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SEC/CORPORATE

SEC Approves FINRA's Funding Portal Rules

On January 22, the Securities and Exchange Commission approved the Financial Industry Regulatory Authority's funding portal rules and related forms for entities functioning as SEC-registered funding portals pursuant to "Regulation Crowdfunding." FINRA's funding rules became effective on January 29, the same date on which the SEC's forms enabling funding portals to register with the SEC became effective (as disclosed in the *Corporate & Financial Weekly Digest* edition of January 29). On January 29, FINRA issued Regulatory Notice 16-06, which provides a brief overview of FINRA's funding portal rules.

For the full text of FINRA's Regulatory Notice 16-06, click here.

DERIVATIVES

See "CFTC Approves Derivative Clearing Organization Registration Order for Eurex Clearing AG" and "NFA Issues Notice Regarding Swap Valuation Dispute Notices" in the CFTC section and "ESMA Publishes Opinions on Pension Schemes To Be Exempt From EMIR Clearing Obligations" in the EU Developments section.

CFTC

CFTC Approves Derivative Clearing Organization Registration Order for Eurex Clearing AG

On February 1, the Commodity Futures Trading Commission issued an order granting Eurex Clearing AG registration as a derivatives clearing organization (DCO) under the Commodity Exchange Act (CEA). The order will allow Eurex Clearing to provide clearing services, in its capacity as a registered DCO, for swaps for (1) US persons clearing for their own proprietary business, or (2) futures commission merchants clearing on behalf of US customers. Before the order becomes effective, however, Eurex Clearing must comply with the CFTC's "straight-through processing" requirements.

Due, in part, to a delay in the implementation of the Markets in Financial Instruments Directive (MiFID II), Eurex Clearing was not able to demonstrate compliance with these requirements prior to the issuance of the CFTC's registration order. Accordingly, the CFTC concurrently issued Letter No. 16-04, extending no-action relief previously granted to Eurex Clearing, which permits it to continue to clear proprietary interest rate swap positions for US clearing members.

The Eurex Clearing AG DCO Registration Order is available here.

CFTC Letter 16-04 is available here.

NFA Issues Notice Regarding Swap Valuation Dispute Notices

On February 2, National Futures Association (NFA) issued Notice I-16-07, which implements an order previously issued by the Commodity Futures Trading Commission authorizing NFA to receive notices of swap valuation disputes exceeding $20 million required to be filed with the CFTC by swap dealers (SDs) and major swap participants (MSPs) pursuant to CFTC Regulation 23.502(c). Effective March 1, NFA will receive and maintain such notices and then provide summaries and reports regarding such disputes to the CFTC. As of that date, SDs and MSPs will be required to file notices of swap valuation disputes through WinJammer™, NFA's online filing application. NFA noted that beginning in Fall 2016, firms must provide standardized information when filing such valuation disputes. Going forward, NFA will provide additional information to allow SDs and MSPs to modify their processes to comply with these new standards.

NFA Notice I-16-07 is available here.

BANKING

FDIC Releases Paper on Cybersecurity

On February 1, the Federal Deposit Insurance Corporation (FDIC) published "A Framework for Cybersecurity," an article that appears in the Winter 2015 issue of *Supervisory Insights*. The article discusses the cyber threat landscape and how financial institutions' information security programs can be enhanced to address evolving cybersecurity risks. The article also provides an overview of actions taken by the FDIC individually and with other regulators in response to the increase in cyber threats. Other articles of interest also appear in the publication.

To read *Supervisory Insights*, click here.

FDIC Seeks Comment on Revised Deposit Insurance Assessment Rule

On January 21, the Federal Deposit Insurance Corporation (FDIC) announced that it was seeking comment on a revised proposed rule that would amend the way small banks are assessed for deposit insurance. The proposed rule would affect banks with less than $10 billion in assets that have been insured by the FDIC for at least five years. According to the revised proposal, it would "update the data and revise the methodology that the FDIC uses to determine risk-based assessments for these institutions to better reflect risks and to help ensure that banks that take on greater risks pay more for deposit insurance than their less risky counterparts." The proposal follows an initial proposed rule on small bank assessments issued in June 2015. The updated proposal reflects comments received last year on topics including the calculation of asset growth and the treatment of reciprocal deposits and Federal Home Loan Bank advances. The revised proposal would be revenue neutral, so that aggregate assessment revenue collected from established small banks is expected to be approximately the same as it would have been otherwise. The FDIC has revised the online assessment calculator that allows institutions to estimate their assessment rates under the proposal to reflect the updated proposal.

