3) clearing venue; (4) an indication of whether the reporting party is a major swap participant with respect to the swap; (5) an indication that the swap will be allocated; and (6) execution timestamp.

To see the final rule, click here.

BANKING

FFIEC Proposes New Consumer Compliance Rating System

On May 2, the Federal Financial Institutions Examination Council (FFIEC) proposed revisions to the current Uniform Interagency Consumer Compliance Rating System (CC Rating System). The revisions are intended to reflect the regulatory, supervisory, technological and market changes that have occurred in the years since the CC Rating System was established. The purpose of the new CC Rating System is to ensure that all regulated financial institutions, as defined in 12 U.S.C. §3302(3), are evaluated in a comprehensive and consistent manner, and that regulators' resources and attention are appropriately allocated to the institutions demonstrating the highest risk of consumer harm. One key change is that the new CC Rating System has shifted from assessing risk through transaction testing to a more comprehensive risk-based supervision that mainly focuses on the institution's compliance management systems (CMS).

The new CC Rating System would retain the 1-to-5 rating scale, with an increasing order of supervisory concern, and uses three broad categories to evaluate an institution's risk of consumer harm: (1) Board and Management Oversight, (2) Compliance Program, and (3) Violations of Law and Consumer Harm. The first two categories are used to assess a financial institution's CMS. The required sophistication and formality of the CMS will typically increase with the institution's size, complexity and risk profile. When evaluating the third category, Violations of Law and Consumer Harm, the examiners will evaluate the scope of any identified violation or consumer harm. Examiners also will consider self-identification and prompt correction of legal violations to be strengths of an institution's CMS.

When evaluating the performance of an institution under the new CC Rating System, an examiner will consider the institution's performance under each of the assessment factors, but the evaluation will not be based on any quantitative average of the different factors. Moreover, the relative importance of each category or assessment factor may differ based on the size, complexity and risk profile of the institution. Examiners also will place greater weight on the institution's management of material products with significant potential consumer compliance risk.

The 28-page proposal is available here. Comments are due 60 days after publication in the *Federal Register*.

Consumer Financial Protection Bureau To Outlaw Mandatory Pre-Dispute Arbitration Provisions

On May 5, the Consumer Financial Protection Bureau (Bureau) issued a proposed rule that would prohibit covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action with respect to the covered consumer financial product or service. Specifically, the rule would prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would require providers to insert language into their arbitration agreements reflecting this limitation. The proposed rule also would require a covered provider that is involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau. The Bureau stated that it intends to use the information it collects to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further action.

According to the Bureau, the proposal applies to providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money. This includes most providers that are engaged in:

- extending or regularly participating in decisions regarding consumer credit under Regulation B implementing the Equal Credit Opportunity Act, engaging primarily in the business of providing referrals or selecting creditors for consumers to obtain such credit, and the acquiring, purchasing, selling, or servicing of such credit;
- extending or brokering of automobile leases as defined in Bureau regulation;
- providing services to assist with debt management or debt settlement, modify the terms of any extension of consumer credit or avoid foreclosure;
- providing directly to a consumer a consumer report as defined in the Fair Credit Reporting Act, a credit score or other information specific to a consumer from a consumer report, except for adverse action notices provided by an employer;
- providing accounts under the Truth in Savings Act and accounts and remittance transfers subject to the Electronic Fund Transfer Act;
- transmitting or exchanging funds (except when integral to another product or service not covered by the proposed rule), certain other payment processing services, and check cashing, check collection, or check guaranty services consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act; and
- collecting debt arising from any of the above products or services by a provider of any of the above products or services, their affiliates, an acquirer or purchaser of consumer credit, a person acting on behalf of any of these persons, or by a debt collector as defined by the Fair Debt Collection Practices Act.

Finally, the Bureau stated that providers would be required to insert language into such arbitration agreements to explain the effect of the rule. The proposal would permit providers of general-purpose reloadable prepaid cards to continue selling packages that contain non-compliant arbitration agreements if they give consumers a compliant agreement as soon as consumers register their cards and the providers comply with the proposed rule's requirement not to use an arbitration agreement to block a class action. The Bureau explained that the proposed rule would only apply to agreements entered into after the end of the 180-day period beginning on the regulation's effective date, which would be 30 days after a final rule is published in the *Federal Register*.

The proposal was criticized by the American Bankers Association, which issued a statement from its president and CEO that stated, "Consumers will get less and pay more if the [Bureau's] proposal to sideline arbitration and promote class actions is ultimately adopted. Banks resolve the overwhelming majority of disputes quickly and amicably." The statement continued, "When needed, arbitration is an efficient, fair and low-cost method of resolving disputes in a fraction of the time—and at a fraction of the cost—of expensive litigation. This helps keep costs down for all consumers."

Further, the Bureau issued a required final report from its Small Business Review Panel (Panel), which also expressed concerns about the proposal. The Panel, chaired by the Bureau, includes representatives from the Bureau, the Small Business Administration's Office of Advocacy, and the Office of Information and Regulatory Affairs in the Office of Management and Budget. Comments of the proposal will be due 90 days after its publication in the *Federal Register*.

