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SEC/CORPORATE

SEC Seeks Comment on Possible Enhancement of Audit Committee Disclosures

On July 1, the Securities and Exchange Commission published a concept release to seek public comment regarding the potential enhancement of audit committee disclosure requirements, particularly as such disclosure relates to an audit committee's oversight of the independent auditor.

The SEC noted that while the majority of current audit committee disclosure requirements have been in place since 1999, the role and responsibilities of audit committees have significantly changed since then due to, among other things, the enactment of the Sarbanes-Oxley Act of 2002, the creation of the Public Company Accounting Oversight Board (PCAOB) and the adoption of additional listing requirements by the securities exchanges and associations. The SEC issued the concept release and is seeking public comment to better understand whether, (and, if so, what) additional reporting requirements related to an audit committee's oversight of the auditor would be useful to investors, due primarily to: (1) increased public discussion by investors, organizations representing audit committee members and auditors of the need for updated audit committee reporting that "more transparently conveys the oversight responsibilities performed by the audit committee relative to an issuer's auditor," (2) divergence in the current reporting practices by various issuers of the activities of their audit committees, with some issuers already voluntarily providing more extensive disclosures than what is required, (3) the PCAOB's engagement in certain standard-setting initiatives that could result in additional information being disclosed relating to auditors and their work that may more appropriately be addressed by the SEC through requiring similar disclosure by the issuer, and (4) initiatives being undertaken in other jurisdictions in respect of expanded audit committee reporting.

The concept release clarifies that the SEC is particularly focused on (a) whether changes should be made to required disclosures about audit committees and their oversight of the audit and the auditor relationship and (b) understanding whether such additional information would help inform investment decisions and, where applicable, voting decisions regarding the ratification of auditors and the election of directors who are members of the audit committee. In furtherance of the foregoing, the SEC is requesting comment on various potential changes to required audit committee disclosures, including as to the following:

- communications between the audit committee and the auditor, including, for example, disclosure of the audit committee's consideration of matters required to be discussed with the auditor (rather than disclosure of solely the fact that those communications occurred) and the nature or substance of those communications between the audit committee and the auditors;
- the frequency with which the audit committee met with the auditor and additional information as to specific meetings;
- whether the audit committee has reviewed and discussed with the auditor its internal quality review and most recent PCAOB inspection report and the nature of any such discussion; and
- whether, and if so, how, the audit committee assesses, promotes and reinforces the auditor's objectivity and professional skepticism.

In addition, the SEC is soliciting comment on potential audit committee disclosures in respect of the audit committee's (1) process for selecting the auditor (e.g., how the auditor and its independence, objectivity and audit

quality were assessed and the board's policy, if any, for an annual shareholder vote to ratify the selection of the auditor and whether the audit committee considers the results of any such vote) and (2) consideration of the qualifications of the audit firm and members of the engagement team when selecting the audit firm, including the audit committee's input in selecting the engagement partner.

The concept release can be found here.

SEC Proposes Rule Requiring Executive Compensation Clawbacks

On July 1, the Securities and Exchange Commission proposed for public comment a new rule and rule amendments to implement provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In particular, proposed Rule 10D-1 under the Securities Exchange Act of 1934, as amended (Exchange Act), would require national securities exchanges to adopt listing standards that require listed companies to develop, implement and disclose incentive-based executive compensation recovery (clawback) policies. Under the proposed rule, a company would be subject to delisting if it did not adopt a clawback policy that complies with the applicable listing standard, properly disclose the policy or comply with the policy's clawback provisions.

Under Rule 10D-1, national securities exchanges would establish listing standards that would require listed companies to adopt a clawback policy to recover from any current or former executive officer who received incentive-based compensation during the three fiscal years preceding the date on which the company is required to prepare an accounting restatement to correct a material error. Recovery under the rule would be on a "no fault" basis, without regard to the executive officer's misconduct or responsibility for the erroneous financial statements. The definition of "executive officer" is modeled after the definition of "officer" for purposes of Section 16 under the Exchange Act, and includes the company's president, principal financial officer, principal accounting officer, any vice president and any other person who performs policy-making functions for the company.