Comments on the proposed rule will be received for 30 days following publication in the *Federal Register*.

To read the revised proposal, click here.

To use the assessment calculator, click here.

OCC Releases Dodd-Frank Stress Test Scenarios for 2016

On January 28, the Office of the Comptroller of the Currency (OCC) released economic and financial market scenarios that will be used in the upcoming stress tests for covered institutions with more than $10 billion in assets. The supervisory scenarios include baseline, adverse and severely adverse scenarios, as described in the OCC's final rules that implement stress test requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 165(i)(2) of the Dodd-Frank Act requires certain financial companies, including national banks and federal savings associations with total consolidated assets of more than $10 billion, to conduct annual stress tests. On December 3, 2014, the OCC published its amended annual stress test rule. The rule states that the OCC will provide scenarios to covered institutions by February 15 of each year. Covered institutions are required to use

the scenarios to conduct annual stress tests. The final policy statement on the development and distribution of the scenarios was issued on October 28, 2013, in the *Federal Register*.

To see the OCC 2016 scenario information, click here.

CFPB Urges 25 Largest Banks To Do More To Create or Promote Deposit Accounts

On February 3, the Consumer Financial Protection Bureau (CFPB) sent a letter to the nation's top 25 retail banking companies urging them to do more to create or promote deposit accounts designed to meet consumers' financial needs. The CFPB is urging banks and credit unions to offer consumers accounts that do not authorize them to spend money they don't have. Separately, the CFPB is weighing what additional consumer protections are necessary for overdraft and related services. The CFPB recommendations include the following:

- Offer lower-risk products that are designed not to authorize overdrafts and that do not charge overdraft fees. A number of institutions have introduced "no-overdraft" accounts and offer them alongside more common checking account products. However, in a recent CFPB review of the top retail banking websites, the CFPB found nearly half do not appear to offer any deposit account that ensures consumers can't overspend. Such a product would give consumers an opportunity to choose an account that helps them avoid overdrafting.
- Advertise lower-risk products prominently in marketing efforts, online and in-store checking account menus, and during sales consultations.

To see the CFPB letter, click here.

UK DEVELOPMENTS

UK Government Publishes Statutory Regulations for UK Companies and LLPs in Connection With PSC Register Requirements

On January 25, the UK Government published two regulations in relation to new requirements for UK-incorporated companies and UK-formed limited liability partnerships (LLPs) to keep a register of people with significant control (PSC Register). The two regulations are the Register of People With Significant Control Regulations 2016 (Company Regulations) and the Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (LLP Regulations) (collectively, Regulations).

The Regulations are in relation to the new PSC Register requirements introduced by the Small Business, Enterprise and Employment Act. Beginning April 6, all UK-incorporated companies and UK-formed LLPs will be required to keep a PSC Register and will be required to file that information with Companies House beginning June 30.

Both Regulations confirm key requirements for UK companies and LLPs, including what a person with "significant control" means and that a fixed fee of £12 will apply for all requests for copies of a company or LLP's PSC Register, regardless of how many parts are required to be copied. The Company Regulations exempt certain companies from the PSC Register requirements, specifically where such companies have voting shares admitted to trading on specific markets in Israel, Japan, Switzerland and the United States (listed in Schedule 1 of the Company Regulations). These companies will *not* be required to keep a PSC Register. The LLP Regulations also insert a requirement for LLPs to file a statement of initial significant control to the registrar on incorporation.

For further background information on the PSC Register requirements, see the *Corporate & Financial Weekly Digest* edition of August 14, 2015.

The draft Company Regulations can be found here.

The draft LLP Regulations can be found here.

UK Government Publishes Statutory Guidance on the Meaning of "Significant Influence or Control" in Connection With PSC Registers

The *Corporate & Financial Weekly Digest* edition of January 8 discussed draft guidance published by the UK Government's Department for Business, Innovation and Skills (BIS) in December 2015 on the meaning of persons with "significant influence or control." The draft guidance is in relation to new requirements for UK-incorporated companies and UK-formed limited liability partnerships (LLPs) to maintain a register of people with significant control (PSC Register).

By way of update, on January 25, draft statutory guidance for companies on the meaning of "significant influence or control" was presented to UK Parliament for approval. On January 27, the BIS also published draft statutory guidance for LLPs, which is to be presented to Parliament for approval on April 6.

