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SEC / CORPORATE

SEC Releases Rule 504 Small Entity Compliance Guide for Issuers

The Securities and Exchange Commission recently released a Small Entity Compliance Guide for Issuers, which provides a brief summary of Rule 504 of Regulation D and its requirements. Rule 504 provides an exemption from the registration requirements under the Securities Act of 1933 for private issuers. As discussed in the November 4, 2016 edition of the *Corporate & Financial Weekly Digest*, Rule 504 was recently amended to, among other things, increase the aggregate amount of securities that may be offered and sold by an issuer in a 12-month period from $1 million to $5 million. As a reminder, amended Rule 504 is now effective and available for capital raising efforts by eligible companies.

The Rule 504 Small Entity Compliance Guide for Issuers is available here.

Acting SEC Chair Directs Staff to Reconsider Rule on Conflict Minerals

On January 31, the acting Securities and Exchange Commission Chairman, Michael Piwowar, issued a statement announcing that he directed the staff of the SEC to reconsider the rule on conflict minerals, including the agency's 2014 guidance on such rule. As discussed in the August 24, 2012 edition of the *Corporate & Financial Weekly Digest*, the rule on conflict minerals, which was mandated by Section 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), implemented disclosure and reporting requirements regarding the use by issuers of conflict minerals from the Democratic Republic of the Congo and adjoining countries. Acting Chairman Piwowar commented that the disclosure requirements led to a *de facto* boycott of minerals from portions of Africa, as well as prohibitively high costs to legitimate mining operators, forcing them to close their mining operations. Comments on reconsideration of the rule and the 2014 guidance are being solicited for 45 days following the announcement.

The statement by Chairman Piwowar follows recent legislative action calling for review of the resource extraction rule, required by Section 1504 of Dodd-Frank. Specifically, Senator Inhofe and Representative Huizenga filed a joint Congressional Review Act Resolution relating to the SEC's final rule requiring disclosure of certain payments made by resource extraction issuers. The joint resolution, if passed, would provide for congressional disapproval of the resource extraction rule.

These statements and actions appear to be consistent with President Trump's focus on "cutting regulations massively for small business and for large business," as reflected in the Executive Order he signed on January 30, directing that for every new federal regulation adopted, an executive department or agency must identify two existing regulations to eliminate. It should be noted, however, that this Executive Order does not apply to the SEC and other independent regulatory agencies.

The press release on President Trump's Executive Order is available here.

The SEC's statement on conflict minerals is available here.

More information on the joint resolution is available here.

BROKER-DEALER

SEC Simplifies Process for Electronically Filing Broker-Dealer Annual Reports

The Division of Trading and Markets (Division) of the Securities and Exchange Commission has updated its no-action relief to broker-dealers and over-the-counter (OTC) derivatives dealers from the requirement to file annual and supplemental reports with the SEC in paper form. The Division had previously issued a no-action letter in December 2015 that provided relief to broker-dealers and OTC derivatives dealers from the requirement to file the reports in paper form so long as the reports are filed using the SEC's EDGAR system. The 2015 letter detailed the procedures for filing reports using the EDGAR system.

The SEC subsequently updated its EDGAR system, accordingly, the Division has updated its no-action relief to allow broker-dealers and OTC derivatives dealers to file the reports using the EDGAR system in one of two ways:

- the broker-dealer or OTC derivatives dealer may attach one document containing all of the annual reports as a public document; or
- the broker-dealer or OTC derivatives dealer may attach two documents to its submission: a public document containing the statement of financial condition, the notes to the statement of financial condition, and the accountant's report which covers the statement of financial condition; and a non-public document containing all of the components of the annual reports.

The Division's latest no-action letter is available here.

FINRA and ISG Update Electronic Blue Sheet Data Elements

The Financial Industry Regulatory Authority (FINRA) and the US members of the Intermarket Surveillance Group (ISG) have updated various data elements for Electronic Blue Sheet (EBS) to include codes for the MIAX Pearl. The FINRA and ISG also have updated the data elements for EBS to include transaction type identifiers for each of "non-program trading, agency to agency" and "non-program trading, proprietary to proprietary," respectively.

The FINRA's notice to members is available here.

PRIVATE INVESTMENT FUNDS

Treasury Form SHC and Private Fund Advisers

Form SHC is due once every five years as part of a survey conducted by the Department of the Treasury soliciting information identifying ownership of foreign securities by US residents. Form SHC is due on March 3 for the year ending December 31, 2016.

An adviser to hedge funds, private equity funds or other private investment funds may have to file Form SHC if its private funds that are organized in the United States own, in the aggregate, at least $200 million of foreign securities. A private fund adviser also will be required to file Form SHC, even without meeting the foregoing threshold, if instructed to do so by the Federal Reserve Bank of New York (FRBNY). Note that US custodians, as well as US residents that are not private funds or private fund advisers, have Form SHC reporting obligations as well.

