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SEC/CORPORATE

SEC Division of Corporation Finance Issues C&DIs on Application of Rule 701

On June 23, the Staff of the Division of Corporation Finance (Staff) of the Securities and Exchange Commission released new Compliance and Disclosure Interpretations (C&DIs) relating to Rule 701 of the Securities Act of 1933, as amended, primarily in the context of a merger transaction. Rule 701 provides a safe harbor exemption for equity securities issued pursuant to employee benefit plans and contracts.

In the new C&DIs, the Staff provided the following guidance:

Rule 701

- In a merger transaction, the acquirer does not need an exemption for the assumption of derivative securities (e.g., stock options) of the target where, by their terms, those derivative securities become derivative securities for an economically equivalent amount of acquirer securities, so long as at the time of the grant by the target, the compensatory benefit plan under which the derivative securities were issued permitted this assumption without the consent of the holders of the derivative securities. (C&DI 271.17)
- The exercise or conversion of derivative securities assumed in a merger transaction would be eligible for exemption under Rule 701 if the target complied with Rule 701 at the time such assumed derivative securities were originally granted, subject, to the extent applicable, to compliance with Rule 701(e), which requires an issuer to provide specified information (including risk factors and financial information) in the case of sales of securities pursuant to Rule 701 exceeding $5 million in any 12-month period. (C&DI 271.18)

Rule 701(d)

- Following the completion of a merger transaction, for purposes of determining the amount of securities that the acquirer may sell under Rule 701(d), which limits the amount of securities that may be sold under Rule 701 in any 12-month period to the greatest of (1) $1 million; (2) 15 percent of the issuer's total assets; and (3) 15 percent of the outstanding amount of securities of the class being offered, the acquirer is required to include the aggregate sales price and amount of securities previously claimed to have been sold by the target under Rule 701 during the same 12-month period for which the acquirer is making its determination. (C&DI 271.19)
- Following the completion of a merger transaction, in order to calculate compliance with Rule 701(d)(2), an acquirer may use for purposes of the total assets test (1) a *pro forma* balance sheet as of its most recent balance sheet date reflecting the merger transaction as of such date; or (2) a balance sheet date after the merger transaction that reflects the total assets and outstanding securities of the combined entity. (C&DI 271.20)

Rule 701(e)

- If the target in a merger transaction was required to provide investors with disclosure pursuant to Rule 701(e) for its derivative securities with respect to such derivative securities that are then assumed by the acquirer and may be exercised or converted following the merger transaction, the acquirer would assume the target's disclosure obligations and need to provide such information meeting the timing and other

requirements of Rule 701(e), a reasonable period of time before the date of exercise or conversion. (C&DI 271.22)

- Following the completion of a merger transaction, when determining whether the amount of securities sold by the acquirer during any consecutive 12-month period exceeds $5 million (and therefore triggers disclosure obligations pursuant to Rule 701(e)), the acquirer must include any securities that the target sold during such 12-month period. (C&DI 271.23)
- Where an obligation to provide disclosure pursuant to Rule 701(e) is triggered, Rule 701(e)(4) requires an issuer to provide investors with the financial statements required to be furnished by Part F/S of Form 1-A within a reasonable time before the date of sale. When an issuer's disclosure obligation under Rule 701(e) is triggered, the issuer may in any case elect to provide financial statements that follow the requirements of either Tier 1 or Tier 2 Regulation A offerings. (C&DI 271.21)

The complete text of all C&DIs can be found here.

SEC Proposes Amendments to Definition of 'Smaller Reporting Company'

On June 27, the Securities and Exchange Commission proposed amendments to the definition of "smaller reporting company," which would increase certain financial thresholds in such definition. Smaller reporting companies are permitted to, among other things, provide scaled disclosures under the SEC's Regulation S-K and Regulation S-X.

Specifically, the proposed amendments would revise the definition of "smaller reporting company" to permit a company to provide scaled disclosures if it has:

- a public float of less than $250 million (as compared to the current threshold of $75 million); or
- no public float and annual revenues that are less than $100 million (as compared to the current threshold of less than $50 million)

In addition, the proposed amendments provide that a company that ceases to qualify as a smaller reporting company (as a result of its exceeding one of the thresholds above) would not qualify again as such until its public float is less than $200 million or, if the company does not have a public float, its annual revenues are less than $80 million.

