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SEC/CORPORATE

SEC Increases Registration Statement Filing Fees for Fiscal Year 2017

On August 31, the Securities and Exchange Commission announced that, effective October 1, the fees that public companies and other issuers pay to register their securities with the SEC will increase from $100.70 per million dollars of securities registered to $115.90 per million dollars of securities, an increase of approximately 15 percent. This increase in the SEC registration statement filing fee follows a decrease in the filing fee from fiscal year 2015 to fiscal year 2016 of approximately 13 percent. This fee rate adjustment applies to the filing fee under Section 6(b) of the Securities Act of 1933 applicable to the registration of securities, the filing fee under Section 13(e) of the Securities Exchange Act of 1934 (Exchange Act) applicable to the repurchase of securities, and the filing fee under Section 14(g) of the Exchange Act applicable to proxy solicitations and statements in corporate control transactions.

For the SEC's fee rate advisory, click here.

For the SEC's order setting the registration fees, click here.

SEC Proposes Amendments Requiring Hyperlinks to Exhibits in Filings

On August 31, the Securities Exchange Commission proposed amendments that would require registrants to include a hyperlink to each exhibit listed in the exhibit index of a registrant's registration statements and periodic and current reports. These amendments are being proposed as part of the SEC's larger Disclosure Effectiveness Initiative.

Item 601 of Regulation S-K permits registrants to incorporate by reference exhibits that have previously been filed with the SEC. Currently, registrants are permitted to submit electronic filings to the SEC via the EDGAR system in one of two formats: "HTML" format, which supports hyperlinks to another part of such document or a separate document, and "ASCII" format, which does not support hyperlinks. Without the benefit of functional hyperlinks, an investor seeking to access cross-referenced, previously filed exhibits must search through a registrant's past filings to locate such exhibits. Additionally, Rules 11, 102 and 105 of Regulation S-T include certain limitations on a registrant's ability to use hyperlinks in EDGAR filings.

The newly proposed amendments would require a registrant (1) to file registration statements and reports in HTML format (in order to support hyperlinks) and (2) with limited exceptions, to include active hyperlinks to each filed exhibit listed on an exhibit index, including previously filed exhibits that have been incorporated by reference, thereby facilitating investors' easier access to the registrant's exhibits.

For the full text of the proposed rule, click here.

SEC To Approve FINRA and MSRB Pay-To-Play Rules

On August 25, the Securities and Exchange Commission (SEC) issued notices (Notices) to the Financial Industry Regulatory Authority and the Municipal Securities Rulemaking Board (MSRB and together with FINRA, SROs) stating that it intends to approve pay-to-play rules proposed by both. In the Notices, the SEC elaborated that the proposals impose substantially equivalent or more stringent restrictions than the SEC's existing pay-to-play rule. Because the SEC already has a pay-to-play rule (17 CFR 275.206(4)-5 (Rule 206(4)-5)), the SROs cannot pass their own separate pay-to-play rules unless the SEC approves them.

Rule 206(4)-5 prohibits investment advisers registered with the SEC and advisers that are required to be so registered from receiving any compensation for providing investment advice to a government entity (which includes all state and local governments, agencies, and instrumentalities and government-sponsored plans, including public pension plans) or government official (which includes any person who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, if the office is directly or indirectly responsible for, or can influence (or has authority to appoint any person who can influence) the outcome of, the hiring of an investment adviser by a government entity), within two years after a contribution has been made by the adviser or one of its covered associates to such entity or official.

Rule 206(4)-5 defines "contribution" broadly to include a gift, subscription, loan, advance, deposit of money or anything of value made for the purpose of (1) influencing (including by paying a campaign debt) a federal, state or local election; or (2) paying transition or inaugural expenses incurred by successful candidates for state or local office. However, contributions to a political action committee (PAC) do not implicate Rule 206(4)-5; provided that, such contributions are not attributable to a specific candidate; provided further that, an adviser or its covered associate may not solicit contributions from PACs on behalf of government officials to which the adviser is providing or seeking to provide investment advice. A "covered associate" includes: (i) any general partner, managing member or executive officer, or other individual with a similar status or function; (ii) any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and (iii) PACs controlled by the investment adviser or a covered associate.

