Katten
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SEC/CORPORATE

SEC Division of Corporation Finance Issues Revised and Additional C&DIs Relating to Form S-8

On November 9, the Division of Corporation Finance of the Securities and Exchange Commission issued two revised and two new Compliance and Disclosure Interpretations (C&DIs) with respect to (1) Form S-8, which is used by publicly traded companies to register securities that will be offered pursuant to employee plans, and (2) the transfer of registration fees from a previously filed Form S-8 or other registration statement to a new registration statement. These C&DIs include the following interpretive guidance:

- **Revised C&DI 126.06** provides that an issuer may register securities to be issued pursuant to two plans on a single registration statement by (1) listing the full title of each plan on the registration statement cover, (2) delivering Form S-8, Part I information with respect to each plan pursuant to Rule 428 of the Securities Act of 1933, as amended (Securities Act), and (3) to the extent that any Form S-8, Part II information relates to a particular plan, making that relationship clear.

- **Revised C&DI 126.42** clarifies that, to the extent an issuer has a Form S-8 on file that registers shares of common stock in excess of the shares needed for issuance upon the exercise of outstanding options, such issuer may *not* transfer filing fees associated with securities registered pursuant to such Form S-8 to a new registration statement. Rule 457(p) of the Securities Act permits the transfer of filing fees only *after* the registered offering has been completed or terminated or the registration statement has been withdrawn.

- **New C&DI 126.43** offers two possible approaches in the event that an issuer (1) has an effective Form S-8 that registers shares of common stock issued under an earlier equity compensation plan and (2) desires to roll over to a new equity compensation plan shares from such earlier plan that are (a) not covered by any award thereunder or (b) expected to expire or terminate (the "existing excess shares").

One approach is that such issuer may register the existing excess shares on the new Form S-8 to be filed to cover shares issuable pursuant to the new plan. However, because the offering covered by the earlier Form S-8 is not yet complete, such issuer may not transfer filing fees associated with such earlier Form S-8 to the new Form S-8.

A second approach would be for such issuer to file a post-effective amendment to the earlier Form S-8 to indicate that such Form S-8 will *also* cover the issuance of the existing excess shares under the new plan once such existing excess shares are no longer issuable pursuant to the existing plan. No new filing fee would be due upon the filing of such post-effective amendment. However, in accordance with Rule 413(a) of the Securities Act, because additional shares may not be added to a registration statement by means of a post-effective amendment, such issuer would still be required to file a new Form S-8 in respect of any newly authorized shares to be made available pursuant to the new plan.

New C&DI 126.44 provides that, when an issuer desires to use fees paid on a previously file registration statement to offset fees due on a subsequent registration statement pursuant to Rule 457(p) of the Securities Act, such registrant (1) is required to include a note to the Calculation of Registration Fee table stating the (a) name of the registrant, (b) file number and initial filing date of the earlier registration statement from which such offset is claimed, and (c) dollar amount of such offset; and (2) should (x) quantify the amount of unsold securities from the prior registration statement associated with such claimed offset and (y) disclose either that (a) the prior registration

statement has been withdrawn or (b) any offering that included such unsold securities has been terminated or completed, which in the case of a Form S-8 offering, is only when no additional securities will be issued pursuant to the plan covered by such Form S-8 (including through the exercise of any outstanding awards under such plan).

The original text of the C&DIs can be found here.

Register for Our 2017 Proxy Season Update Webinar

On Thursday, December 8 at 12:00 p.m. (CT), please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Sard Verbinnen & Co. for a webinar discussion of key developments and trends impacting public companies in the 2017 annual report and proxy season.

Click here to register.

BROKER-DEALER

SEC Approves Plan To Create Consolidated Audit Trail

On November 15, the Securities and Exchange Commission approved the consolidated audit trail (CAT) plan proposed by the self-regulatory organizations (SROs). As specified by the CAT plan, the CAT will be designed to create a central repository to track all trading activity in national market system (NMS) securities, including options and equity securities.

The SROs propose to conduct the activities of the CAT through a nonprofit Delaware limited liability company, which they would own jointly and which would be managed by an operating committee comprised of all of the SROs, each with one vote. In addition, broker-dealers, specialists and others would serve on an advisory committee.

Within two months of approval of the plan, SROs will be required to select a plan processor to build and operate the CAT. SROs will be required to begin reporting to the CAT within one year of approval, with large broker-dealers reporting in the following year and small broker-dealers in the year after that.