The proposed amendments do not presently propose to amend the financial thresholds applicable to "accelerated filer" status. The proposed amendments would, however, adjust the definition of "accelerated filer" to eliminate the provision that excludes registrants that are eligible to use the smaller reporting company requirements under Regulation S-K for their annual and quarterly reports. Accordingly, as noted in the SEC's press release, companies with $75 million or more of public float that would qualify as smaller reporting companies would be subject to the requirements that apply currently to accelerated filers, including the timing of the filing of periodic reports and the requirement that accelerated filers provide the auditor's attestation of management's assessment of internal controls over reporting required by Section 404(b) of the Sarbanes-Oxley Act of 2002.

SEC Chair Mary Jo White noted in the SEC's press release announcing the proposed amendments that "[r]aising the financial thresholds in the smaller reporting company definition is intended to promote capital formation and reduce compliance costs for smaller companies while maintaining important investor protections."

The SEC is soliciting public comment on the proposed amendments, and the comment period expires on August 30.

The SEC's proposed amendments can be read here.

The SEC's press release can be read here.

SEC Approves NASDAQ's 'Golden Leash' Disclosure Rule

On July 1, the Securities and Exchange Commission approved the NASDAQ Stock Market LLC's proposed Rule 5250(b)(3) (Rule), which requires listed companies to publicly disclose the material terms of all agreements and arrangements between any director or nominee and any person or entity other than the company (Third Party) relating to compensation or other payment in connection with such person's candidacy or service as a director.

The Rule requires that such disclosure may be made either on the issuer's website, which may include hyperlinking (as long as such website or hyperlink is continuously available), or in a proxy statement or information statement for any shareholders' meeting at which directors are elected (or, if such company does not file proxy or information statements, on Form 10-K or Form 20-F).

Under the Rule, the terms "compensation" and "other payment" are intended to be construed broadly and apply to agreements and arrangements that provide for non-cash compensation and other payment obligations, such as health insurance premiums or indemnification. The issuer is not, however, required to disclose pursuant to the Rule agreements and arrangements that: (1) relate only to the reimbursement of expenses in connection with candidacy as a director; (2) existed prior to the nominee's candidacy (including as an employee of the Third Party), so long as the nominee's relationship with the Third Party has been publicly disclosed in a proxy or information statement or annual report; or (3) for purposes of the issuer's initial disclosure obligation only (as opposed to the ongoing annual disclosure requirement discussed below), have been disclosed pursuant to Item 5(b) of Schedule 14A of the Securities Exchange Act of 1934 (Exchange Act) (i.e., by a party engaging in a proxy contest) or Item 5.02(d)(2) of Form 8-K in the issuer's current fiscal year.

Issuers will have to disclose the agreements and arrangements in accordance with the Rule by no later than the date on which the issuer files or furnishes a proxy or information statement subject to Regulation 14A or 14C under the Exchange Act in connection with the issuer's next shareholders' meeting at which directors are elected (or, if the issuer does not file proxy or information statements, no later than when it files its Form 10-K or Form 20-F). The Rule also requires that issuers make such disclosure at least annually until the earlier of the resignation of the director or one year following the termination of the agreement or arrangement.

If an issuer discovers an agreement or arrangement that should have been disclosed pursuant to the Rule, it must promptly make the required disclosure by filing a Form 8-K or by issuing a press release. The Rule states that an issuer shall not be considered deficient with respect to such disclosure under the Rule if the issuer has undertaken reasonable efforts to identify all such agreements or arrangements, including asking each director or nominee in a manner designed to allow timely disclosure, and made such disclosure upon discovery of the agreement or arrangement.

Companies should consider updating their director and officer questionnaires to elicit the relevant information.

Rule 5250(b)(3) will become effective on July 31.

The SEC's order approving the Rule can be found here.

BROKER-DEALER

SEC Approves Consolidated FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions)

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposed rule change to adopt a new, consolidated rule governing accounts opened or established by associated persons at firms other than the member firm at which they are employed or registered (FINRA Rule 3210). FINRA Rule 3210 combines provisions of various National Association of Securities Dealers and New York Stock Exchange rules that address review and investigation of securities transactions and oversight of the trading activities of associated persons of member firms.

Under FINRA Rule 3210, an associated person who wishes to open an account or have a beneficial interest in an account at another member firm or other financial institution must obtain the prior written consent of his or her member firm. An associated person is deemed to have a beneficial interest in an account when, among other things, the account is held by: (1) his or her spouse; (2) his or her child; (3) a related individual over whose account the associated person has control; or (4) an individual over whose account the associated person has control and to whom the associated person contributes financially.

