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DUE TO THE HOLIDAY, *CORPORATE AND FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON NOVEMBER 27. THE NEXT ISSUE WILL BE DISTRIBUTED ON DECEMBER 4.

SEC/CORPORATE

SEC Commissioner Piwowar Speaks at Current Financial Reporting Issues Conference

On November 16, Securities and Exchange Commissioner Michael Piwowar addressed the 34th Annual Current Financial Reporting Issues Conference in New York to share his views on the current and future state of financial reporting. Commissioner Piwowar focused his remarks on three areas: (1) the future role of international financial reporting standards (IFRS) for financial statements filed with the Securities and Exchange Commission; (2) improving the quality of interactive data filed in reports with the SEC; and (3) the SEC's efforts to improve corporate disclosures and his personal concerns that special interests have "corrupted the disclosure process to the detriment of investors."

Future Role of IFRS

In addressing the role of IFRS, Commissioner Piwowar noted concerns expressed to him about the United States' commitment to adopting a single set of high quality global accounting standards and steps taken by the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) in furtherance of such standards. Commissioner Piwowar noted that, while there is little to no support for the SEC to either mandate IFRS reporting for all issuers or provide for optional IFRS reporting for domestic issuers, "there is continued support for a single set of high-quality, globally accepted accounting standards."

Commissioner Piwowar emphasized that any requirement for "IFRS financial reporting should be investor-driven, not regulator-driven." In this regard, Commissioner Piwowar suggested that allowing for, but not requiring, supplemental IFRS financial reporting, without reconciliation to US generally accepted accounting principles, is worth serious consideration.

Improvement of the Quality of Interactive Data

Commissioner Piwowar next addressed the need for the SEC to review and assess whether SEC interactive data requirements are achieving the intended objectives and at what cost. Commissioner Piwowar specifically mentioned concerns about the "quality and accuracy of the information contained in interactive data filings with the SEC." Commissioner Piwowar discussed moving such data "in-line," as opposed to in separate exhibits, which he suggested may "improve the accuracy of structured data, ease the burdens of issuers, and facilitate easier review."

Improvement of Corporation Disclosure

Lastly, Commissioner Piwowar offered this thoughts on improvements to the SEC's corporate disclosure requirements, noting that "the SEC's corporate disclosure regime does not provide easily digestible information about a company." In highlighting the disclosure effectiveness project undertaken by the Division of Corporate

Finance, citing Keith Holmes, the director of that Division, Commissioner Piwowar emphasized "better disclosure" is the objective and reducing the volume of disclosure is not (although these efforts by the Division might ultimately reduce company costs and burdens). In particular, he emphasized that the primary factor in his assessment on disclosure initiatives would be materiality.

Commissioner Piwowar further asserted that special interest groups have "hijacked" the SEC's disclosure regime, expressing his view that certain rulemaking mandated by the Dodd–Frank Wall Street Reform and Consumer Protection Act (e.g., as to pay ratio disclosure and conflicts minerals) has "nothing to do with helping investors." In closing, he suggested that the SEC's focus should be on making sure that material information is efficiently and quickly delivered to the financial markets.

See the complete text of Commissioner Piwowar's speech here.

Register for Our 2016 Proxy Season Update Webinar

On Wednesday, December 9 at 12:00 p.m. (CT), please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Georgeson Inc. for a webinar discussion of key developments and trends impacting public companies in the 2016 annual report and proxy season.

Further details are available here; click here to register.

BROKER-DEALER

SEC Proposes Rules to Enhance Transparency and Oversight of Alternative Trading Systems

On November 18, the Securities and Exchange Commission proposed a rule to enhance operational transparency and regulatory oversight of alternative trading systems (ATSs) that trade stocks listed on a national securities exchange (NMS stocks), including "dark pools." If adopted, the rule would require NMS Stock ATSs to publicly disclose, on new Form ATS-N, detailed information about the operations and activities of a broker-dealer operator and its affiliates.

The Form ATS-N would include information about: (1) products or services offered to subscribers; (2) use of smart order routers (or similar functionality) or algorithms to send or receive subscriber orders; (3) fees; and (4) market quality statistics published or provided by the NMS Stock ATS to one or more subscribers. In addition, the proposal would amend Regulation ATS to require all ATSs to have and maintain written safeguards and procedures to protect the confidential trading information of their subscribers, and written procedures to ensure that those safeguards and procedures are followed.

The comment period expires on January 18, 2016, and, among other things, the SEC is specifically asking for comments addressing the proposals regarding: (1) disclosure of additional information; (2) the requirement that ATSs have written safeguards and procedures; and (3) the recordkeeping requirements for ATSs.

For the full text of the Rule click here.