Notably, under Rule 206(4)-5 advisers must look back in time to determine whether a covered associate has made a triggering contribution prior to becoming a covered associate. Pursuant to the lookback provision, depending on whether a covered associate solicits clients for the adviser, contributions made by such covered associate will be attributed to an adviser if those contributions were made within the prior two years or six months. In addition, there are exemptions for certain *de minimis* contributions of $350 or $150 per covered associate per election depending on whether the covered associate is entitled to vote in the relevant election, and Rule 206(4)-5 contains a cure provision for certain "inadvertent" contributions that do not exceed $350 per government official, per election. Moreover, under Rule 206(4)-5 advisers must keep chronological records of contributions and payments identifying each contributor and recipient, the amounts and dates of each contribution or payment, and whether a contribution was subject to Rule 206(4)-5's cure for inadvertent contributions.

FINRA proposed Rule 2030 on December 29, 2015. Rule 2030 will prohibit a member firm and its covered associates from engaging in distribution activities or solicitation activities, on behalf of an unaffiliated registered investment adviser, with a government entity or government official to which the member firm or its covered associate has made political contributions within the past two years. Rule 2030 includes provisions similar to those in Rule 206(4)-5 including: (1) that a member firm or its covered associate may not solicit any PAC to make contributions to a government official in respect of which the member firm is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an unaffiliated registered investment adviser; (2) *de minimis* exemptions; (3) a lookback for certain associated persons (though it will not cover contributions made prior to the effective date of Rule 2030); and (4) consistent definitions of associated person, government entity and government official. In addition, FINRA adopted Rule 4580 that requires covered members to maintain books and records related to Rule 2030.

Similarly, on December 16, 2015, the MSRB proposed changes to its existing pay to play rule (Rule G-37) to extend its application to municipal advisors. Prior to the proposed changes, Rule G-37 only applied to brokers, dealers and municipal securities dealers. Once amended, Rule G-37 will also ban municipal advisors from soliciting certain government business within the two years after a contribution. Rule G-37 includes provisions similar to those in Rule 206(4)-5 including: (1) a lookback for certain associated persons; (2) *de minimis*

exemptions; (3) definitions of "government municipality" and "official" that are consistent with "government entity" and "government official"; and (4) a prohibition on soliciting or coordinating payments from a PAC to a government municipality where the dealer or municipal advisor is engaging, or is seeking to engage in, municipal securities business or municipal advisory business, as applicable.

To See SEC Rule 206(4)-5, click here.

To see the Notice for FINRA Rule 2030, click here.

To see the Notice for MSRB Rule G-37, click here.

SEC Adopts Amendments to Rules on Access to Data Obtained by Security-Based Swap Data Repositories

On August 29, the Securities and Exchange Commission announced the adoption of amendments to the Securities Exchange Act of 1934 (Exchange Act) Rule 13n-4 (Amended Rule) that implement the statutory requirement that security-based swap data repositories (SBSDR) provide certain data involving security-based swaps, including individual counterparty trade and position data (Data), to certain regulators and other entities provided that certain conditions are met.

Pursuant to the Amended Rule, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, the Federal Housing Finance Agency and Federal Reserve Banks are eligible to access Data. The Amended Rule also identifies other entities, including the Commodity Futures Trading Commission and the Department of Justice, that may access Data under certain conditions and provides broad language that gives the SEC authority to determine when it would be appropriate for Data to be available to any other person, including foreign authorities (Determination). In making a Determination, the SEC expects to consider, among other things, (1) whether Data would be subject to robust confidentiality safeguards, such as safeguards set forth in the relevant jurisdiction's statutes, rules or regulations; (2) the relevant entity's interest in access to Data based on its regulatory mandate or legal responsibility or authority; and (3) how the entity would be expected to use the information. Additionally, the SEC may issue a Determination that is of a limited duration and may revoke a Determination at any time, if for example, a relevant authority fails to keep Data confidential.