If an account was opened by an associated person prior to his or her association with the member firm, the associated person, within 30 calendar days of becoming so associated, must obtain the written consent of his or

her member firm to maintain the account and must notify in writing the executing member or other financial institution of his or her association with the member firm.

For more information about FINRA Rule 3210 please click here.

DERIVATIVES

Lehman Brothers Court Holds Swap Safe Harbor Protects 'Flip' Transactions

The bankruptcy court overseeing the Lehman Brothers chapter 11 cases rejected efforts by Lehman Brothers Special Financing Inc. (LBSF) to recover roughly $1 billion in payments made to numerous noteholder defendants from the liquidation of collateral originally pledged to secure both obligations under notes issued by special purpose entities and credit default swap (CDS) obligations to LBSF, holding that the termination of the swap and liquidation and distribution of the collateral were protected by the Bankruptcy Code's safe harbor. Bankruptcy Judge Chapman's predecessor in the Lehman cases, Judge Peck, had previously ruled in proceedings involving similar transactions that a provision in the agreements which, upon an LBSF default, "flipped" the payment priority under which obligations to LBSF under in-the-money CDSs were entitled to collateral proceeds (Swap Priority) before the noteholders were entitled to such proceeds (Noteholder Priority) was an unenforceable *ipso facto* provision. Judge Peck held that the "flip" from Swap Priority to Noteholder Priority altered LBSF's rights based on a bankruptcy event default and that the priority provisions and distribution of the collateral proceeds were not protected by the safe harbor applicable to swaps in section 560 of the Bankruptcy Code. In doing so, Judge Peck also found that the chapter 11 filing by Lehman Brothers Holdings Inc. (LBHI) on September 15, 2008, and the subsequent chapter 11 filing by LBSF on October 3, 2008, was a "singular event" by an "integrated enterprise" such that even though LBSF's bankruptcy filing had not occurred at the time of a default triggered by LBHI's bankruptcy filing, the flip provision still violated the *ipso facto* restrictions in the Bankruptcy Code.

In the current case, the court analyzed two types of provisions involving Swap Priority and Note Priority waterfalls—Type 1 and Type 2—and characterized the transactions as follows: (1) "pre-pre" transactions where both early termination of the swap and distributions of collateral occurred prior to LBSF's bankruptcy; (2) "pre-post" transactions where early termination occurred prior to LBSF's bankruptcy but collateral was distributed after LBSF's bankruptcy; and (3) "post-post" transactions where early termination and distribution of collateral both occurred subsequent to LBSF's bankruptcy. The timing of the collateral distributions, which varied, was held not to matter—it was the date of early termination that mattered. Accordingly, pre-pre and pre-post transactions did not yield different analyses by the court.

Judge Chapman held that in Type 1 transactions, which, coincidentally, were all "post-post" transactions, the flip to Noteholder Priority violated the *ipso facto* provisions because LBSF had a pre-bankruptcy right to Swap Priority that was fixed at the outset of the transaction and was *altered* by LBSF's bankruptcy default. Type 2 transactions, however, did not violate the *ipso facto* provisions because LBSF did not have a pre-determined right to payment that was altered by its default—which of the two priorities would apply in a Type 2 transaction was not determined until the swap was terminated and, accordingly, LBSF's rights were not "altered" by its default.

The court alternatively held that even if the choice of Noteholder Priority in Type 2 transactions was an *ipso facto* modification, for both "pre-pre" and "pre-post" transactions, the modification of LBSF's rights based on LBHI's earlier bankruptcy filing would have occurred prior to LBSF's bankruptcy (before *ipso facto* prohibitions applicable to LBSF were in place) and thus were not violative of the Bankruptcy Code. She expressly declined to adopt Judge Peck's much criticized "singular event" analysis.

Most importantly, however, the court went on to conclude, unlike Judge Peck, that the distribution of the collateral or its proceeds, and the enforcement of the alternate priority provisions, were protected by the safe harbor applicable to swaps under section 560 of the Bankruptcy Code. The court held that "liquidation" of a swap under the safe harbor carried with it not only the right to terminate the swap and liquidate the collateral, but the right to determine "which party was owed how much," and to distribute the proceeds of liquidation accordingly.

The decision, *Lehman Brothers Special Financing Inc. v Bank of America National Association, et al.*, Adv. Proc. No. 10-03547 (Bankr. S.D.N.Y. June 28, 2016).

See also "CFTC Approves Clear Markets North America, Inc. as a Registered Swap Execution Facility" in the CFTC section, and "European Commission Adopts MiFIR Delegated Regulations" and "European Commission Adopts MiFIR Delegated Regulation on Straight-Through Processing" in the EU Developments section.