DERIVATIVES

See "CFTC Releases Preliminary Report on the Swap Dealer De Minimis *Exception" in the CFTC section and "ESMA Issues Public Statement on Collateralization of Bank Guarantees for Energy Derivatives" in the EU Developments section.*

CFTC

CFTC Extends No-Action Relief to Certain Affiliated Counterparties

On November 17, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) and Division of Clearing and Risk (DCR) each extended no-action relief for certain affiliated counterparties.

Specifically, in CFTC Letter 15-62, the DMO extended the temporary no-action relief previously provided in CFTC Letters 14-26 and 14-136 from the trade execution requirement to affiliated counterparties that satisfy CFTC regulation 50.52(a) but not CFTC regulations 50.52(b), (c) or (d) and are not exempt from clearing. This relief will now extend until December 16, 2016.

In CFTC Letter 15-63, the DCR extended no-action relief previously provided in CFTC Letter 14-135 to affiliated counterparties in jurisdictions with non-US mandatory clearing regimes that were otherwise eligible to rely on the alternative compliance framework in CFTC regulations 50.52(b)(4)(ii)-(iii). This relief will now extend until the earlier of (1) December 31, 2016 and (2) with respect to a particular jurisdiction, 60 days after the CFTC announces that it has made a comparability determination described in CFTC regulation 50.52(b)(4)(i) with respect to that jurisdiction.

CFTC Letter 15-62 is available here.

CFTC Letter 15-63 is available here.

CFTC To Hold an Open Commission Meeting on Automated Trading

The Commodity Futures Trading Commission announced that it will hold an open meeting on Tuesday, November 24 at 9:00 a.m. (ET) to consider a proposal on automated trading. Among other provisions, the proposed rules are expected to set requirements with regard to the design, testing and supervision of automated trading systems, both high-frequency and low-frequency. In a speech earlier this week, CFTC Chairman Timothy Massad indicated that the CFTC also is considering whether to require proprietary trading firms that use automated trading systems and access exchange markets directly to register with the CFTC.

The meeting is open to the public or can be accessed via live webcast or conference call.

More information is available here.

CFTC Releases Preliminary Report on the Swap Dealer *De Minimis* Exception

On November 18, staff from the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight and Office of the Chief Economist issued a preliminary report regarding the swap dealer *de minimis* exception under the CFTC rules defining "swap dealer."

The report discusses the potential effects of raising or lowering the *de minimis* threshold and provides several alternative approaches. The report also discusses the available swap data used when developing estimates of swap dealer activity.

The report is open for public comment until January 17, 2016.

More information is available here.

UK DEVELOPMENTS

Anti-Money Laundering Update: HM Treasury Advisory Notice on Money Laundering and Terrorist Financing Controls

On November 12, HM Treasury published an advisory note on money laundering and terrorist financing controls in jurisdictions outside the European Union. The advisory note identifies that on October 23, the Financial Action Task Force (FATF) published two statements identifying those jurisdictions that the FATF deems to have "strategic deficiencies" in their anti-money laundering and counter terrorist financing regimes. The HM Treasury advisory note may be seen as an explicit acknowledgement of and support for the FATF's statements.

The United Kingdom's Money Laundering Regulations 2007 require regulated entities to have policies and procedures in place so as to prevent activities related to money laundering and terrorist financing. Consequently, the HM Treasury advisory note advises firms to:

- consider North Korea, Iran and Myanmar high risks for the purposes of the Money Laundering Regulations 2007, and to apply enhanced due diligence measures in accordance with the risks; and
- take appropriate actions in relation to Afghanistan, Algeria, Angola, Bosnia and Herzegovina, Guyana, Iraq, Laos, Panama, Papua New Guinea, Syria, Uganda and Yemen to minimize the associated risks, possibly applying enhanced due diligence measures in high-risk situations.

The FATF statements are available here and here.

HM Treasury's advisory notice is available here.

For details on the specific sanctions in place against the countries referenced above, please see HM Treasury's regime specific lists here.

FCA Enforcement: Recent Action Against Former Investment Analyst for "Cherry Picking"

On November 17, the UK Financial Conduct Authority (FCA) published its final notice addressed to Mothahir Miah, a former investment analyst at a large UK institutional asset manager, fining him £139,000 and banning him from performing any function in relation to any regulated activity in the United Kingdom for at least five years. In its investigation of Mr. Miah's trading activities leading up to the issuance of the final notice, the FCA found that Mr. Miah had failed to satisfy the FCA's approved persons "Statement of Principle and Code of Practice for Approved Persons" (APER). In particular, Mr. Miah failed to satisfy Statement of Principle 1, which mandates that any approved person must act with integrity in carrying out his accountable functions. The FCA found that Mr. Miah had failed to act with integrity and consequently has been deemed a person who is not fit and proper to act in a function relating to a regulated activity in the UK financial services industry.

