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SEC/CORPORATE

SEC Proposes Amendments To Update and Simplify Disclosure Requirements: A Closer Look

On July 13, the Securities Exchange Commission proposed and requested comment regarding rule amendments to update and simplify certain disclosure requirements that may have become "redundant, duplicative, overlapping, outdated or superseded" in light of: 1) US Generally Accepted Accounting Principles (GAAP); 2) International Financial Reporting Standards (IFRS); 3) other SEC disclosure requirements; or 4) changes in the information environment. The SEC also solicited comment on certain disclosure requirements that overlap with GAAP, but also require additional information, to determine whether to retain, modify, eliminate or refer them to the Financial Accounting Standards Board (FASB) for potential inclusion in GAAP. The proposals are part of the Division of Corporate Finance's ongoing disclosure effectiveness initiative aimed at improving disclosure for both investors and companies and the SEC's efforts to implement the Fixing America's Surface Transportation (FAST) Act.

A. Redundant or Duplicative Requirements. The SEC proposes the deletion of certain disclosure requirements set forth in Regulation S-X, predominately, and Regulation S-K in a few instances, in light of corresponding redundant or duplicative GAAP, IFRS and other SEC disclosure requirements, with respect to topics such as consolidation; debt obligations; warrants, rights and convertible instruments; related parties; contingencies; earnings per share (EPS); interim financial statements.; equity compensation plans; and ratio of earnings to fixed charges. For example:

- *Warrants, Rights and Convertible Instruments*: The SEC proposes the deletion of Rule 4-08(i) of Regulation S-X, which requires disclosure of the title and amount of securities subject to warrants or rights, the exercise price and the exercise period, in a manner redundant with certain provisions of Accounting Standards Codification (the ASC).
- *EPS*: The SEC proposes the deletion of Item 601(b)(11) of Regulation S-K and Instruction 6 to "Instructions as to Exhibits" of Form 20-F, which require disclosure of the computation of EPS in annual filings, and which is redundant with ASC 260-10-50-1a, Rule 10-01(b)(2) of Regulation S-X, and International Accounting Standards 33, paragraph 70.

B. Overlapping Requirements. The SEC proposes the deletion or integration of requirements that (i) convey reasonably similar information to, (ii) are encompassed by disclosures that result from compliance with, or (iii) require disclosure incremental to overlapping requirements of, GAAP, IFRS or other SEC disclosure requirements. Specifically, the SEC proposes deletion of certain overlapping disclosure requirements with respect to topics such as derivative accounting policies; material events subsequent to the end of the most recent fiscal year in interim financial statements; segments; geographic areas; seasonality; research and development activities; and invitations for competitive bids. For example:

- *Segments*: The SEC proposes the deletion of Item 101(b) of Regulation S-K, which requires disclosure of segment financial information, restatement of prior periods when reportable segments change, and discussion of interim segment performance that may not be indicative of current or future operations and is similar to disclosures required under GAAP and Item 303(b) of Regulation S-K.

- *Financial Information by Geographic Area*: The SEC proposes the deletion of (i) Item 101(d)(1) of Regulation S-K, which requires disclosure of financial information by geographic area and is similar to GAAP disclosure requirements, and (ii) Item 101(d)(2) of Regulation S-K, which permits issuers to cross-reference between the financial statement notes and the description of the business to avoid duplicative disclosures about geographic area.

The SEC proposes the integration of certain overlapping disclosure requirements with respect to topics such as foreign currency restrictions and restrictions on dividends and related items. For example:

- *Restrictions on Dividends and Related Items*: Disclosure about restrictions on payment of dividends and related items is currently required in multiple places, namely, Item 201(c)(1) of Regulation S-K and Rules 4-08(d)(2) and 4-08(e) of Regulation S-X. The SEC proposes to streamline these into a single requirement for the disclosure of material restrictions on dividends and related items to which an issuer and its subsidiaries are subject by (i) deleting the requirements in Item 201(c)(1) and Rule 4-08(d)(e)(2) to disclose restrictions, and (ii) revise Rule 4-08(e)(3) to require dividend restrictions and related disclosures in subparagraphs (i) and (iii) thereof when material, rather than when restricted net assets exceed a 25 percent threshold.