Such clawback policies would require a listed company to claw back the amount of incentive-based compensation received by an executive officer that exceeds the amount the executive officer would have received had such compensation been calculated based on the restated financial statements (referred to as "excessive incentive-based compensation"). Incentive-based compensation that is granted, earned or vested based on the achievement of any financial reporting measure would be subject to recovery under the proposed rule. Companies would be permitted to use a reasonable estimate of the effect of the accounting restatement in the case of incentive-based compensation based on stock price or total shareholder return. In determining the incentive-based compensation subject to recovery with respect to equity awards, the recoverable amount for awards still held at the time of recovery would be the number of shares or options received in excess of the number that should have been received based upon the restated financial statements. If options or stock appreciation rights (SARs) have been exercised, but the underlying shares have not been sold, the recoverable amount would be the number of shares attributable to the excess options or SARs based upon the restated financial statements. If the shares issued upon exercise of such options have been sold, the recoverable amount would be the sale proceeds received by the executive officer with respect to the excess number of shares.

In general, under the proposed rule, listed companies would have only limited discretion in regards to recovery of "excessive incentive-based compensation." Listed companies would, however, have discretion not to claw back the "excess incentive-based compensation" received by an executive officer if the recovery would be impractical because the direct expense of enforcing recovery would exceed the amount to be recovered or, in the case of a foreign private issuer, when the clawback would violate applicable home country law. The listed company would first need to make a reasonable attempt to recover the excessive incentive-based compensation before it could determine that such recovery would be impractical.

Rule 10D-1 would require a listed company to file its clawback policy as an exhibit to its Form 10-K (or other annual report) filed under the Exchange Act. If a listed company prepared an accounting restatement that required recovery under its clawback policy or it had an outstanding balance of excess incentive-based compensation relating to a prior accounting restatement, such company would also need to disclose with its other executive compensation disclosure (typically included in annual meeting proxy statements):

- the date it was required to prepare the restatement, the aggregate dollar amount of excess incentive-based compensation attributable to the restatement and the aggregate dollar amount that remained outstanding at fiscal year-end;

- a list of persons from whom the listed company decided not to pursue recovery, the amounts due from each such person and the reason the company elected not to pursue recovery; and
- if amounts of excess incentive-based compensation are outstanding for more than 180 days, the name of, and amount due from, each person at the company's fiscal year end.

Under the proposed rule, exchanges would be required to propose listing rules within 90 days following the publication of adopted Rule 10D-1, and each listed company would be required to adopt a clawback policy no later than 60 days following the effective date of the applicable exchange's listing rule. The proposed rule would require listed companies to recover excessive incentive-based compensation received on or after the effective date of Rule 10D-1 that results from financial information for a fiscal period ending on or after the effective date of Rule 10D-1. It would also require listed companies to comply with the proposed disclosure requirements in annual reports and proxy or information statements filed on or after the effective date of the applicable exchange's listing rule.

Comments on Rule 10D-1 are due within 60 days following the publication of the proposed rule in the *Federal Register*.

Read the proposed rule and press release.

BROKER-DEALER

FINRA Requests Comment on Revised Discretionary Accounts and Transactions Rule

The Financial Industry Regulatory Authority is requesting comment on a revised proposal to consolidate and clarify certain National Association of Securities Dealers (NASD) and New York Stock Exchange rules into new FINRA Rule 3260 (Discretionary Accounts and Transactions by Persons Other Than the Customer) in the consolidated FINRA rulebook. The NASD and NYSE rules govern the obligations of member firms and their associated persons when exercising discretionary authority over a customer's account and accepting orders for a customer's account from a person other than the customer. The proposal also addresses the treatment of customers' free credit balances, sweep programs, bulk transfers of customers' accounts and changes to the broker-dealer of record. FINRA issued its initial proposal in November 2009; the revised proposal addresses comments received from interested persons.

The comment period on the revised proposal expires on August 17. The revised proposal is available here.