The Amended Rule provides that an SBSDR is required to inform the SEC of its receipt of a request for Data from a particular entity (which may include any request that the entity be provided ongoing online or electronic access to Data) and must maintain records of all information provided in connection with the request or access related to the initial and all subsequent requests for Data from that entity. Such records should include the identity of the requestor or person accessing Data; the date, time and substance of the request or access; the date and time access is provided; and copies of all data reports or other aggregations of Data. Before any Data is provided to an entity, such entity needs to have entered into an agreement with the SEC (in the form of a memorandum of understanding or otherwise) to address the confidentiality of Data made available to the regulator.

To see the Amended Rule, click here.

DERIVATIVES

See "SEC Adopts Amendments to Rules on Access to Data Obtained by Security-Based Swap Data Repositories" in the Broker-Dealer section and "FCA Trade Association Roundtable on MiFID II Implementation" in the UK Developments section.

CFTC

CFTC Proposes Amendments to Whistleblower Awards Process

On August 30, the Commodity Futures Trading Commission published in the *Federal Register* proposed amendments to its whistleblower awards process (17 CFR Part 165). The proposed amendments are designed to clarify the process for reviewing whistleblower claims and to reinterpret the CFTC's authority as it relates to retaliation against whistleblowers.

The CFTC's current whistleblower rules allow for the payment of awards to those who voluntarily provide the CFTC with original information about a violation of the Commodity Exchange Act (CEA) that leads to a successful enforcement action with monetary sanctions exceeding $1 million, or the successful enforcement of a related action, or both. The proposed amendments clarify eligibility requirements to receive an award and extend the timeframe during which a claimant may seek an award after the claimant has provided the same information to another entity, such as Congress or another federal or state authority.

The proposed amendments also further define the review process of a whistleblower claim, including assigning overall responsibility for administering the program to the director of the Division of Enforcement and establishing several methods for a claimant to contest the determinations of CFTC staff. The CFTC notes that the amendments will establish a process that is similar to the Security and Exchange Commission's whistleblower program.

Finally, the CFTC disavows its prior interpretation with regard to its authority to take enforcement action against violators of the anti-retaliation provisions of CEA. Whereas previously the CFTC stated that it believed it lacked the statutory authority to conclude that retaliation against a whistleblower could be subject to an enforcement action as an independent violation of the CEA, the CFTC now indicates that retaliation against a whistleblower is a separate violation of the CEA subject to the CFTC's enforcement powers.

The proposed amendments are available here. Comments with respect to the proposed amendments must be received on or before September 29.

CFTC Extends Comment Period For Proposed Amendments to CPO Annual Report Regulation

On August 30, the Commodity Futures Trading Commission announced that it is extending the comment period with respect to proposed amendments to CFTC Regulation 4.22, which pertains to the annual reports a commodity pool operator must distribute with respect to each commodity pool it operates. The proposed amendments deal with acceptable accounting principles to be utilized when compiling such reports and the audit requirements for certain newly formed pools. The comment period, originally scheduled to expire on September 6, has been extended to September 20.

The proposed amendments are available here.

UK DEVELOPMENTS

IOSCO Publishes Good Practice Guidelines on Fees and Expenses of Collective Investment Schemes

On August 25, the Board of the International Organization of Securities Commissions (IOSCO) published a final report (Report) on good practices for fees and expenses of collective investment schemes (CISs). The Report is published in the context of heightened regulatory scrutiny surrounding CISs and builds on existing standards with respect to CIS fees and expenses published in a report by IOSCO in 2004.

The good practices set out in the Report cover permitted and prohibited costs, remuneration for CIS operators, initial and ongoing disclosures of fees, performance-related fees, transaction costs, commissions, and changes to fees and expenses. It also covers issues arising when a CIS invests in other vehicles (including funds of funds).