Under the CAT plan, SROs and broker-dealers would be required to submit information about an order, including the identity of the customer, the date and time, the relevant broker-dealer, and the price, size, symbol and order type. Such information would need to be recorded contemporaneously with an order event (e.g., upon origination, routing, modification/cancellation and execution of the order) and reported to the central repository by 8:00 a.m. (ET) on the following day. For the sake of uniformity, the CAT NMS plan would require broker-dealers to synchronize their business clocks to the time maintained by the National Institute of Standards and Technology.

The SROs and the SEC would have access to the data contained in the central repository for regulatory and oversight purposes. The CAT plan, however, provides data security requirements regarding connectivity and data transfer, encryption, storage, access, breach management and personally identifiable information. In addition, the SROs would handle CAT data under information security protocols as rigorous as those applicable to the central repository.

The CAT plan provides details on data recording and reporting, governance, regulatory access and use, data security and confidentiality, and other items.

More information is available here.

CFTC

CFTC Staff Issues Results of Supervisory Stress Test of Clearing Organizations

The staff of the Division of Clearing and Risk of the Commodity Futures Trading Commission recently released its findings from a supervisory stress test it conducted across five derivatives clearing organizations registered with the CFTC: CME Clearing, ICE Clear Credit, ICE Clear Europe, ICE Clear U.S. and LCH Clearnet Ltd. This is the

first stress test that the CFTC has performed across multiple clearing organizations; such tests will be a regular part of the CFTC's risk surveillance program going forward.

The purpose of the stress test was to assess the impact of hypothetical, extreme but plausible scenarios across multiple clearing organizations, with a focus on firms that hold clearing memberships at more than one clearing organization. The ability of each clearing organization to meet the required resiliency levels under such scenarios was evaluated as part of making such assessment.

A total of 11 different stress scenarios, including extreme price changes, were designed and tested across the five clearing organizations and eight clearing organization guaranty funds. The following are the key findings: (1) all of the clearing organizations had the financial resources to withstand a variety of extreme market price changes across a wide range of products and instruments and had sufficient financial resources to cover a default by at least the two clearing members (including affiliates) with the largest margin shortfalls; (2) clearing member risk was diversified among the different scenarios such that no specific scenario or scenarios tended to cause loss at many or most clearing members; (3) clearing member risk was diversified across clearing organizations such that if a particular scenario caused a clearing member to incur loss at one clearing organization, such scenario did not necessarily cause the clearing member to suffer a loss at a different clearing organization; and (4) there was no scenario where the same two firms generated the largest losses at more than one guaranty fund.

The CFTC noted that, although these results were positive, the exercise had a number of limitations. For example, it only analyzed a limited number of scenarios, it only applied the impact of extreme price changes during a one-day period, and it did not take into account strains on liquidity or cyber security or operational risks.

To see the CFTC's published results, click here.

CFTC Division of Market Oversight Reminds Market Participants of the Upcoming Expiration of Certain No-Action Relief From the Ownership and Control Final Rule

The Commodity Futures Trading Commission's (CFTC) Division of Market Oversight recently issued a press release to remind all participants in CFTC-regulated derivatives markets that certain time-limited no-action relief from compliance with certain provisions of the Ownership and Control Report (OCR) final rule expires on November 18. Specifically, the relief granted in CFTC Letter No. 16-32 from the electronic submission requirements for Forms 40/40S and 71 expires. However, staff noted that reporting obligations for Forms 40/40S and 71 are triggered only if a market participant receives a request from the CFTC staff. Therefore, market participants have no immediate obligations with respect to these provisions of the rule.

To see the press release, click here.

To see the *Corporate & Financial Weekly Digest* edition from April 15 on CFTC Letter No. 16-32, click here.

BANKING

FDIC Approves Final Rule on Recordkeeping for Timely Deposit Insurance Determination

On November 15, the Federal Deposit Insurance Corporation (FDIC) approved a final rule detailing recordkeeping requirements for FDIC-insured depository institutions with more than 2 million deposit accounts (Covered Institutions) to facilitate rapid payment of insured deposits to customers should those institutions fail. The FDIC estimates that 38 depository institutions currently qualify as Covered Institutions.

Covered Institutions will need to develop information systems capable of quickly: (1) calculating deposit insurance coverage for each deposit account; (2) generating and retaining output records in the FDIC-specified format; (3) restricting access to some or all of the deposits in a deposit account until the FDIC completes its insurance determination for that account; and (4) debiting from each deposit account the calculated uninsured amount.