The SEC is requesting comment as to whether certain requirements should be retained, modified, eliminated or referred to FASB for potential incorporation in GAAP with respect to topics that include consolidation on shares; assets subject to lien; debt obligations; related parties; common control transactions disclosure in interim financial statements; products and services; major customers; and legal proceedings. For example:

- *Products and Services*: The SEC seeks comment on the inconsistency between Regulation S-K and GAAP with respect to disclosure of the amount of revenue from products and services. Regulation S-K only requires such disclosure for products and services which account for 10 percent or more of consolidated revenue in each of the last three fiscal years; whereas GAAP requires such disclosure for each product or service, or group of similar products and services, unless impracticable.
- *Legal Proceedings*: The SEC seeks comment on the inconsistency between Regulation S-K, which requires disclosure of certain legal proceedings (i.e., one type of loss contingency), and GAAP, which more broadly requires disclosure of loss contingencies generally.

C. Outdated Requirements. The SEC proposes the deletion or amendment of requirements that have become obsolete over time or due to regulatory, business or technological changes with respect to topics such as available information; market price disclosure; and exchange rate data. For example:

- *Available Information*: Various SEC disclosure requirements and forms require issuers to disclose the availability of their filings for reading or copying at the SEC's Public Reference Room and the Public Reference Room's physical address and phone number. However, the Public Reference Room is rarely used by the public because paper filings are now only permitted in very limited circumstances.
- *Market Price Disclosure*: Item 201(a)(1) of Regulation S-K requires various disclosures with respect to market price, for example, the principal US market(s) where an issuer's common equity is traded, and the high and low sale prices for its common equity for each quarter within the two most recent fiscal years and subsequent interim period. However, these disclosure requirements are outdated in light of the easy accessibility of such information via the Internet. Accordingly, the SEC proposes the elimination of detailed disclosure requirement of sale or bid prices for most issuers whose common equity is traded on an established public trading market and replace it with disclosure of the trading symbol.

D. Superseded Requirements. The SEC proposes the deletion or amendment of requirements that are inconsistent with recent legislation or more recently updated SEC or GAAP requirements with respect to topics that include statement of cash flows; consolidation; discontinued operations; published report regarding matters submitted to vote of security holders; and non-existent or incorrect references. For example:

- *Published Report Regarding Matters Submitted to Vote of Security Holders*: The SEC proposes the deletion of Item 601(b)(22) of Regulation S-K and its accompanying inclusion in the Exhibit Table within 601, as these requirements to disclose the voting results for matters submitted to shareholders are no longer applicable.

The SEC's proposing release is available here.

BROKER-DEALER

FINRA Proposes To Require Members To Report Transactions in US Treasury Securities to TRACE

On July 19, the Financial Industry Regulatory Authority filed a proposed rule change with the Securities and Exchange Commission to amend its Trade Reporting and Compliance Engine (TRACE) reporting rules to require the reporting of transactions in all US Treasury Securities other than US savings bonds. This proposal would include transactions in US Treasury bills, notes and bonds, as well as separate principal and interest components of a US Treasury Security that have been separated pursuant to the Separate Trading of Registered Interest and Principal of Securities (STRIPS) program operated by the Treasury Department.

Purchases of US Treasury Securities by a FINRA member from the Treasury Department in connection with an auction would be exempt from these reporting requirements. However, when-issued trading in these securities would be reportable. In addition, repurchase and reverse repurchase transactions involving US Treasury Securities would not be reportable to TRACE.

The proposed rule change would require members to report transactions in US Treasury securities to TRACE on an end-of-day basis, and FINRA is not currently proposing to disseminate the information it receives under the proposal to the public. FINRA also is not proposing to charge transaction-level fees on the transactions in US Treasury Securities reported to TRACE at this time.

More information is available here.

DERIVATIVES

See "CFTC Extends DTCC-SWIFT's LEI Provider Designation" in the CFTC section.

CFTC

CFTC Extends DTCC-SWIFT's LEI Provider Designation

On July 21, the Commodity Futures Trading Commission published in the *Federal Register* an order to extend for an additional year the CFTC's designation of the Depository Trust and Clearing Corporation and Society for Worldwide Interbank Financial Telecommunications joint venture (DTCC-SWIFT) as the provider of legal entity identifiers (LEIs). Such LEIs are used by registered entities and swap counterparties subject to the CFTC's jurisdiction to comply with the swap data recordkeeping and reporting obligations set forth in Parts 45 and 46 of the CFTC's regulations. This order supersedes a July 17, 2015 order (2015 Order) which extended DTCC-SWIFT's designation as the LEI provider during the continued transition to a fully operational global LEI system. (For a more complete discussion of the aforementioned order, see the July 24, 2015 edition of *Corporate & Financial Weekly Digest*.)

