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SEC/CORPORATE

SEC Publishes Concept Release Regarding Business and Financial Disclosure

On April 13, the Securities and Exchange Commission published a concept release, recommended by the SEC's Division of Corporation Finance, regarding business and financial disclosure required by Regulation S-K. This concept release is part of a comprehensive disclosure effectiveness initiative recommended in the SEC staff's report on review of disclosure requirements in Regulation S-K, which was required by the Jumpstart Our Business Startups Act (JOBS Act). In a statement at an open meeting to discuss the concept release, SEC Chair Mary Jo White noted that the recommendation "analyzes evolving business models, advancements in technology, and ongoing public dialogue on disclosure issues and seeks public input on how our business and financial disclosure requirements in Regulation S-K can best be modernized in the current context."

Through the publication of the concept release, the SEC is seeking public comment on how to improve business and financial disclosure requirements in Regulation S-K, including changes to improve readability and navigability of public disclosure (for example, posing questions as to cross-referencing, hyperlinks, incorporation by reference and the use of company websites). The concept release does not seek comment with respect to other disclosure requirements in Regulation S-K, including disclosure requirements relating to executive compensation and governance matters.

The SEC's concept release is available here.

DERIVATIVES

See "NFA Issues Notice to Member Regarding Approval Process for New Margin Models Used by Covered Swap Entities" in the CFTC section.

CFTC

CFTC Issues No-Action Letters and Guidance Regarding the Ownership and Control Final Rule

On April 8, the Division of Market Oversight (DMO) of the Commodity Futures Trading Commission issued two no-action letters providing additional relief with respect to the ownership and control reports final rule (OCR Final Rule), which requires reporting parties to submit trader identification and market participant data electronically on new and updated reporting forms. CFTC Letter No. 16-32 extends the relief provided by CFTC Letter No. 15-52 by providing reporting members with temporary relief from certain OCR reporting obligations. The relief will extend from September 28 to April 29, 2018, depending on the OCR form. For a more complete discussion of CFTC Letter No. 15-52, see the *Corporate & Financial Weekly Digest* edition of October 2, 2015.

Such relief is conditioned upon a reporting party complying with certain terms and conditions, such as providing test submissions, status reports and other information in the form and manner requested by DMO or the CFTC's Office of Data and Technology. In connection with CFTC Letter No. 16-32, DMO also issued additional guidance to clarify how the terms "owner" and "controller" should be interpreted in the context of OCR Forms 102A and 102B.

In conjunction with CFTC Letter No. 16-32, DMO also issued CFTC Letter No. 16-33, which addresses the masking of certain reportable information under the OCR Final Rule. CFTC Letter No. 16-33 permits reporting parties to mask certain identifying information on OCR Forms 120A and 120B subject to certain conditions. Reporting parties will be able to mask such information until the earlier of March 1, 2017, or the date when the reporting party no longer has a reasonable belief that reporting such information would violate privacy laws in non-US jurisdictions. Reporting parties will not be required to have outside counsel verify such privacy law issues before taking advantage of the no-action relief. However, reporting parties will need to obtain a formal response from foreign regulators to verify that reporting trader identification and market participant data via Form 102A or 102B would violate the laws of a particular non-US jurisdiction.

CFTC Letter No. 16-32 is available here and the corresponding guidance is available here.

CFTC Letter No. 16-33 is available here.

NFA Issues Notice Regarding the Approval Process for New Margin Models Used by Covered Swap Entities

On April 14, National Futures Association (NFA) issued Notice I-16-03, which provides further details regarding NFA's review and approval process for margin models used by swap dealers and major swap participants that are not subject to the oversight of a prudential regulator (Covered Swap Entities). To comply with Commodity Futures Trading Commission margin rules, Covered Swap Entities must first choose between a standardized grid-based calculation for initial margin or an internal risk-based initial margin model. (For a more complete discussion of initial margin models, see the *Corporate & Financial Weekly Digest* edition of March 11.) Once a Covered Swap Entity has chosen a margin model, CFTC or NFA approval must be secured. For Covered Swap Entities with outstanding notional amounts greater than $3 trillion in transactions facing counterparties with outstanding notional amounts greater than $3 trillion, the initial date for such approval is September 1.

To assist Covered Swap Entities seeking to comply with the September 1 approval date, Notice I-16-03 outlines the process NFA will use when reviewing a Covered Swap Entity's choice of margin model. NFA's review process will include exploratory discussions with each Covered Swap Entity to determine the reasonableness of the proposed margin model plan. A Covered Swap Entity will then be required to go through a submission process where NFA will evaluate whether the chosen margin model complies with CFTC requirements. Before granting final approval, NFA will review each margin model submission and conduct onsite reviews to ensure that the chosen margin model is appropriate to that particular Covered Swap Entity. Post-approval, NFA will continue to review various governance aspects related to a Covered Swap Entity's margin model through analyzing margin model back-tests and monitoring the entity's compliance with margin regulations.