Between January 2010 and October 2012, Mr. Miah's employment at a large UK institutional asset manager afforded him authority to trade on behalf of hedge funds and long-only funds. He exploited weaknesses in his employer's trading systems and controls, allowing him to deliberately delay (sometimes by up to nine hours) the booking and allocation of trades in order to assess their performance and then allocate those trades that benefited from favorable intraday price movements to hedge funds that paid performance fees. He allocated trades that did not benefit from favorable intraday price movements to certain long-only funds that paid lower or no performance fees. This practice is commonly known as "cherry picking." Mr. Miah's actions contributed to his employer having to pay significant compensation to a number of long-only funds. The FCA's final notice asserts that Mr. Miah knew that cherry picking was dishonest, but did so anyway in an effort to gain recognition for his trading ability from his colleagues (the FCA notes that Mr. Miah did not receive any direct financial benefit from his misconduct).

The fine (reduced from £198,600 as a result of Mr. Miah's cooperation with the FCA investigations) and the five-year ban were imposed on Mr. Miah because the FCA considered his misconduct to be particularly serious in light of:

- his role as an experienced industry professional;
- his actions, which were deliberate and favored his personal interests over those of his employer's customers; and
- his failure to act with integrity.

The FCA's final notice is available here.

EU DEVELOPMENTS

ESMA Publishes MiFID II Delay Analysis

As discussed in last week's *Corporate & Financial Weekly Digest*, on November 18, the European Securities and Markets Authority (ESMA) published a note relating to delays in the "go-live date" of certain Markets in Financial Instruments Directive (MiFID II) provisions. The note was published at the request of members of the European Parliament and expands upon the analysis currently being undertaken at the European Commission (EC), European Parliament and European Council of Ministers as to whether or not MiFID II implementaiton should be delayed.

The note addresses:

- the identification of possible delays in the expected real applicability of certain MiFID II provisions, especially those related to the development of information technology systems (by both regulators and market participants) that need to interact;
- the reasons why those delays are hard to eliminate or manage; and
- the possible alternatives for how to tackle them, in a coordinated EU manner.

The note explains that the legal timeframe for MiFID II implementation also is delayed because ESMA published regulatory technical standards (RTS) and implementing technical standards (ITS) on September 28. The EC now has until January 28, 2016 to indicate if it will endorse the RTS/ITS. The European Parliament and the Council then have between one and six months to exercise their right of objection. As a result, even assuming only a one-month objection period, it is unlikely that the RTS and ITS will be finalized and published in the *Official Journal of the European Union* before March 2016. When considering that MiFID II (and the associated Markets in Financial Instruments Regulation (MiFIR)) is set to come into effect on January 3, 2017, the above timeline leaves less than nine months to finalize business requirements and develop, program, test and deploy the systems needed for the MiFID II implementation. For the most complex systems, ESMA comments this is insufficient:

> The possibility of a delay is, in some cases, already a certainty. The current state of the final rules and the expected publication time prevent the different parties to start working with the necessary certainty and we are already past the point of no return after which the launch of the system into production in January 2017 becomes unfeasible.

ESMA notes that the options for resetting the January 3, 2017 date are as follows:

- **Level 1 fix** – ESMA believes that postponing the application date of some articles for a few months is the best option in terms of legal certainty and synchronicity. This was the method used to delay implementaion of MiFID I originally when some articles were postponed for a few months.
- **Level 2 fix** – This achieves similar results as a Level 1 fix (i.e., legal certainty and synchronicity), but this solution requires fixing the applicability date, due to duly justified technical reasons, at a later moment than the applicability date of Level 1. ESMA notes that it is not a solution for transaction reporting and does not solve the problem of a legal vacuum, which puts at risk the enforceability of some key provisions.
- **Level 3 fix** – This would consist of an agreement between all EU regulators on an implementation date that would be later than the one contained on the RTS/ITS.

ESMA's preference is for a Level 1 fix.

The full text of the note is available here.

ESMA Issues Public Statement on Collateralization of Bank Guarantees for Energy Derivatives

On November 19, the European Securities and Markets Authority (ESMA) issued a public statement (Public Statement) regarding its decision not to extend the current three year grace period which permits non-financial firms to use bank guarantees that are not collateralized for their energy derivatives transactions that are cleared by European central counterparties (CCPs). As of March 15, 2016, all CCPs authorized under the European Market Infrastructure Regulation (EMIR) will be required to fully collateralize commercial bank guarantees that cover transactions in derivatives relating to electricity or natural gas.

ESMA determined not to extend the existing grace period for the following reasons:

- the elimination of an undue source of risk for CCPs arising from non-collateralized guarantees;
- the current three-year grace period was deemed to be sufficient to permit the wholesale energy market to prepare for the incoming collateral requirements;
- some European CCPS are already requiring fully collateralized bank guarantees;
- EMIR requires CCPs to only accept collateral that is highly liquid, with limited credit and market risk; and
- a further postponement would lead to discrepancies with international standards for CCPs.

ESMA noted that it expects all interested stakeholders to be in compliance with the obligation to fully collateralize commercial bank guarantees by March 15, 2016.

A copy of the Public Statement can be found here.

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