To read the proposed rule, click here.

To read the Panel's final report, click here.

Federal Reserve Board Proposes Restrictions on Qualified Financial Contracts Used by Systemically Important Banking Organizations

On May 3, the Board of Governors of the Federal Reserve System (Board) reviewed a draft rule proposal that would require any US bank holding company identified as a global systemically important banking organization (GSIB), its subsidiaries and the US operations of any foreign GSIB (Covered Entities) to comply with new restrictions regarding non-cleared qualified financial contracts (QFCs).The Board currently estimates that the proposed rule would apply to 29 banking organizations, including eight US holding companies and approximately 21 foreign banking organizations.

Under the draft rule proposal, Covered Entities would be required to ensure that the QFCs that they enter into contain contractual provisions that recognize the automatic stay of termination provisions and transfer provisions applied in resolutions under the Dodd-Frank Wall Street Reform and Consumer Protection Act's Orderly Liquidation Authority and the Federal Deposit Insurance Act. The proposal also would generally require that the QFCs of Covered Entities prohibit a counterparty to a QFC from exercising default rights based on the entry into resolution of an affiliate of the Covered Entity. The Office of the Comptroller of the Currency is expected to issue a proposed rule subjecting national banks and federal savings associations that are GSIB subsidiaries to substantively identical requirements. Once the draft proposal is finalized and published in the *Federal Register*, the comment period is expected to be open until August 5.

The draft rule proposal is available here.

EU DEVELOPMENTS

ESMA Publishes Opinions on Amendments to MiFID II Non-Equity Transparency and Position Limits RTS

On May 2, the European Securities and Markets Authority (ESMA) published two opinions (Opinions) to revise draft regulatory technical standards (RTS) made under the amended and restated Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MiFIR).

The revisions relate to draft RTS 2 on non-equity transparency and draft RTS 21 on the methodology for the calculation and application of position limits for commodity derivatives. ESMA has submitted revisions to the RTS in response to letters (Letters) published by the European Commission (EC) on April 20, in which the EC confirmed its intention to endorse the draft RTS, subject to certain changes.

In summary, ESMA's revisions reflect the following:

- In terms of draft RTS 2, ESMA has included changes to allow for phase-in approaches for assessing bond liquidity, and for determining the pre-trade size specific to the instrument threshold for non-equity classes. ESMA has also made other technical amendments.
- In terms of draft RTS 21, ESMA has proposed to increase the range of position limits up to 50 percent for contracts with low levels of liquidity or few market participants. ESMA has included amendments to allow that where there is a significant discrepancy between open interest and deliverable supply, the other months' position limits should be adjusted. ESMA also has revised and extended the definition of economically equivalent over-the-counter contracts, among other revisions.

ESMA is intending to publish a further opinion on the draft RTS relating to ancillary activities later in May.

The two Opinions and accompanying annexes (which show ESMA's proposed changes to each draft RTS) can be found here.

The EC's Letters can be found here.

A copy of ESMA's press release can be found here.

European Commission Publishes Staff Working Document on CMU Crowdfunding

On May 3, the European Commission (EC) published a staff working document (Report) on crowdfunding in the EU Capital Markets Union (CMU).

The Report sets out the EC's work on crowdfunding, the current status of crowdfunding in the European Union (including business models, emerging trends and risks), the regulatory environment for crowdfunding (including authorization and investor protection) and an analysis of cross-border crowdfunding activities in the European Union. Notably, the EC highlights that crowdfunding in the European Union is "predominantly local" with member states developing tailored national regimes for crowdfunding activities. As a result, the EC feels that "no strong case" exists for EU-level intervention at present. The EC notes in the Report that it will nonetheless conduct twice-yearly meetings with EU member states, the European Supervisory Authorities and the crowdfunding sector to monitor developments.

For further information on the CMU, see the *Corporate & Financial Weekly Digest* editions of April 29 and October 9, 2015.

A copy of the Report can be found here.

The EC's accompanying press release can be found here.

European Council Publishes European Central Bank Opinion on MiFID II Delay

On May 2, the European Council published a cover note attaching an opinion (Opinion) from the European Central Bank (ECB) regarding proposals to delay the application dates of the amended and restated Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MiFIR).

Notably, the ECB recommends in its Opinion that for consistency, the deadline for EU member states to transpose MiFID II also should be delayed by one year, in line with proposals to delay the application dates of MiFID II and MiFIR. If implemented, the transposition deadline for EU member states would shift from July 2016 to July 2017. Aside from this, the ECB had no further comments on the proposals in its Opinion.

For further information on the proposals to provide for a one-year extension to the application dates of MiFID II and MiFIR, see the *Corporate & Financial Weekly Digest* editions of April 15, February 26 and February 12.

A copy of the cover note attaching the ECB's Opinion can be found here.

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

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EU DEVELOPMENTS

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