Recognizing that not all Covered Institutions will be able to collect and maintain all of the information needed to make a determination for every account, the FDIC bifurcated the recordkeeping requirement. For deposit account records collected in the ordinary course of business, such as for single ownership accounts, Covered Institutions

must ensure that they maintain the information required to calculate deposit insurance coverage. For deposit accounts where the beneficial owner information is not maintained by Covered Institutions or the amount of insurance is dependent on additional factors, such as brokered deposits or deposit accounts held in connection with a trust, Covered Institutions may instead meet an alternative recordkeeping requirement. There also are additional requirements for accounts with "transactional features" unless such account type is specifically excluded from this requirement.

Covered Institutions may request an exemption from these requirements from the FDIC if they demonstrate that they do not and will not take deposits from any account holder for any owner of the funds on deposit which, when aggregated, exceed the standard maximum deposit insurance amount (SMDIA), which is currently $250,000. Covered Institutions also may request an exception from the FDIC from any specific requirement if it is impracticable or overly burdensome. Finally, Covered Institutions can obtain a release from the provisional hold and standard data format requirements by submitting to the FDIC a required compliance certification.

The final rule is effective as of April 1. Covered Institutions have three years from the effective date or three years after first becoming a Covered Institution to implement the requirements, but they may request an extension from the FDIC. However, on a case-by-case basis, upon notice, the FDIC may accelerate the implementation time frame for a Covered Institution.

The FDIC intends to issue functional design assistance for system programming prior to the effective date to aid in this process.

The final rule is available here.

EU DEVELOPMENTS

ESMA Publishes Opinion Under EMIR

On November 15, the European Securities and Markets Authority (ESMA) published an opinion (Opinion) under the European Market Infrastructure Regulation (EMIR). The Opinion is designed to promote a common supervisory approach in relation to: (1) new products and services offered by central counterparties (CCP) that require regulatory approval under Article 15 of EMIR; and (2) the meaning of "significant changes" under Article 49 of EMIR.

Article 15 of EMIR requires CCPs wishing to extend their business to additional services or activities not covered by their initial authorizations to submit an extension request to their relevant national regulators. The Opinion clarifies that "additional services or activities" in this context includes any service or activity:

- that exposes the CCP to new or increased risks;
- in respect of classes of financial instruments that have differing risk profiles or differences to the products cleared by the CCP; and
- in respect of classes of financial instruments not covered by the CCP's authorization.

The Opinion also sets out a list of non-exhaustive indicators for regulators to consider when determining if a CCP's current authorization covers the proposed additional service or activity. The indicators include where the CCP needs to: (1) amend or create a new risk management framework; (2) adjust its capital by more than 10 percent; (3) change its operational structure; or (4) adopt new or different methods to obtain prices, among others.

Article 49 of EMIR requires CCPs to review the models and parameters used to calculate their respective margin requirements, default fund contributions and collateral requirements. It also requires CCPs to perform stress tests and back tests on the models, and states that CCPs must obtain independent validation, inform ESMA and their national regulator of the test results and obtain their validation prior to adopting any significant changes to their models. The Opinion sets out a non-exhaustive list of indicators which regulators should consider when determining if a change to a CCPs models and parameters is "significant". These indicators include where the change: (1) introduces a new set of eligible collateral with a different credit or liquidity

risk profile; (2) may require the development of new stress scenarios; and (3) results in an adjustment of pre-funded financial resources or capital, among others.

The Opinion can be found here.

ESMA Publishes Final Report on Clearing Obligations for Financial Counterparties With Limited Activity Volumes

On November 14, the European Securities and Markets Authority (ESMA) published a final report (Final Report) under the European Market Infrastructure Regulation (EMIR). The Final Report sets out draft regulatory technical standards (RTS), which amend the clearing obligations for financial counterparties with a limited volume of OTC derivatives activity (Category 3 Counterparties). Under the RTS, ESMA has proposed to postpone the phase-in implementation for clearing for Category 3 Counterparties by two years. If adopted, the new compliance dates for interest rates and credit derivatives clearing for such counterparties would be June 21, 2019.

The Final Report has been submitted to the European Commission and once adopted will go into effect 20 days following publication in the Official Journal of the *European Union*.

The Final Report can be found here and 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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