While the Report published by IOSCO focuses on funds sold to retail investors, managers of wholesale funds (i.e., funds intended for institutional investors) also may wish to take the Report's good practices into consideration, particularly in the context of ongoing regulatory scrutiny in the European Union and elsewhere, since many regulators consider that fee arrangements, even when fully disclosed, can give rise to conflicts of interest. IOSCO comments in its press release for the Report that high standards of transparency and conduct in this area should help encourage competition among CIS operators/fund managers and lead to a more efficient market, thereby eventually benefitting all investors.

The Report can be found here.

IOSCO's accompanying press release can be found here.

FCA Trade Association Roundtable on MiFID II Implementation

On August 31, the UK Financial Conduct Authority (FCA) published minutes from a roundtable (Roundtable) held on August 3 with trade associations. The Roundtable was held as part of ongoing discussions in relation to the application and implementation of the revised and recast Markets in Financial Instruments Directive and the Markets in Financial Instruments Regulation (jointly referred to as MiFID II).

The FCA noted at the Roundtable that most MiFID II regulatory technical standards (RTS) and implementing technical standards (ITS) have now been adopted by the European Commission (EC). However, the FCA noted that the RTS on indirect clearing, position limits and the ancillary exemption for commercial firms trading commodity derivatives had not yet been adopted. The FCA also noted that some RTS adopted by the EC are being treated as having amendments, which subjects them to a further three-month period of review. The FCA is thus of the view that the implementing legislation for MiFID II will not be finalized (and the finalized text will not be published in the *Official Journal of the European Union*) until the end of 2016 at the earliest.

The FCA updated the Roundtable on the European Securities and Markets Authority's (ESMA's) progress with developing "level 3" guidance for MiFID II in relation to investor protection, secondary markets, commodity derivatives and market data. In terms of secondary markets, the FCA reported that ESMA is developing a discussion paper on the derivatives trading obligation in addition to guidelines on trading halts and management bodies of regulated markets. The FCA confirmed that ESMA also is developing a Q&A on various topics, including: (1) the definition of a "multilateral system"; (2) the differences between multilateral trading facilities and organized trading facilities; (3) Article 2(1)(d) of MiFID II (which provides a limited exemption for persons dealing on own account from MiFID II); (4) the meaning of "traded on a trading venue," transparency requirements, organizational requirements for investment firms and trading venues engaged in algorithmic trading; and (5) access to market infrastructure and benchmarks (among others). The FCA expects ESMA to publish the Q&A for secondary markets at some point after the summer. The Roundtable minutes note that ESMA cannot progress significantly with developing interpretive guidance on commodity derivatives until the associated implementing measures are complete.

In terms of UK implementation, the FCA confirmed that it intends to allow for authorization applications and variations of permission in January 2017, although this will be dependent on MiFID II legislation being finalized and published.

For more information on previous FCA trade association roundtables, see the *Corporate & Financial Weekly Digest* editions of April 29 and January 15.

The FCA's MiFID II Roundtable minutes are available here.

EU DEVELOPMENTS

European Parliament Confirms Non-Objection to MiFIR Delegated Regulation

On August 25, the European Parliament confirmed it has not objected to a delegated regulation (Delegated Regulation) made under the Markets in Financial Instruments Regulation (MiFIR). The Delegated Regulation covers definitions, transparency, portfolio compression and supervisory measures on financial product intervention and positions and was adopted by the European Commission in May.

As mentioned in previous updates regarding other delegated regulations, the Delegated Regulation will be published in the *Official Journal of the European Union* and will go into effect 20 days following publication.

For more information, see the *Corporate & Financial Weekly Digest* editions of August 26, July 22, June 17, June 10, May 27, May 20, April 29 and April 15.

The European Parliament updated its online procedure file for the Delegated Regulation to indicate its non-objection, which 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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