CFTC

CFTC Issues Advisory Regarding Suspicious Activity Reporting and Economic Sanctions Programs

On July 6, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) published Staff Advisory No. 16-60 (Advisory), which reminds futures commission merchants (FCMs) and introducing brokers (IBs) of their obligations to report certain kinds of suspicious activities. The Advisory notes that FCMs and IBs must file suspicious activity reports with the Financial Crimes Enforcement Network no later than 30 calendar days after detecting such suspicious activity (subject to limited exceptions). It also reminds all CFTC registrants of their obligations to monitor and comply with Office of Foreign Asset Control (OFAC) economic sanctions programs (including prohibitions on dealing with persons included in OFAC's list of Specially Designated Nationals and Blocked Persons). DSIO noted that such reporting requirements assist regulators in identifying patterns and trends of illegal activities, such as money laundering and terrorist financing.

A copy of the Advisory is available here.

CFTC Releases Results of CBOE Futures Exchange Rule Enforcement Review

On June 29, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) released the results of its trade practice rule enforcement review (Review) of Chicago Board Options Exchange Futures Exchange, LLC (CFE). The review covered a one-year period from March 1, 2014, to February 28, 2015.

DMO determined that CFE generally maintains an adequate trade practice surveillance program, uses adequate surveillance tools for detecting rule violations, and conducts thorough and complete investigations. Nonetheless, DMO made several recommendations designed to remedy certain identified deficiencies and further enhance CFE's surveillance program. In particular, DMO recommended that CFE take appropriate action to (1) reduce staff turnover within the CFE's department of regulation; and (2) ensure that investigations are completed in one year or less as required under CFTC Regulation 38.158(b).

A copy of the Review is available here.

CFTC Approves Clear Markets North America, Inc. as a Registered Swap Execution Facility

On June 27, the Commodity Futures Trading Commission issued an Order of Registration (Order) approving Clear Markets North America, Inc. as a fully registered Swap Execution Facility (SEF). After reviewing Clear Markets' application, the CFTC determined that Clear Markets is in compliance with the Commodity Exchange Act (CEA) and the CFTC's regulations applicable to SEFs. As a registered SEF, Clear Markets will be required to comply with all current and future SEF-applicable provisions of the CEA and CFTC requirements. Currently, there are 22 SEFs, including Clear Markets, that are fully registered with the CFTC.

A copy of the Order is available here.

UK/BREXIT DEVELOPMENTS

UK Publishes MAR Regulations Ahead of July 3 Deadline

On June 30, the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 (Regulations) were published in the United Kingdom. The Regulations came into effect on July 3, and make amendments to UK laws in order to implement the EU Market Abuse Regulation (MAR). Under the Regulations:

- The Financial Conduct Authority (FCA) is designated as the UK competent authority for the purposes of MAR and has the power to: (1) require information from issuers and other persons; (2) compel issuers to

publish information; (3) suspend trading in financial instruments; and (4) apply penalties, prohibitions and suspensions for breaches to MAR.

- Individual liability in respect of legal persons under Articles 8 (Insider Dealing) and 12 (Market Manipulation) of MAR is clarified to be imposed for an individual participates in the decisions of a corporate body when: (1) the individual is an officer of the corporate body at the time the decision was made; and (2) the FCA is satisfied the individual was knowingly concerned in the decision. Officers include directors, members of management committees, chief executives and individuals who are controllers of the corporate body.

Other changes include measures to amend provisions implementing the previous market abuse regime under the EU Market Abuse Directive, among others.

The explanatory memorandum published alongside the Regulations notes the short timeframe between the Regulations being presented to Parliament on June 29 and their commencement on July 3. The explanatory memorandum states that it was deemed inappropriate to publish the Regulations during the period of purdah prior to the UK referendum on whether to remain part of the European Union.

As noted in the *Corporate & Financial Weekly Digest* edition of June 24, despite the United Kingdom voting to leave the European Union, the UK's financial services regime, which includes recent EU laws such as MAR, will remain in place until further notice, with further clarity unlikely until a post-exit model and relationship has been agreed between the United Kingdom and the European Union.

A copy of the Regulations can be found here, and the accompanying explanatory memorandum here.