For purposes of calculating $200 million of foreign securities, reporters should include, among other things, their gross long positions in: (1) foreign equity securities; (2) short-term and long-term foreign debt securities; (3) foreign asset-backed securities; and (4) equity or other securities issued by foreign investment vehicles. Foreign securities entrusted to US-resident custodians that are in turn held at a US-resident central securities depository (such as the Depository Trust Company or FRBNY), or a foreign-resident central securities depository (such as Euroclear or Clearstream), must be reported by the US-resident custodian, not by the US- or foreign-resident central securities depository. Likewise, foreign securities held by a US-resident end-investor directly with a US-resident or foreign-resident central securities depository must be reported by the US-resident end investor, not by the central securities depository.

"Direct investments" do not need to be reported. A "direct investment" relationship exists when a US resident owns 10 percent or more of the voting equity securities of an incorporated foreign business (or an equivalent interest in an unincorporated foreign business or branch). Ownership by US feeder funds of shares or interests in affiliated non-US master funds that do not carry voting rights are not direct investments, even if greater than 10 percent, and must be included.

Form SHC, including filing instructions, can be found here.

DERIVATIVES

See "SEC Simplifies Process for Electronically Filing Broker-Dealer Annual Reports" in the Broker-Dealer section and "The CFTC Releases Time Limited No-Action Relief For Swap Dealers Complying with EU Requirements" in the CFTC section.

CFTC

CFTC Releases Time Limited No-Action Relief for Swap Dealers Complying With EU Requirements

On February 1, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued No Action Letter 17-05, which allows certain swap dealers to substitute—for a limited period of time—compliance with the non-centrally cleared OTC derivative margin requirements applicable in the European Union (the "EU Rules") for compliance with certain of the CFTC's uncleared swap margin requirements in cross-border transactions with counterparties subject to the EU Rules. The overall CFTC framework for substituted compliance is identified in the CFTC Cross-Border Margin Rule (81 FR 34818 (May 31, 2016)) and is conditioned in the case of each other jurisdiction on a determination by the CFTC that the rules of the other jurisdiction are "comparable" to the relevant CFTC rules. The effect of the relief is to suspend that condition for the EU. The no-action relief only applies to swap dealers that do not have a prudential regulator (i.e., non-bank swap dealers) and is effective from (and including) February 4 to (and excluding) May 8.

DSIO cautioned that the granting of this no-action relief should not be presumed to be a guarantee that the CFTC will ultimately make a comparability determination with respect to the EU Rules that is exactly consistent with the terms of this letter. When, and if, the EU Rules are determined to be comparable to the CFTC's uncleared swap margin requirements, a swap dealer without a prudential regulator will be able to comply with the EU Rules in lieu of the CFTC's rules in accordance with the Cross-Border Margin Rule and this relief will no longer be necessary. DSIO indicated the European Commission is assessing the CFTC's uncleared swap margin requirements to potentially make an equivalency determination of its own.

The CFTC's no-action letter is available here. The CFTC's press release pertaining to the no-action relief is available here.

UK/BREXIT DEVELOPMENTS

FCA Extends AIFMD Annex IV Reporting to Master Funds

On January 25, the UK Financial Conduct Authority (FCA) published amendments to its rules on Annex IV reporting under the EU Alternative Investment Fund Managers Directive (AIFMD). The amendments will affect non-European Economic Area (EEA) Alternative Investment Fund Managers (AIFMs) that market feeder Alternative Investment Funds (AIFs) in the United Kingdom under the United Kingdom's implementation of the Article 42 of AIFMD, which allows such non-EEA AIFMs to market their funds in the United Kingdom in accordance with the UK's national private placement regime.

After the amendments go into effect, AIFMs that report Annex IV information for their feeder AIFs on a quarterly basis will be required to report quarterly information regarding the feeder AIF's master AIF, notwithstanding that the master AIF is not itself marketed in the United Kingdom.

Furthermore, UK authorized managers that are subject to the quarterly reporting requirement also will need to complete Annex IV reporting for each non-EEA fund that is not marketed in the EEA. UK managers that are subject to the reporting requirement for non-EEA master funds (either because the feeder fund is an EEA fund or is a non-EEA fund that is marketed in the EEA) will only need to continue to complete Annex IV reporting for the master fund if they are also subject to the quarterly reporting requirement.

The revised requirements go into effect on June 29, requiring firms to report under them by August 15 for a fund of funds, and July 31 for all other fund types.

The amendments are available here.

For background information on the amendments, see the *Corporate & Financial Weekly Digest* edition of July 22, 2016.