FINRA Proposes Changes to the Reporting Requirements for TRACE-Eligible Securities

On July 2, the Financial Industry Regulatory Authority proposed to amend FINRA Rule 6730 (Transaction Reporting) to require member firms to report transactions in eligible securities that are subject to dissemination to the Trade Reporting and Compliance Engine (TRACE) as soon as practicable. FINRA Rule 6730 currently provides that each member firm that is a party to a transaction in a TRACE-eligible security report the transaction within 15 minutes of execution, unless a different time period for the security is specified in the rule. FINRA's proposed amendment retains the current reporting window, but makes clear that member firms must report transactions in TRACE-eligible securities as soon as practicable following the time of execution.

In addition, the proposed amendment includes new supplementary material to provide guidance on the "as soon as practicable" requirement. Specifically, the new supplementary material requires member firms to adopt policies and procedures reasonably designed to achieve compliance with the requirement by implementing appropriate systems to report TRACE-eligible securities. Further, the new supplementary material makes clear that a member firm with reasonably designed policies, procedures and systems will not be in violation of the "as soon as practicable" requirement as a result of unintentional and unpredictable delays in trade reporting that are due to extrinsic factors. Also, the new supplementary material recognizes that member firms may manually report transactions in TRACE-eligible securities, which can result in slower reporting times than a member firm using an automated trade reporting system. Under these circumstances, FINRA will take into consideration the member firm's reporting system when assessing whether its policies and procedures are reasonably designed to achieve compliance with the "as soon as practicable" requirement.

FINRA's proposed rule change is available here.

CFTC

CFTC Proposes Rule on Margin Requirements for Uncleared Swaps in Cross-Border Transactions

On June 29, the Commodity Futures Trading Commission proposed a rule that is intended to clarify the extent to which covered swap entities must comply with CFTC's margin rules for uncleared swaps in cross-border transactions. The proposed rule expands on the general margin rules for uncleared swaps of covered swap entities (i.e., registered swap dealers and major swap participants) that were previously proposed by the CFTC under the mandate of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rule would apply to covered swap entities that are not subject to margin requirements from the banking regulators or the Securities and Exchange Commission. The comment period will be open for 60 days after the rule has been published in the *Federal Register*.

Under the proposed rule, a non-US covered swap entity (CSE) must apply the same margin rules for uncleared swaps as a US CSE if the obligations of the non-US CSE are guaranteed by a US person or if the non-US CSE is a "Foreign Consolidated Subsidiary", which is a non-US covered swap entity in which a US person has a controlling financial interest such that the results of the non-US CSE are included in the U.S. person's consolidated financial statements. Uncleared swaps between a non-US covered swap entity and a non-U.S. counterparty will be excluded from the US margin rules if neither party's obligations under the relevant swap are guaranteed by a US person and neither party is a US branch of a non-US covered swap entity, a Foreign Consolidated Subsidiary or a non-dealer counterparty consolidated into the financials of a US parent.

The proposed rule includes procedures for requesting determinations from the CFTC that the rules of another jurisdiction are comparable to the US margin rules. The procedures use a comparability standard that is "outcome-based." Substituted compliance would allow a US CSE dealing with certain non-US counterparties to comply with comparable margin requirements with respect to margin it posts post, but not the margin it collects.

The rule also defines the term "guarantee" and notes that "the terms of the guarantee need not necessarily be included in the swap documentation or even otherwise reduced to writing" as long as legally enforceable rights are created under the laws of the relevant jurisdiction. The definition of US person in the proposed rule differs from the interpretation of that term in the CFTC cross-border guidance in that it does not include a foreign fund that is majority–owned by US persons. The new definitions under the proposed rule would be used only for purposes of the margin rules, in which case they will primarily affect CSEs. However, if the new definitions come to be used more generally in the CFTC's swap regulations, they could have significant impact for non-dealers as well.

More information is available here and in Appendix A of the proposed rule, available here.

CFTC Requests Public Comment on Rule Amendment Certification Filing by Ice Futures

The Commodity Futures Trading Commission is requesting public comment on a certification of proposed rule amendments that were filed by ICE Futures U.S. Inc.