Overall, both sets of statutory guidance reflect the drafts released in December 2015. The latest statutory guidance for both companies and LLPs expand the list of "excepted roles" that would not normally be considered as exercising "significant influence or control" (the roles were referred to as "safe harbours" in the December 2015 draft guidance). Tax advisors and investment managers are included in the non-exhaustive lists of roles that would not be considered to be exercising "significant influence or control." The statutory guidance also confirms that where a person meets any of the first three "significant control" conditions in Schedule 1A of the Companies Act 2006, it is unnecessary to confirm whether that person has "significant influence or control."

The conditions for companies include:

- the holding of more than 25 percent of the shares;
- the holding of more than 25 percent of the voting rights; or
- the right to appoint or remove the majority of the board of directors.

The conditions for LLPs include:

- the rights to more than 25 percent of the assets on a winding up;
- the holding of more than 25 percent of the voting rights; or
- the right to appoint or remove the majority of management.

The draft statutory guidance presented to Parliament with respect to companies, and the draft guidance in relation to LLPs, can be found here.

The December 2015 draft guidance released for companies can be found here, and for LLPs here.

FCA Publishes "Dear CEO" Letter in Relation to Client Take-On Procedures for CFD Products

On February 2, the Financial Conduct Authority (FCA) published a "Dear CEO" letter (Letter) setting out the FCA's findings from a review of client take-on procedures for firms that offer contract for difference (CFD) products to clients.

The FCA reviewed a sample of 10 firms that offer CFDs on a non-advised basis. The review considered: (1) approaches to assessing the appropriateness of CFDs for clients; (2) initial disclosures given to clients; (3) anti-money laundering (AML) systems and controls in place; and (4) approaches to categorizing clients.

The aim of the review was to assess the areas above against the requirements of the FCA's Conduct of Business sourcebook (COBS) and Senior Management Arrangements, Systems and Controls sourcebook (SYSC).

The Letter reports that the FCA found several areas of concern. The FCA found that most firms were not assessing the appropriateness of CFDs for clients in line with chapter 10 of COBS. Firms were found to issue "poorly worded risk warnings" and in some cases, were unable to assess the appropriateness of CFDs for clients. The FCA was concerned with firms asking clients to "self-certify" they understood the risks of a CFD, as opposed to actually assessing the appropriateness of CFDs for clients. In addition, AML systems and controls in place were found to be inadequate, particularly for clients identified as high risk. When conducting AML risk assessments, firms were also found to focus on jurisdictional risk, as opposed to considering a range of factors.

However, the FCA notes in its Letter that in terms of client classification, the FCA was heartened that eight of the 10 firms had classified "all of their clients" as retail, to give them "the highest level of protection."

The FCA is concerned that CFD providers, on an industry-wide basis, are not meeting the FCA's requirements in relation to taking on new clients and or preventing financial crime. Firms are expected to ensure they are complying with the FCA's requirements in relation to CFD products, and to amend their policies and procedures accordingly so as to comply with SYSC and COBS requirements.

A copy of the FCA's Letter can be found here.

EU DEVELOPMENTS

ESMA Publishes Opinions on Pension Schemes To Be Exempt From EMIR Clearing Obligations

On February 2, the European Securities and Markets Authority (ESMA) published a set of opinions to exempt 16 UK-based pension schemes from clearing obligations contained in the European Market Infrastructure Regulation (EMIR).

Under Article 89(2) of EMIR, relevant competent authorities (such as the Financial Conduct Authority (FCA)) are able to exempt certain pension schemes from the obligation to clear OTC derivatives contracts. In order to grant the exemption, the FCA must first notify ESMA of the exemption request and obtain an opinion from ESMA, which then consults with the European Insurance and Occupational Pensions Authority (EIOPA). Once ESMA issues an opinion to confirm the exemption, which it must within 30 calendar days, the FCA has 10 working days to adopt and communicate its decision.

Only pension scheme arrangements that are: (1) occupational requirement provision businesses of life insurance undertakings covered by Directive 2002/83/EC; and (2) other authorized and supervised entities or arrangements operating on a national basis, recognized under national law and with a primary purpose of providing retirement benefits (both under Article 2(10)(c) and (d), respectively), come within the exemption requirements of Article 89(2).

In assessing the exemption request, the FCA, ESMA and EIOPA consider the pension scheme's compliance with Article 2(10)(c) or (d) of EMIR (as applicable) and also the reasons as to why the pension scheme will encounter difficulties in meeting variation margin requirements.

A copy of ESMA's press release and opinions 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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