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SEC / CORPORATE

SEC Adopts Technical Amendments to JOBS Act Rules

On March 31, the Securities and Exchange Commission adopted technical amendments to rules adopted by the SEC under the Jumpstart Our Business Startups Act (JOBS Act). These technical amendments include, among others, an increase in the revenue cap for determining emerging growth company (EGC) status; an increase of the amount of money companies can raise through crowdfunding; and revisions to certain rules and forms to conform to amendments made to the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) by the JOBS Act. Specifically:

- The amendments increased the annual gross revenue cap for a company to qualify as an EGC from $1 billion to $1.07 billion to adjust for inflation. The JOBS Act, enacted in April 2012, requires the SEC to index to inflation the annual gross revenue cap every five years at minimum.
- The amendments increased the amount that companies can raise through crowdfunding to adjust for inflation, as described more fully in a press release issued by the SEC on April 5 (SEC Press Release). The SEC is required to make such an inflation adjustment at least every five years, as is the case with the EGC annual gross revenue cap. SEC acting Chairman Michael Piwowar stated in the SEC Press Release that "[r]egular updates to the JOBS Act, as prescribed by Congress, ensure that the entrepreneurs and investors who benefit from crowdfunding will continue to do so . . . Under these amendments, the JOBS Act can continue to create jobs and investment opportunities for the general public."
- The amendments revised Securities Act Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3 and F-4 and the Exchange Act Forms 10, 8-K, 10-Q, 10-K, 20-F and 40-F. As a result of the amendments, for example, the cover pages of Securities Act registration statements and Exchange Act reports now include a "check the box" item to indicate if the company filing the report is an EGC. Further, EGCs filing reports may check an additional box indicating "if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act."

These amendments will become effective when they are published in the *Federal Register*, which is expected to occur in the next few days.

The technical amendments are available here.

The SEC Press Release is available here.

DERIVATIVES

See "CFTC Grants No Action Relief From CPO Registration for Managers of Endowment Assets" in CFTC section.

CFTC

CFTC Grants No-Action Relief From CPO Registration for Managers of Endowment Assets

On April 4, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DISO) granted no-action relief from registration as a commodity pool operator (CPO) to a management company and certain fund directors whose sole clients are funds established to manage the endowment of a state university (University) and certain of its affiliates.

The no-action relief pertains to a fund complex consisting of three funds: Fund Z, which invests all of its investible assets in Fund X; Fund Y, which invests a portion of its assets in Fund X; and Fund X (together with Fund Y and Fund Z, the "Funds"), which invests in a broad range of asset classes, including funds, vehicles and accounts that currently, or may in the future, invest in commodity interests. In addition, Fund X engages in a *de minimis* amount of direct investment in commodity interests for risk management purposes. Directors (Fund Z Directors) control the management and operational decisions of Fund Z, and a management company (Management Company) manages the daily operations and investments of Fund X and Fund Y, and provides recommendations to the Fund Z Directors with respect to Fund Z's investments. The investors in the Funds are University affiliates, supporting organizations and foundations. Neither the Fund Z Directors nor the Management Company market the Funds to the public. The Fund Z Directors and the board of directors of the Management Company are appointed by affiliates of the University. Because of the commodity interest exposure of the Funds, the Fund Z Directors and the Management Company may, without relief, have been required to register as CPOs.

DSIO granted the relief from registration as a CPO based on several factors and subject to certain conditions. DSIO indicated relief is appropriate (1) as the Management Company, the Fund Z Directors and the Funds have a common goal, namely the prudent management of the endowment assets of the University; and (2) the investors in the Funds have control over the Management Company and the Fund Z Directors. Furthermore, DSIO noted that the Management Company and the Fund Z Directors must provide the investors with detailed disclosures relating to Fund investments, as well as periodic and annual reports to the investors and University and state officials. Further, the Funds are subject to audits and SOC audits with the assistance of independent certified accountants. DISO conditioned the relief on the requirements that (1) future participants in Fund Z be limited to certain tax-exempt entities and other entities established by the University; and (2) any commodity trading advice received by the Management Company, the Fund Z Directors or the Funds be provided only by registered commodity trading advisors or entities exempt or excluded from such registration. As Fund X and Fund Y had existing limitations on eligible participants similar to those mentioned above, DSIO did not impose additional requirements as it relates to those Funds.