Under the amendments, ICE Futures would base position limits for eight of its NYISO Zone G electric power futures contracts on a new estimation for deliverable supply. The CFTC's Division of Market Oversight determined that ICE Futures' submission did not adequately explain the subject rule amendment and is potentially inconsistent with Section 5c(c)(2) of the Commodity Exchange Act and Sections 40.6(c)(1), 40.7(a)(2) and 40.7(a)(3) of the CFTC's regulations.

Commenters may review ICE Futures' submissions 15-101 and 15-101 Supplemental and the CFTC's questions for public comment. Comments may be submitted electronically on or before August 6.

More information is available here.

NFA Revises CPO Form PQR and CTA Form PR

The National Futures Association (NFA) has made enhancements to the CPO Form PQR and CTA Form PR (CPR) effective for the quarter ending June 30.

In the PQR, commodity pool operators may no longer list themselves as trading managers for pools that they operate. PQRs also include footing validations in the Schedule of Investments, which will ensure that the sum of the sub-categories is not greater than the sum for the applicable category.

In both the PQR and CPR, firms may now access both active and ended relationships by clicking on the text underneath a relationship table. To reinstate an ended relationship, a firm may simply add the relationship and select a start date after the last indicated end date.

More information is available here.

CFTC Requests Comments on Petition for Exemption from DCO Registration by OTC Clearing Hong Kong Limited

The Commodity Futures Trading Commission is requesting public comment on a petition for exemption from registration as a derivatives clearing organization (DCO) filed by OTC Clearing Hong Kong Limited.

Under Section 5b(h) of the Commodity Exchange Act, the CFTC may exempt a clearing organization from DCO registration for the clearing of swaps if it determines that such clearing organization is subject to comparable, comprehensive supervision by appropriate government authorities in the clearing organization's home country.

Comments may be submitted electronically on or before July 23. Public portions of the petition and all comments received will be available on CFTC's website.

More information is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Enforcement Action Signifies the Need for Investment Advisers to Adopt Written Expense Allocation Policies

On June 29, the Securities and Exchange Commission charged Kohlberg Kravis Roberts & Co. (KKR) with violations of Sections 206(2) and 206(4) of the Investment Advisers Act of 1940, as amended, and Rule 206(4)-7 thereunder for the misallocation of broken deal expenses. The charge addressed KKR's failure to disclose in its flagship funds' offering materials that it did not attribute broken deal expenses to co-investor funds.

Rule 206(4)-7 provides that registered investment advisers need to adopt policies and procedures reasonably designed to prevent violations of the Advisers Act. In bringing this enforcement action, the SEC found that KKR violated Rule 206(4)-7 by not having policies and procedures governing its broken deal allocation practices. More broadly, the charge indicates the necessity of investment advisers having written allocation expense policies.

SEC Division of Investment Management Issues Guidance Update Relating to Rule 204A-1 of the Investment Advisers Act

In June, the Securities and Exchange Commission's Division of Investment Management issued a Guidance Update relating to Rule 204A-1 under the Investment Advisers Act of 1940. Rule 204A-1 provides that a registered investment adviser must establish, maintain and enforce a written code of ethics that requires, among other things, its directors, officers and supervised persons who have access to nonpublic information regarding securities transactions of clients or who are involved in making securities recommendations to clients or who have access to such recommendations that are nonpublic (access persons) to report their personal securities holdings and transactions. Subsection (b)(3)(i) of the rule (reporting exception) provides an exception to the reporting requirements when an access person's securities are held in accounts over which he or she had "no direct or indirect influence or control."

The Guidance Update clarified that an adviser may not rely on the reporting exception *solely* based on the access person providing a trustee with management authority over a trust for which he or she is grantor or beneficiary, or providing a third-party manager discretionary investment authority over his or her personal account. The access person might have "direct or indirect influence or control" through suggestions or directions to the trustee or third-party discretionary manager concerning account holdings, purchases or sales of investments, or particular allocation of investments to be made in the account.