The new order does not modify the 2015 Order other than extending DTCC-SWIFT's designation as the LEI provider until July 24, 2017. As a result, registered entities and swap counterparties subject to the CFTC's jurisdiction may continue to comply with swap data and recordkeeping obligations through the use of LEIs provided by DTCC-SWIFT. In addition, the order reiterates that such entities may also comply with the aforementioned requirements by using (1) any pre-Local Operating Unit (pre-LOU) endorsed by the Regulatory Oversight Committee of the global LEI system (ROC) as globally acceptable and as issuing globally acceptable LEIs or (2) any LOU accredited by the Global LEI Foundation (GLEIF).

The order is available here.

A list of pre-LOUs endorsed by ROC is available here.

A list of LOUs accredited by GLEIF is available here.

BANKING

Banking Agencies Issue CRA Questions and Answers

On July 15, the federal bank regulatory agencies with responsibility for Community Reinvestment Act (CRA) rulemaking—the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC)—published final revisions to the "Interagency Questions and Answers Regarding Community Reinvestment." The Questions and Answers document provides additional guidance to financial institutions and the public on the agencies' CRA regulations. The agencies are adopting as final revisions to the Questions and Answers based on the proposal issued on September 10, 2014 addressing alternative systems for delivering retail banking services; community development related issues; and the qualitative aspects of performance, including innovative or flexible lending practices and the responsiveness and innovativeness of an institution's loans, qualified investments, and community development services.

More information from the FDIC is available here.

EU/BREXIT DEVELOPMENTS

EU Commissioner Confirms No Rush To Relocate Euro Clearing Inside Eurozone

A senior European official has stated that the European Union has no immediate plans to push for the euro-denominated clearing business of London clearinghouses to relocate inside the Eurozone. Speaking at an event in Washington, DC, Valdis Dombrovskis, the member of the European Commission (Commission) responsible for financial services, noted that among the many issues for discussion in the Brexit negotiations between the United Kingdom and the European Union, London clearinghouses are not the most urgent. Commissioner Dombrovskis nonetheless did not exclude the possibility of the issue arising for discussion in the future. Commissioner Dombrovskis is vice president of the Euro and Social Dialogue of the Commission, and recently replaced Jonathan Hill, of the United Kingdom, as Commissioner for Financial Services and Capital Markets Union, following Lord Hill's resignation in the aftermath of the Brexit vote in late June.

ESMA Publishes Advice on Potential Extension of AIFMD Marketing Passport

On July 19, the European Securities and Markets Authority (ESMA) published its long-delayed and much anticipated advice to the European Commission (Commission) in relation to the extension of the Alternative Investment Fund Managers Directive (AIFMD) marketing passport to non-EU Alternative Investment Fund Managers (AIFMs) and Alternative Investment Funds (AIFs). In it, ESMA gives broadly positive advice in relation to 12 countries: Australia, Bermuda, Canada, Cayman Islands, Guernsey, Hong Kong, Japan, Jersey, Isle of Man, Singapore, Switzerland, and the United States—with some reservations, as noted below.

Currently, non-EU AIFMs and AIFs must comply with each EU country's national private placement rules when they market funds in that country, whereas under AIFMD, EU AIFMs managing an EU AIF have the benefit of a marketing passport so that those AIFs can be marketed throughout the European Union.

A year ago, in July 2015 (see the *Corporate & Financial Weekly Digest* edition for July 31, 2015), ESMA published its first advice on the application of the passport to six non-EU countries (Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States). At that time, ESMA deemed Jersey, Guernsey and Switzerland as being "equivalent," but ESMA could not recommend equivalence for the United States because of competition concerns. In response to the July 2015 advice, the Commission elected to wait for ESMA to approve more countries as being "of equivalence" before endorsing these decisions. ESMA has now reassessed the initial list of jurisdictions and several others, looking at how equivalent their competition rules, market disruption, regulatory enforcement, market access, investor protection and the monitoring of systemic risk are to the rules in the European Union.