The no-action letter is available here.

UK DEVELOPMENTS

FCA Publishes First Policy Statement on MiFID II Implementation

On March 31, the UK Financial Conduct Authority (FCA) published its first policy statement (PS17/5) on implementation of the revised Markets in Financial Instruments Directive (MiFID II) into FCA rules.

In PS17/5, the FCA highlights several areas of its previous MiFID II consultations on which it received the most feedback:

- Multilateral systems—in a previous consultation (CP15/43), the FCA consulted on draft perimeter guidance on "multilateral systems," where it expressed the view that the activities that will be regulated as a trading venue under MiFID II are broader than under the original Markets in Financial Instruments Directive (MiFID). The FCA states that all of its final perimeter guidance will be published in its next policy statement. On the specific issue of the meaning of "multilateral systems," the FCA states that the issue is being considered further by the European Securities and Markets Authority (ESMA) and the FCA will decide in light of any interpretative guidance from ESMA whether to provide its own perimeter guidance. Post-trade transparency deferrals—in CP15/43, the FCA consulted on allowing trading venues to use the post-trade deferrals, which

national competent authorities (NCAs) are allowed to provide under MiFID II. The FCA states that it will allow venues to use the maximum permitted deferrals. The FCA adds that NCAs' approach to the use of deferrals will not be harmonized across the European Union because of the national discretion provided in the Markets in Financial Instruments Regulation (MiFIR), but details of the regime in each member state will be published by ESMA.

- Transaction reporting and collective portfolio managers and pension funds—in CP15/43, the FCA proposed that transaction reporting rules would only apply to firms required to transaction report under MiFID II. This would mean removing its current requirement for collective portfolio managers (including authorized UK alternative investment fund managers) and pension funds to transaction report because it did not think the benefits of requiring them to report transactions on the MiFID II basis would outweigh the costs. This remains the FCA's view, and it will not require such firms to report transactions under MiFID II.
- Transaction reporting and third parties—respondents to CP15/43 raised questions about the use by investment firms of third parties to provide transaction reports to Approved Reporting Mechanisms (ARMs) and the use of ARMs by trading venues. These questions led to the FCA proposing guidance in consultation paper CP16/43, which will be included in in the FCA's final rules. The FCA also provided guidance that investment firms providing transaction reports to the FCA directly can use third parties to assist them, but must submit the reports to the FCA themselves.

The FCA has confirmed that issues consulted on in previous consultations that are not otherwise addressed in PS17/5 will be included in the FCA's second policy statement on MiFID II implementation, which it plans to publish at the end of June. The FCA plans to finalize all of its MiFID II implementation rules at that time.

PS17/5 is available here.

FCA Publishes Fifth Consultation on UK Implementation of MiFID II

On March 31, the Financial Conduct Authority (FCA) published its fifth consultation paper (CP17/8) on the implementation of the revised Markets in Financial Instruments Directive (MiFID II).

CP17/8 covers the following three areas:

- occupational pension scheme (OPS) firms;
- the decision procedure and penalties manual and enforcement guide; and
- consequential changes to the FCA Handbook and reporting financial instrument reference data and positions in commodity derivatives.

The deadline for comments on the proposals relating to OPS firms is June 23. The FCA requests comments on its other proposals by May 12.

CP17/8 is available here.

BREXIT/EU DEVELOPMENTS

MiFID II Delegated Acts Published in the *Official Journal*

On March 31, 28 delegated regulations (Delegated Regulations) supplementing the revised Market in Financial Instruments Directive (MiFID II)and Market in Financial Instruments Directive Regulation (MiFIR) were published in the *Official Journal of the European Union* (*OJ*).

The Delegated Regulations will become effective 20 days after their publication in the *OJ* (that is, April 20), and the majority will apply from January 3, 2018.

The text of Commission Delegated Directive (EU) 2017/593, which supplements MiFID II, with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits has also been published in the *OJ*. Member states are required to adopt and publish, by July 3, at the latest, their national

laws, regulations and administrative provisions necessary to comply with this Directive, and apply those provisions from January 3, 2018.

A full list of the Delegated Regulations published in the *OJ* and Directive can be found here and here.

