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CORPORATE & FINANCIAL
WEEKLY DIGEST

April 8, 2016 Volume XI, Issue 14

BROKER-DEALER

SEC Approves FINRA's Proposed Expansion of Supplement Schedule for Derivatives and Off-Balance Sheet Items

On April 5, the Financial Industry Regulatory Authority released Regulatory Notice 16-11 stating that the Securities and Exchange Commission had approved its proposal to expand the derivatives and other off-balance sheet (OBS) items schedule filing requirement to certain non-carrying and non-clearing firms that have significant amounts of OBS obligations. Historically, the OBS was required to be filed by FINRA member firms that self-clear proprietary transactions, clear transactions for others or carry customer accounts. FINRA's proposal expands the filing requirement to FINRA member firms that have, pursuant to Rule 15c3-1 under the Securities Exchange Act of 1934, a minimum dollar net capital requirement equal to or greater than $100,000 and at least $10 million in reportable items pursuant to the OBS. There is a *de minimis* exception to the filing requirement for firms whose aggregate gross amount of off-balance sheet items is less than 10 percent of the firm's excess net capital on the last day of the reporting period. Firms who seek to take advantage of the *de minimis* exception must affirmatively indicate so in the eFOCUS system.

Newly reporting firms must file their initial OBS on or before August 2. Firms with reporting obligations prior to the recent expansion should continue to file without interruption.

FINRA Regulatory Notice 16-11 is available here.

DERIVATIVES

See "SEC Approves FINRA's Proposed Expansion of Supplement Schedule for Derivatives and Off-Balance Sheet Items" in the Broker-Dealer section, "CFTC Proposes Guidance on Electric Power and Natural Gas Contracts" in the CFTC section and "ESMA Declines to Exclude Exchange-Traded Derivatives From MiFIR Open Access" in the EU Developments section.

CFTC

CFTC Proposes Guidance on Electric Power and Natural Gas Contracts

The Commodity Futures Trading Commission has proposed to issue guidance clarifying that certain electric power and natural gas contracts are not "swaps" for purposes of the Commodity Exchange Act. Specifically, the proposed guidance includes the following types of contracts:

- "capacity" contracts in electric power markets that are used in situations in which a state public utility commission obligates load serving entities and load serving electric utilities to purchase capacity from suppliers to secure grid management and deliverability of power; and

- “peaking supply” contracts that enable an electric utility to purchase natural gas from another natural gas provider on days when its local natural gas distribution companies curtail their natural gas transportation services.

The CFTC is requesting public comment regarding whether these contracts should be considered swaps. The comment period will close 30 days after the proposed guidance is published in the *Federal Register*.

The proposed guidance is available here.

CFTC’s Market Risk Advisory Committee Meeting

The Commodity Futures Trading Commission’s Market Risk Advisory Committee (Committee) is scheduled to hold a public meeting on April 26 at 10:00 a.m. The Committee will discuss: (1) how effectively end-users and other market participants in different asset classes are able to find counterparties for transactions, receive accurate pricing and volume information, and otherwise access the markets; and (2) the extent and nature of the current use of portfolio compression and related services, and the benefits and challenges posed by portfolio compression activity in the derivatives markets.

More information, including dial-in information, is available here.

BANKING

FDIC Rescinds *De Novo* Time Period Extension

On April 6, the Federal Deposit Insurance Corporation (FDIC) rescinded Financial Institution Letter (FIL) 50-2009 entitled “Enhanced Supervisory Procedures for Newly Insured FDIC-Supervised Depository Institutions.” The FIL, among other measures, had extended the *de novo* period for newly organized, state nonmember institutions from three to seven years for examinations, capital maintenance and other requirements. It remains to be seen whether the rescission will have an effect on the number of new bank applications filed, which have dwindled to near zero the last few years.

The FDIC also issued a supplement to its November 2014 guidance related to the Statement of Policy on Applications for Deposit Insurance. The guidance is in a question-and-answer format to aid applicants who are developing proposals for deposit insurance. The supplemental questions and answers focus on the development of business plans.

The supplemental guidance is available here.

FDIC Issues Guide to Corporate Governance

On April 5, the Federal Deposit Insurance Corporation (FDIC) issued a Director’s Guide to Corporate Governance (Guide) as part of its publication entitled *Supervisory Insights*. Among other things, the Guide provides the FDIC’s views on the respective duties of directors and officers of FDIC-insured institutions.

The Guide is available here.

EU DEVELOPMENTS

ESMA Declines to Exclude Exchange-Traded Derivatives From MiFIR Open Access Requirements

On April 4, the European Securities and Markets Authority (ESMA) published a risk assessment (Risk Assessment) that confirmed it sees no need to temporarily exclude exchange-traded derivatives (ETD) from open and non-discriminatory access requirements applicable to central counterparties (CCPs) and trading venues, introduced by Articles 35 and 36 of the Markets in Financial Instruments Regulation (MiFIR). The Risk Assessment is required to be published by July 3, and permits the European Commission (EC), subject to ESMA’s conclusions, to adopt a delegated act to provide for an exclusion of up to 30 months for ETDs from the open access provisions.

In conducting the Risk Assessment, ESMA was required to assess whether the open access provisions applicable to CCPs and trading venues regarding ETD's would result in any risks to the overall stability and orderly functioning of financial markets in the European Union. ESMA's analysis did not identify any risk relating to open access for ETDs that could not, in ESMA's view, be addressed within the existing open access framework. ESMA intends to update its review of the effects of open access on ETDs in connection with the EC's report on the application of Articles 35 and 36 of MiFIR, which is due by July 3, 2019.

A copy of ESMA's Risk Assessment can be found here.

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

ESMA Publishes Final UCITS V Remuneration Guidelines

On March 31, the European Securities and Markets Authority (ESMA) published final guidelines on sound remuneration policies for staff, under the Undertakings for the Collective Investment in Transferable Securities V (UCITS V) Directive (UCITS V Guidelines). ESMA also published an amendment to the Alternative Investment Fund Managers Directive (AIFMD) remuneration guidelines (AIFMD Remuneration Guidelines), and confirmed it has written a letter to the European Commission, European Parliament and European Council calling for further clarity on proportionality in relation to the remuneration principles.

The UCITS V Guidelines apply to management companies and competent authorities in relation to remuneration policies and practices under the UCITS V Directive. The UCITS V Guidelines set out: (1) guidelines on how to identify the categories of staff and remuneration captured by the requirements; (2) guidelines for management companies part of a group; and (3) guidelines on governance arrangements for remuneration (including management bodies, supervisory functions, remuneration committees and control functions), risk alignment and disclosure. The amendment to the AIFMD Remuneration Guidelines relates to AIFMs belonging to a group.

Next steps are for the UCITS V Guidelines and AIFMD Remuneration Guidelines to be translated into the official languages of the European Union, with final texts published on ESMA's website. The UCITS V Guidelines will apply beginning January 1, 2017 (subject to transitional provisions), and the amendment to the AIFMD Remuneration Guidelines also will apply on January 1, 2017.

For further information on the development of the UCITS V Guidelines and AIFMD Remuneration Guidelines, see the *Corporate & Financial Weekly Digest* editions of January 15, July 31, 2015, and February 15, 2013.

A copy of the UCITS V Guidelines and the amendment to the AIFMD Remuneration Guidelines can be found here.

A copy of ESMA's letter can be found here.

A copy of ESMA's accompanying press release 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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