In the new advice ESMA comments that:

- **United States:** There were no significant obstacles regarding investor protection and the monitoring of systemic risk that would impede the application of the AIFMD passport to US AIFMs or AIFs. With respect

to the competition and market-disruption criteria, while ESMA considers there to be no significant obstacle for AIFs that are privately placed, it does consider that for AIFs marketed by way of a public offering that there is an "un-level playing field" between EU and non-EU AIFMs as market access conditions, which would apply to these US funds in the European Union under an AIFMD passport would be less onerous than the market access conditions applicable to EU funds in the United States. ESMA suggests, therefore, that the European Union consider options to mitigate this risk.

- **Canada, Guernsey, Japan, Jersey and Switzerland:** There are no significant obstacles impeding the application of the AIFMD passport to these countries.
- **Hong Kong and Singapore:** If ESMA considers the assessment only in relation to AIFs, there are no significant obstacles impeding the application of the AIFMD passport to AIFs in Hong Kong and Singapore. However, ESMA notes that both Hong Kong and Singapore operate regimes that facilitate the access of Undertakings for Collective Investment in Transferable Securities (UCITS) from only certain EU Member States to retail investors in their territories.
- **Australia:** There would be no significant obstacles regarding market disruption and obstacles to competition impeding the application of the AIFMD passport to Australian entities, as long as the Australian regulator extends to all EU Member States the "class order relief," currently available only to some EU Member States.
- **Bermuda and the Cayman Islands:** ESMA cannot give definitive advice with respect to the criteria on investor protection and effectiveness of enforcement since both countries are in the process of implementing new regulatory regimes and the assessment will need to take into account the final rules in place.
- **Isle of Man:** ESMA finds that the absence of an AIFMD-like regime makes it difficult to assess whether the investor protection criterion is met.

The possible extension of the passport to such countries (which remains subject to sign-off by each of the Commission, Parliament and Council) bodes well for the UK, which voted last month to leave the European Union. Post-"Brexit," as a non-EU jurisdiction that has EU law in effect, the UK also should be approved by ESMA with a positive "equivalence" determination, meaning that UK AIFMs and AIFs would be treated broadly as they are today—allowing UK firms to retain their "passporting" access to the single market, as at present.

A copy of the ESMA advice is available here.

European Commission Adopts MiFID II and MiFIR Delegated Regulations

On July 14, the European Commission (Commission) adopted several delegated regulations (Delegated Regulations) to supplement the amended and restated Markets in Financial Instruments Directive (MiFID II), and the Markets in Financial Instruments Regulation (MiFIR), respectively.

The Delegated Regulations adopted by the Commission include the following:

- **Exchange of information between competent authorities.** MiFID II contains provisions to facilitate cooperation between EU regulators in relation to supervisory activities, on-site verifications and investigations. This delegated regulation further specifies the information to be exchanged between regulators for these activities, and covers information requests with respect to investment firms, credit institutions and also natural or legal persons.

  A copy of the delegated regulation is available here.

- **Requirements for authorization.** Under MiFID II, EU regulators are required to assess a firm's compliance with MiFID II when reviewing and processing applications for authorization. This delegated regulation further specifies the categories of information that applicant firms will be required to furnish to regulators to assist their assessment, including information on the firm's capital, shareholders, management, organization and finances.

  A copy of the delegated regulation is available here.

- **Tick size.** MiFID II requires EU trading venues to adopt tick size requirements set by the European Securities and Markets Authority (ESMA) in order to preserve orderly functioning of markets. This delegated

regulation further details the tick size regimes for shares, deposit receipts, exchange-traded funds, certificates and other similar financial instruments.

A copy of the delegated regulation is available here, and its accompanying annex, here.

- **Data standards for financial instrument reference data.** MiFIR contains obligations on trading venues to provide identifying reference data to EU regulators for the purposes of transaction reporting. This delegated regulation further specifies the data standards and formats for the reference data to be provided, and includes a table of details to be reported in the annex accompanying the regulation.

  A copy of the delegated regulation is available here, and its accompanying annex, here.