In order to rely on the reporting exception, an adviser may implement additional controls to establish a reasonable belief that the access person had no direct or indirect influence or control. For example, the Guidance Update states that an investment adviser may obtain information about a trustee or third-party manager's relationship to the access person, obtain *specific* certifications regarding the access persons' influence or control, provide access persons with a clear definition of "no direct or indirect influence or control," or request reports to identify transactions that would have been prohibited pursuant to the adviser's code of ethics, absent reliance on the reporting exception. These policies and procedures should focus on the access person's actual influence or control, rather than the third-party manager's discretionary authority.

Effective Date of Investment Adviser Pay-to-Play Rule Ban on Third-Party Solicitation

The Securities and Exchange Commission's Rule 206(4)-5 (Pay-to-Play Rule) under the Investment Advisers Act of 1940, as amended, prohibits, among other restrictions, an investment adviser subject to the rule, and its covered associates, from providing or agreeing to provide, directly or indirectly, payment to any third party for a solicitation of advisory business from any government entity on behalf of such adviser, unless such third party is a "regulated person." A regulated person is defined as (1) an SEC-registered investment adviser, (2) a registered broker or dealer subject to pay-to-play rules adopted by a registered national securities association such as the Financial Industry Regulatory Authority, or (3) a registered municipal advisor that is subject to pay-to-play rules adopted by the Municipal Securities Rulemaking Board (MSRB). In addition, the SEC must by order find that the national securities association and/or MSRB pay-to-play rules: (1) impose substantially equivalent or more stringent restrictions on broker-dealers or municipal advisors respectively than the Pay-to-Play Rule imposes on investment advisers; and (2) are consistent with the objectives of the Pay-to-Play Rule.

In a June 2012 release (Investment Advisers Act Rel. No. 3418), the SEC extended the compliance date for the ban on third-party solicitation to nine months after the compliance date of a final rule adopted by the SEC by which municipal advisors must register under the Securities Exchange Act of 1934. Because the final date on which a municipal advisor must file a complete application for registration was October 31, 2014, the SEC provided notice on June 25. 2015, that the compliance date of the third-party solicitation ban is July 31, 2015. However, neither FINRA nor the MSRB have yet adopted pay-to-play rules. Therefore, on June 25, in response to a new Pay-to-Play Rule frequently asked question, the Division of Investment Management stated that it will not recommend enforcement of the third-party solicitation ban until the later of (1) the effective date of such a FINRA pay-to-play rule, or (2) the effective date of such an MSRB pay-to-play rule. Consequently, the compliance date for the ban on third-party solicitation loses significance until after FINRA and the MSRB adopt pay-to-play rules.

LITIGATION

CFTC Sues Chinese Citizen Accused of Executing Fraudulent Money Pass Trades

The Commodity Futures Trading Commission recently sued Chinese citizen Yumin Li, for violations of the Commodity Exchange Act (CEA). The CFTC accused Ms. Li of fraudulently accessing her employer's futures account to transfer approximately $300,000 to Kering Capital, Ltd., a company owned by her mother, with a futures trading account operated by Ms. Li. According to the CFTC complaint, Ms. Li was employed by a trading firm in California to conduct research related to futures markets and she was afforded a unique ID to conduct that research, also allowing her to trade on the Chicago Mercantile Exchange (CME). The CFTC alleges that Ms. Li used the account to trade uncommon, illiquid Eurodollar futures contracts with Ms. Li's Kering Capital account when no other orders were likely to interfere with the trade. Ms. Li allegedly used her employer's account to buy the contracts at a high price from Kering Capital and then sold them back at a lower price. Using this process, during six separate trading days, Ms. Li was able to siphon approximately $300,000 from her employer's account. According to the CFTC, Ms. Li violated Section 4b of the CEA by defrauding her employer and entering unauthorized trades in its account, misappropriating those funds. The CFTC also alleges that this activity separately violates Section 4c(a) of the CEA as well as CFTC regulation 1.38(a) because Ms. Li knowingly

executed fictitious, non-competitive trades—commonly known as money passes—in which she used the CME to transfer money between accounts rather than execute true, competitive trades. The CFTC is seeking disgorgement of the misappropriated funds from Kering Capital as well as civil penalties and fees under the CEA.