UK House of Commons Votes on the Brexit Bill and Government Issues White Paper

On February 1, the House of Commons voted on the European Union (Notification of Withdrawal) Bill (Bill), which, when passed, will allow the Prime Minister to notify the European Council of the United Kingdom's intention to withdraw from the European Union. Further information on the Bill can be found in the *Corporate & Financial Weekly Digest* edition of January 27, 2017.

After two days of debate, a majority of parliament members voted 498 to 114 for the Bill to progress from its second reading to the committee stage, when the House of Commons will propose amendments, debate and make decisions on the Bill's contents. The House of Lords also must examine and vote on the Bill.

On February 2, the government issued its official policy document (White Paper) on its plan for the United Kingdom's exit from the European Union. The White Paper contains further details on the 12 principles set out in the Prime Minister's speech on the exit plan (see the *Corporate & Financial Weekly Digest* edition of January 20, 2017 for more information).

The Bill's timetable and the White Paper can be viewed here and here.

EU DEVELOPMENTS

ESMA Updates Q&As on MiFID II Transparency and Market Structure Topics

On January 31, the European Securities and Markets Authority (ESMA) updated two Question and Answer (Q&A) documents on implementation issues relating to transparency and market structure under the revised Markets in Financial Instruments Directive (MiFID II) and the associated Markets in Financial Instruments Regulation (MiFIR).

The Q&A on transparency clarifies issues related to the systematic internalizer regime, which, under MiFID II and MiFIR, is extended beyond shares to apply to other equity-like instruments and non-equity instruments, while also being subject to a quantitative calculation to determine if a firm is a systematic internalizer. The updated Q&A adds four new items, clarifying issues relating to:

- the level at which the firm must perform the calculation where it is part of a group or operates EU branches;
- which transactions should be exempted from, and included in, the calculation;
- at which level of asset class the calculation should be performed for derivatives, bonds and structured finance products; and
- how a systematic internalizer in non-equity instruments can comply with some of its quoting obligations.

The Q&A on market structures has been updated to clarify when a Multilateral Trading Facility (MTF) operator also can be a member of its own MTF, that trading venues locating electronic systems on a third-party data center must comply with the co-location provisions and how the reference to market makers should be understood under Article 2(1)(d) of MiFID II, which provides an exemption, under very specific conditions, from the obligation to be authorized as an investment firm.

ESMA's Q&As relating to transparency and market structures are available here and here.

ESMA Issues Consultation on Future Guidelines for Portability Between Trade Repositories

On January 31, the European Securities and Markets Authority (ESMA) published a public consultation (Consultation) on the future guidelines on the transfer of data between trade repositories (TRs) authorized in the European Union under the European Market Infrastructure Regulation (EMIR).

The proposed guidelines establish high-level principles that would need to be followed by various stakeholders such as the TR participants, reporting entities, counterparties and central counterparties, as well as the TRs themselves.

ESMA states that the purpose of the proposed guidelines is threefold; they aim to ensure that: (1) the competitive environment relating to TRs underpinning EMIR is guaranteed; (2) high-quality data is available to authorities; and (3) a consistent and harmonized method of transferring records from one TR to another is established to support the continuity of reporting and reconciliation.

ESMA is seeking stakeholders' views on the draft guidelines by March 31 and expects to publish a final report of the guidelines by Q3 of 2017.

The Consultation Paper is available here.

ESMA Issues Open Letter on EMIR Review and Sanctioning Powers to the EC

On January 27, the European Securities and Markets Authority (ESMA) wrote an open letter (Letter) to the European Commission (EC) to ask it to consider a number of issues relating to its supervisory and sanctioning powers under the European Market Infrastructure Regulation (EMIR). This request is in the context of the ongoing review of EMIR launched in 2015 by the EC (see the *Corporate & Financial Weekly Digest* edition of May 22, 2015 for more information). The Letter also addresses similar issues related to credit rating agencies.

The Letter reinforces the importance of ESMA's previous position taken in relation to the review of EMIR. Part of the Letter focuses on trade repositories (TRs), and identifies the following aspects of reform considered essential to ensure that ESMA is seen as a credible supervisor: (1) strengthening ESMA's sanctioning powers and the level of TR fines; (2) enhancing the tools available to ESMA to supervise TRs; (3) adding requirements for TRs relating to data quality and access; and (4) further reporting requirements.

More generally in relation to EMIR, ESMA reinforces the importance of: (1) considering amendments to the clearing obligation framework; (2) redefining, simplifying and recalibrating the categories of large and small non-financial counterparties and the obligations to which each of the two categories are subject; (3) improving transparency and predictability of margin requirements; and (4) reconsidering the third country central counterparty clearing house recognition framework.

The Letter 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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