ESMA Updates MiFID II Q&As on Market Structures, Commodity Derivatives and Transparency

On April 5, the European Securities and Markets Authority (ESMA) announced that it had published four new questions and answers (Q&A) providing guidance on implementation of the revised Market in Financial Instruments Directive (MiFID II) and Market in Financial Instruments Directive Regulation (MiFIR).

The new Q&As are included in updated versions of the following MiFID II Q&As:

- market structures topics (available here)—updated in relation to direct electronic access and algorithmic trading, multilateral and bilateral systems, organized trading facilities and systematic internalizers (SI), and riskless transactions.
- commodity derivatives topics (available here)—updated in relation to position limits.
- transparency topics (available here)—updated in relation to transparency generally and equity transparency.
- market data topics (available here)—updated in relation to reporting on the seniority of a bond, inflation indexed bonds and transaction reporting.

ESMA's Q&As clarify that the key characteristic of an SI's activity is to provide liquidity bilaterally to clients by trading at risk. However, SIs, which are functionally similar to a trading venue, would need to seek authorization. This would be the case for SIs meeting the following criteria:

- where arrangements between the SI and a client go beyond a bilateral interaction, and where the SI does not undertake risk facing activity;
- where the arrangements in place are used on a regular basis and qualify as a system or facility (as opposed to ad-hoc transactions); and
- where transactions arising from bringing together multiple third-party buying and selling interests are executed OTC, outside the rules of a trading venue.

ESMA highlights that the above does not prevent SIs from hedging the positions arising from the execution of client orders, as long as it does not lead to the SI executing non-risk-facing transactions and bringing together multiple third-party buying and selling interests. This is intended to cover the issue highlighted by ESMA in its letter to the European Commission on February 1 (further information in relation to this can be found in the *Corporate & Financial Weekly Digest* edition of February 17.)

ESMA Updates MiFID II/MiFIR Investor Protection Q&As

On April 4, the European Securities and Markets Authority (ESMA) added 10 new questions and answers (Q&A) to its Q&A document on the implementation of investor protection topics under the revised Market in Financial Instruments Directive (MiFID II)and Market in Financial Instruments Directive Regulation (MiFIR).

The Q&A provides clarification on the following topics:

- best execution;
- suitability;
- post-sale reporting;
- inducements (research);
- information on charges and costs; and
- underwriting and placement of a financial instrument.

The Q&A is available here.

European Parliament Adopts Resolution on Brexit Negotiations With UK

On April 5, the European Parliament (Parliament) announced that it has voted to adopt a resolution (Resolution) on negotiations with the United Kingdom, following its notification that it intends to withdraw from the European Union.

The Resolution sets out Parliament's key principles and conditions for its approval of the United Kingdom's withdrawal agreement. Any such agreement at the end of UK-EU negotiations will require the approval of the Parliament.

In the Resolution, as well as stating the importance of the protecting the rights of citizens during the negotiations, the need for negotiations to be made in good faith and that the United Kingdom negotiating trade agreements with third countries prior to its formal exit from the European Union would breach the EU Treaty, the Parliament makes several points relating to financial services, among other things. The Parliament:

- warns that any bilateral arrangement in the areas of EU competence between one or several remaining member states and the United Kingdom, which has not been agreed by the EU member states acting together, relating to issues included in the scope of the withdrawal agreement or impinging on the future relationship of the European Union with the United Kingdom, would be in contradiction with the Treaties. This would especially be the case for any bilateral agreement or regulatory or supervisory practice that would relate to any privileged access to the internal market for UK-based financial institutions;
- opposes any future agreement that contains piecemeal or sectoral provisions, including with respect to financial services, providing UK-based institutions with preferential access to the internal market or the customs union;
- underlines that, after its withdrawal, the United Kingdom will fall under the third-country regime provided for in EU legislation; and
- calls for an agreement to be reached as quickly as possible on the relocation of the European Banking Authority (currently located in London) and for the process of relocation to begin as soon as practicable.

More generally, the Parliament states that, should substantial progress be made towards a withdrawal agreement, talks could start on possible transitional arrangements for the UK's future relationship with the European Union. However, such arrangements must not last longer than three years, and an agreement on a future relationship between the European Union and the United Kingdom as a third country can only be concluded once the United Kingdom has withdrawn from the European Union.

Upon being formalized, the resolution will be submitted to the European Council, the Council of the European Union, the European Commission, the European Central Bank, EU national parliaments and the UK government.

A provisional copy of the Resolution 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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