Complaint, *CFTC v. Li*, No. 15-cv-05839 (E.D. Ill. July 1, 2015).

Seventh Circuit Holds Under Indiana Law, Company Was Allowed to Vote Its Own Shares

The United States Court of Appeals for the Seventh Circuit recently affirmed a district court decision holding that under Indiana law, an Indiana corporation could vote its own outstanding preferred shares. In 1999, Emmis Communications Corporation issued 2.875 million shares of preferred stock, which included cumulative yearly dividends, *i.e.*, a dividend in which any unpaid portion carried over to the next year. In 2008, Emmis stopped paying dividends to preferred shareholders and in 2010, Emmis asked the owners of the preferred stock to accept a going-private transaction which would exchange their preferred shares for subordinated debt, which proposal was rejected. In 2011, the preferred shares were selling at a substantial discount and Emmis sought a way to change the preferred stock terms to go private. To get control of the voting rights of its preferred stock, Emmis signed 60 percent of preferred shareholders to a "total return swap," purchased each preferred share at a discount and then the owners delivered the shares to escrow. Closing was deferred five years, and the sellers agreed to vote their shares as Emmis instructed during the interim. Additionally, Emmis repurchased shares of preferred stock in a tender offer, and then reissued them to a trust, which would be used to pay employee bonuses. The trustee was instructed to vote this stock at management's direction. The "total return swap" and stock reissuance to a trust allowed Emmis to approve the changes to preferred stock needed to execute the going-private transaction. The shareholders holding most of the preferred shares commenced litigation, claiming, *inter alia*, that Emmis did not have authority to vote the shares as it did. The Seventh Circuit affirmed the lower court's determination that Indiana's corporate law is unique in that it allows corporations to vote their own outstanding shares. First, the plaintiff preferred shareholders argued that the court should ignore the shares in the trust because they were not held in a fiduciary capacity. However, the Seventh Circuit held that under Indiana law, a company may vote its own shares when held as an employee benefit plan, which was the case with the shares at issue. Second, the plaintiffs argued that Emmis could not vote the shares held in escrow because they were no longer outstanding once Emmis became the beneficial owner. The Seventh Circuit disagreed, holding that Indiana, unlike most states, allows corporations to vote their outstanding shares as long as it is not the legal owner. The court refused to accept plaintiffs' "corporate governance best practices," theory, holding that the corporate laws of the different states protect investors through price and competition.

Corre Opportunities Fund, LP v. Emmis Commc'ns Corp., No. 14-1647 (7th Cir. July 2, 2015).

BANKING

CFPB Postpones "Know Before You Owe" Mortgage Rule Until October 3

On June 24, the Consumer Financial Protection Bureau (CFPB) issued a proposed amendment to the "Know Before You Owe" mortgage disclosure rule, which proposes to move the rule's effective date to October 3. The rule, also called the TILA-RESPA Integrated Disclosure rule, requires easier-to-use mortgage disclosure forms. The CFPB, according to reports published recently, delayed the rule to correct an error in giving notice to Congress under the Congressional Review Act at least 60 days before the planned effective date of the regulation. The CFPB stated that it was issuing the proposal "to correct an administrative error that would have delayed the effective date of the rule by at least two weeks, until August 15 at the earliest."

The CFPB is proposing a new effective date of Saturday, October 3. The CFPB stated that it "believes that moving the effective date may benefit both industry and consumers with a smoother transition to the new rules."

The CFPB had earlier been requested by members of Congress to delay implementation until January 1, 2016, and by several trade groups to provide a "hold harmless" period. Neither request was granted, the CFPB having instead stating that it "would be sensitive to the progress made by those entities that have been squarely focused on making food-faith efforts to come into compliance with the rule on time" and that it had "made it a point to engage directly and intensively with financial institutions and vendors through a formal regulatory implementation project."