NTM I-16-13 is available here.

EU DEVELOPMENTS

ECON Votes in Favor of Legislative Proposals To Delay MiFID II

On April 7, the European Parliament's Committee on Economic and Monetary Affairs (ECON) voted to adopt the European Commission's legislative proposals to delay the application date of the amended and restated Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MiFIR), from January 3, 2017 to January 3, 2018.

For further information, see the *Corporate & Financial Weekly Digest* editions of February 26 and February 12.

A copy of a press release published by ECON Vice-Chair Markus Ferber, in which this one-year delay is referenced as a "quick fix," can be found here.

ESMA Publishes Opinion on Proposed EU Framework for Loan Origination by Investment Funds

On April 12, the European Securities and Markets Authority (ESMA) published an opinion (Opinion) addressed to the European Parliament, European Council and European Commission (EC), on the potential for a European framework on loan origination by investment funds. The Opinion is issued in the context of the EC's ongoing work toward its Action Plan on Building a Capital Markets Union, published in September 2015.

The Opinion sets out key issues identified by ESMA to be considered for any loan origination framework, including recommending the authorization (i.e., licensing) of loan-originating funds and their managers and the types of loan-originating alternative investment funds (AIFs) (including a recommendation that they should be closed-ended AIFs), as well as making recommendations as to the types of investors (generally, non-retail), eligible investments and eligible debtors.

As a basic principle, ESMA believes that loan-originating AIFs should not be allowed to have liabilities with a shorter maturity than the loans granted by the fund. In the case of AIFs with a finite lifecycle, ESMA believes that the maturity of originated loans should not exceed the remaining lifespan of the originating AIF.

ESMA also has included organizational requirements for AIFMs managing loan-originating AIFs, as well as leverage, liquidity, stress testing and reporting principles.

It should be noted that the Opinion—and, it is understood, any new EU legislation that forms part of a new loan origination framework—would *not* be applicable to AIFs that participate in loans on the secondary market, such as credit funds.

The EC is expected to consult on the European loan origination framework (and any new legislation) later this year. ESMA has encouraged the EC to incorporate the elements identified in its Opinion into the resulting framework.

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

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

European Commission Adopts Delegated Act in Relation to MiFID II

On April 7, the European Commission adopted its first delegated directive (Delegated Directive) to supplement the amended and restated Markets in Financial Instruments Directive (MiFID II). The Delegated Directive sets out provisions in relation to the safeguarding of financial instruments and funds belonging to clients, product governance obligations, and the provision and reception of fees, commission, and monetary or non-monetary benefits (or inducements).

Notably, the Delegated Directive confirms that research provided to investment firms by third parties will not be considered an inducement if it is paid directly by the investment firm out of its own resources or from a separate research payment account (RPA), the operation of which is subject to certain conditions, including that investment firms agree to the research charge with clients, set a research budget that is regularly assessed and make a payment summary of the RPA available to clients or competent authorities on request. The Delegated Directive also confirms that investment firms providing execution services must identify separate charges for those services that reflect the cost of executing transactions only.

The European Council and European Parliament will consider the Delegated Directive and, once formally approved, the Delegated Directive will go into effect 20 days following its publication in the *Official Journal of the European Union*.

A copy of the Delegated Directive can be found here.

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

On April 13, the European Securities and Markets Authority (ESMA) published a set of opinions (Opinions) in relation to the European Market Infrastructure Regulation (EMIR). The Opinions exempt three Danish-based pension schemes from the clearing obligations contained in EMIR and are addressed to Finanstilsynet, Denmark, the relevant competent authority for the pension schemes.

As noted in the *Corporate & Financial Weekly Digest* edition of February 5, under Article 89(2) of EMIR, a competent authority wishing to exempt a pension scheme from the clearing obligation under EMIR must first gain the approval of ESMA, which in turn consults with the European Insurance and Occupational Pensions Authority. ESMA maintains a list of the types of pension scheme arrangements that have been granted exemptions from EMIR clearing obligations.

ESMA's list can be found here.

ESMA's Opinions 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.

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
EU DEVELOPMENTS		
David A. Brennand	+44.20.7776.7643	david.brennand@kattenlaw.co.uk
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@kattenlaw.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@kattenlaw.co.uk

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