EU DEVELOPMENTS

European Commission Adopts MiFIR Delegated Regulations

On June 24, the European Commission adopted two delegated acts to supplement the Markets in Financial Instruments Regulation (MiFIR). The delegated acts take the form of directly applicable regulations (together, Delegated Regulations)—meaning that they will be binding laws in each of the EU member states without any need for local law implementation. The Delegated Regulations cover: (1) clearing access in respect of trading venues and central counterparties (Clearing Access Regulation); and (2) maintenance of relevant data relating to orders in financial instruments (Maintenance of Data Regulation).

- **Clearing Access Regulation** – MiFIR introduces a non-discriminatory or "open access" regime for central counterparties (CCPs) and trading venues. Under MiFIR, CCPs are required to accept financial instruments for clearing on a non-discriminatory basis, regardless of the trading venue on which the transaction was executed. Trading venues are similarly required under MiFIR to provide CCPs with trade feeds on a non-discriminatory basis (including in relation to access fees) on request. The Clearing Access Regulation further specifies what constitutes grounds for denial of access by a CCP or trading venue (including operational risk and complexity, or significant undue risk). It also specifies the contents of access agreements and collateral and margining requirements for economically equivalent contracts, in addition to transitional arrangements.

- **Maintenance of Data Regulation** – Under MiFIR, operators of trading venues are required to maintain records and data of all orders in financial instruments advertised through their systems for at least five years (that must be made available to the relevant competent authority on request). The Maintenance of Data Regulation further sets out the format and details of these records, including specifications around identifying the relevant parties, trading capacity, timestamping, sequencing, order instruments and price.

As mentioned in previous updates, the European Council and European Parliament will consider the Delegated Regulations and, once formally approved, the Delegated Regulations will go into effect 20 days following their publication in the *Official Journal of the European Union*.

For more information, see the *Corporate & Financial Weekly Digest* editions of June 17, June 10, May 27, May 20, April 29 and April 15.

A copy of the Clearing Access Regulation can be found here, and its annex here.

A copy of the Maintenance of Data Regulation can be found here, and its annex here.

ACER Revises Guidance on the Application of REMIT

On June 17, the Agency for the Cooperation of Energy Regulators (ACER) published a fourth edition of its guidance (Guidance) on the application of the EU regulation on wholesale energy market integrity and transparency (REMIT). In particular, the Guidance focuses on Article 15 of REMIT, which requires persons professionally arranging transactions (PPATs) in wholesale energy products to report transactions they reasonably suspect might breach REMIT prohibitions of insider trading or market manipulation. The Guidance further defines the concept of PPATs, and gives examples of entities that would fall within the parameters of a PPAT. According to the Guidance, energy exchanges, broker platforms/brokers, cross-border capacity exchanges and secondary capacity allocation platforms would likely be considered PPATs.

A copy of the Guidance can be found here.

Regulation Extending Commodity Dealer Exemptions From the EU Capital Requirements Regulation Published in the European Union's *Official Journal*

On June 29, the regulation amending the EU Capital Requirements Regulation (CRR) regarding exemptions for commodity dealers (Regulation) was published in the *Official Journal of the European Union*. Under the CRR, commodity dealers are granted exemptions from large exposure and own fund requirements until December 31, 2017. The recently published Regulation extends this exemption until December 31, 2020, or the date amendments, if any, commence for the prudential supervision regime for commodity dealers and investment firms generally.

The Regulation can be found here.

European Commission Adopts MiFIR Delegated Regulation on Straight-Through Processing

On June 29, the European Commission adopted a delegated regulation (Regulation) under the Markets in Financial Instruments Regulation (MiFIR) in relation to "straight-through processing"—i.e., the obligation to clear derivatives traded on regulated markets and the timing of acceptance for clearing.

Under MiFIR, trading venues, central counterparties (CCPs) and clearing members are required to have systems, procedures and arrangements in place to ensure derivatives are cleared as quickly as technologically practicable. The Regulations further specify requirements for trading venues and CCPs to achieve timely clearing, which include: (1) arrangements to facilitate the transfer of information; (2) pre-trade checks for cleared derivatives concluded on trading venues; (3) timeframes for transferring information for cleared derivatives concluded on trading venues and bilaterally; and (4) the treatment of cleared derivatives not accepted for clearing. For exchange-traded derivatives, those requirements will not apply, provided the relevant contractual arrangements offer certainty of clearing.

As mentioned in previous updates, the European Council and European Parliament will consider the Regulation and, once formally approved, the Regulation will go into effect 20 days following its publication in the *Official Journal of the European Union*.

For more information, see the *Corporate & Financial Weekly Digest* editions of June 17, June 10, May 27, May 20, April 29 and April 15.

A copy of the Regulation 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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