Read more.

EU DEVELOPMENTS

ESMA Publishes Final Report on Draft Rules Under MiFID II

On June 29, the European Securities and Markets Authority (ESMA) published its final report (Report) on draft rules (both draft implementing technical standards (ITS) and draft regulatory technical standards (RTS)) relating to authorization (EU licensing requirements), passporting (the right for an investment firm to provide its services cross-border within the European Union), registration of non-EU firms, and co-operation between regulatory authorities under the revised EU Markets in Financial Instruments Directive (MiFID II) and the EU Market in Financial Instruments Regulation (MiFIR).

ESMA consulted on the MiFID II ITS and RTS in December 2014, and this Report on the draft ITS and RTS covers the majority of the draft rules on investor protection topics that ESMA was required to develop (and which it was required to submit to the European Commission (Commission) before July 3) as well as a feedback statement to the ESMA consultation.

ESMA recommends that the Report should be read in conjunction with the consultation paper and the related discussion paper published on May 22, 2014, in order "to have a complete overview of the rationale for ESMA's proposals." ESMA states in the introduction to the Report that the remaining draft technical standards that ESMA is required to develop under MiFID II will be published by the end of 2015. (ESMA has indicated (in separate announcements) that the remaining standards will be delivered in September and December 2015).

The Report, which is more than 130 pages, sets out feedback to the consultation, describes any material changes to the technical standards (or confirms that there have been no material changes) and explains the reasons for those changes.

RTS 5 (information to be provided for the registration of non-EU investment firms with ESMA) and RTS 6 (information exchanged between regulatory authorities) and discussions in the Report in connection with the making of an equivalence decision regarding the regulatory status and supervision of non-EU investment firms by their non-EU regulators will be of interest to many non-EU firms who wish to operate in the European Union. This is because MiFIR offers the possibility for non-EU firms to provide investment services or perform investment activities throughout the European Union upon registration with ESMA—though this will be contingent upon an equivalence decision being made regarding specific non-EU countries and their supervision of investment firms. Some other EU directives and regulations also stipulate that access to the European market may be granted to non-EU firms upon the making of an equivalence decision (notably, the European Markets Infrastructure Regulation (EMIR)), though the equivalence decision-making process has not been smooth and it remains to be seen how possible it will be for non-EU investment firms to be able to register with ESMA. To date, under EMIR, there has not been any decision made regarding the "equivalence" of the United States and this remains very much an open issue.

The Report (and the draft ITS and RTS) have also been submitted to the Commission, which now has three months to decide whether or not to endorse ESMA's technical standards. If the Commission does endorse the technical standards, the European Parliament and the Council of the European Union will then have a further three months to scrutinize them. It is anticipated that the ITS and RTS should be finalized in December 2015 or in the first calendar quarter of 2016, giving EU national regulatory authorities either one year or nine months to implement the standards into national law ahead of the January 3, 2017 MiFID II and MiFIR "go live" date when market participants will be required to comply with the new rules and MiFID I is superseded.

The Report is available online here.

ESMA Renews Short Selling Ban by Greek HCMC

On July 6, the European Securities and Markets Authority (ESMA) issued an official opinion (Opinion), agreeing to renew the emergency short selling prohibition originally imposed by the Hellenic Capital Market Commission (HCMC) on June 29. The original ban was imposed under Regulation (EU) No 236/2012 of the European Parliament and Council on short selling and certain aspects of credit default swaps. The renewed ban took effect on July 7 and will close at 11:00 p.m. CET on July 13. The original and renewed bans place a temporary prohibition on transactions in any financial instrument that creates, or increases, a net short position on any of the

shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of EN.A (Alternative Market of the Athens Exchange). The original and renewed bans apply to any person, regardless of their country of residence and do not include an exemption for market making activities.

ESMA stated in the Opinion that they had renewed the ban because adverse developments continue to exist that can threaten the confidence in the Greek market. ESMA further stated that such a ban is an appropriate and proportionate action.

A copy of the Opinion issues by ESMA can be found here.

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