- **Information for registration of third-country firms.** MiFIR allows firms from non-European Economic Area (EEA) countries (known as "third-country firms") to provide investment services and/or activities in the EU to eligible counterparties and professional clients, without establishing a branch, provided they register with ESMA and disclose certain information to those EU clients. This delegated regulation further specifies the information necessary for third-country firm registrations (including full name, contact details, website and details on the investment services and or activities to be performed). It also specifies that client disclosures by third-country firms must be provided in a durable medium and must be presented in a way that is easy to read (among other requirements).

  A copy of the delegated regulation is available here.

- **Organizational requirements of trading venues.** Under MiFID II, ESMA is tasked with specifying organizational requirements for regulated markets, multilateral trading facilities and organized trading facilities that enable algorithmic trading through their systems. This delegated regulation further specifies these organizational requirements, including in relation to governance, the compliance function of a trading venue, staffing and outsourcing. It also details measures to ensure the capacity and resilience of trading venues, including in relation to due diligence of members, testing, monitoring, business continuity arrangements and the prevention of disorderly trading conditions.

  A copy of the delegated regulation is available here, and its accompanying annex, here.

- **Transparency in respect of equity instruments.** MiFIR contains several transparency obligations for trading venues and investment firms with respect to shares, depository receipts, exchange-traded funds, certificates and other similar instruments, and also several mandates for ESMA to further specify these requirements in regulatory technical standards (RTS). This delegated regulation collates these mandated technical standards into a single regulation and sets out: 1) pre-trade transparency for trading venues (including provisions covering most relevant markets, negotiated transactions and large scale orders; 2) pre-trade transparency for systematic internalizers and investment firms trading outside trading venues; and 3) post-trade transparency for trading venues and investment firms trading outside trading venues.

  A copy of the regulation is available here, and its accompanying annexes, here.

- **Transparency in respect of non-equity instruments.** MiFIR also prescribes pre- and post-trade transparency requirements for non-equity instruments, including bonds, structured finance products, emissions allowances and derivatives. ESMA submitted draft RTS to the Commission in September 2015. The Commission returned comments on the draft RTS in April 2016 and, as noted in the *Corporate & Financial Weekly Digest* edition of May 6, 2016, ESMA published an opinion addressing the Commission's requested changes to the RTS on May 2.

A copy of the delegated regulation is available here, and its accompanying annexes, here.

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.

FCA Proposes Amendments to UK AIFMD Annex IV Reporting

On July 4, the UK Financial Conduct Authority (FCA) published its quarterly consultation paper (Quarterly Consultation), which details proposed amendments to the FCA Handbook. In this Quarterly Consultation, the FCA has proposed to extend and amend UK reporting requirements under the EU Alternative Investment Fund Managers Directive (AIFMD) for certain UK AIFMs and also for non-European Economic Area (EEA)AIFMs that market feeder AIFs in the United Kingdom.

Specifically, the Quarterly Consultation contains the following changes:

- **Full-scope UK AIFMs.** The FCA has proposed to insert a new section into the "FUND" section of the *FCA Handbook* which will require full-scope UK AIFMs—that manage but do not market non-EEA AIFs (and/or their respective feeder AIFs) and those that report on a quarterly basis— to report data on those non-EEA AIFs not currently captured by reporting requirements. The FCA has proposed to extend the reporting requirements only to full-scope UK AIFMs that: 1) have a total of €1 billion worth of assets under management; or 2) manage an individual AIF with a total of €500 million worth of assets under management.
- **Non-EEA AIFMs.** Under current arrangements, non-EEA AIFMs marketing feeder AIFs in the United Kingdom do not need to report on the respective master AIF, unless that master AIF is also marketed in the United Kingdom. Significantly, in the Quarterly Consultation, the FCA has proposed to extend reporting requirements to capture master AIFs as well (even where they are not marketed in the United Kingdom) (which would bring UK reporting more in-line with that in other EU countries). The proposed changes would only apply to master AIFs managed by above threshold non-EEA AIFMs where quarterly reporting is currently required on the feeder AIFs. The FCA notes that this presents an alternative interpretation to the requirements in the EU Alternative Investment Fund Managers Regulations, and that the European Securities and Markets Authority (ESMA) is also considering whether to update current Q&A guidance.

Comments on the proposed changes outlined above must be submitted to the FCA by September 1. A copy of the Quarterly Consultation is available here. The FCA's accompanying press release is available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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