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SEC/CORPORATE

SEC Adopts Revised Net Worth Standard for Accredited Investors

On December 21, the Securities and Exchange Commission adopted an amendment to the accredited investor net worth standard under Regulation D of the Securities Act of 1933, as amended, to exclude the value of an individual's primary residence from the $1 million net worth calculations used to determine whether such individual is an "accredited investor" qualified to invest in certain unregistered securities offerings. The amendment conforms the SEC's definition of an "accredited investor" to the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).

Under the revised net worth standard, indebtedness secured by the individual's primary residence, up to the estimated fair market value of the primary residence, is not treated as a liability in the net worth calculation, unless the borrowing occurs in the 60 days preceding the purchase of securities in the exempt offering and is not in connection with the acquisition of the primary residence, in which case the debt secured by the primary residence must be treated as a liability. This exception is intended to prevent manipulation of the net worth standard, by eliminating the ability of an individual to artificially inflate net worth under the new definition by borrowing against home equity shortly before participating in an exempt securities offering. In addition, any indebtedness secured by an individual's primary residence in excess of the property's estimated fair market value is treated as a liability under the revised net worth calculation.

In response to comments received by the SEC, the amendment contains a provision under which the former accredited investor net worth test will apply to follow-on investments in accordance with a right to purchase such securities, so long as (1) the right was held by the individual on July 20, 2010 (the day before enactment of the Dodd-Frank Act); (2) the individual qualified as an accredited investor on the basis of net worth at the time the right was acquired; and (3) the individual held securities of the issuer, other than the right, on July 20, 2010.

Beginning in 2014, and every four years thereafter, the Dodd-Frank Act requires the SEC to review the "accredited investor" definition in its entirety and to engage in further rulemaking to the extent deemed appropriate by the SEC.

Click here for the complete text of the SEC's adopting release.

SEC Issues Final Mine Safety Disclosure Rules Under Dodd-Frank Act

On December 21, the Securities and Exchange Commission adopted final rules (the Final Rules) implementing Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which included disclosure requirements for operators of coal or other mines.

The Final Rules amend the SEC periodic and current reporting forms, including Forms 8-K, 10-Q and 10-K, to incorporate the disclosure requirements of Section 1503 of the Dodd-Frank Act. These disclosure requirements apply to all registrants who operate, or have a subsidiary that operates, a coal or other mine that is regulated under the Federal Mine Safety and Health Act of 1977 (the Mine Act). The specific disclosure requirements of the Final Rules only apply to mines located in the United States because those are the only mines subject to the Mine Act. However, to the extent there are safety issues with a mine located outside of the United States that are material to the registrant, disclosure may be required under existing SEC disclosure requirements.

Quarterly and Annual Reports on Forms 10-Q and 10-K

The Final Rules require the registrant to provide a statement in its Forms 10-Q and 10-K to the effect that the registrant has matters to report pursuant to Section 1503(a) of the Dodd-Frank Act and that such disclosures are included as an exhibit to the report.

Pursuant to new Item 104 under Regulation S-K, the following information must be disclosed:

- For each mine of which the registrant, or a subsidiary of the registrant, is the operator, the following:
  - the total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Mine Act;
  - the total number of orders issued under Section 104(b) of the Mine Act;
  - the total number of citations and orders for unwarrantable failure of the operator to comply with the health and safety standards set forth in Section 104(d) of the Mine Act;
  - the total number of flagrant violations under Section 110(b)(2) of the Mine Act;
  - the total number of imminent danger orders issued under Section 107(a) of the Mine Act;
  - the total dollar value of proposed assessments of the Mine Safety and Health Administration (the MSHA) under the Mine Act; and
  - the total number of mining-related fatalities.
- A list of all coal or other mines of which the registrant, or a subsidiary of the registrant, is an operator that receives written notice from the MSHA of:
  - a pattern of violations of mandatory health or safety standards that could have significantly and substantially contributed to the cause and effect of a health or safety hazard under Section 104(e) of the Mine Act; or
  - the potential to have such a pattern.
- A description of any pending legal action before the Federal Mine Safety and Health Review Commission.

Periodic Reports on Form 8-K

The Final Rules also impose a Form 8-K filing obligation if the registrant or its subsidiary receives the following orders or notices:

- imminent danger order issued under Section 107(a) of the Mine Act;
- a written notice from the MSHA that the mine has a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act; or
- written notice from the MSHA that the mine has the potential to have such a pattern.

In Form 8-K, the registrant must disclose (1) the date of receipt of such order or notice; (2) the category of the order or notice; and (3) the name and location of the mine involved. While a Form 8-K must be filed within four business days of the reportable event, a late filing will not affect the registrant's eligibility to use the short-form S-3 registration statement.

The final rules are effective on January 27, 2012.

Click here to read the press release from the SEC.
Click here to read the final rules.

PRIVATE INVESTMENT FUNDS

Please see "SEC Adopts Revised Net Worth Standard for Accredited Investors" in **SEC/Corporate** above.

CFTC

Amendments to Effective Date for Swap Regulation

On December 19, 2011, the Commodity Futures Trading Commission issued a final order that extends the CFTC's prior grant of temporary relief from certain swap-related provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) that would otherwise have taken effect on July 16, 2011 (the Order). Specifically, the Order provides relief with respect to (1) self-effectuating provisions of the Dodd-Frank Act that reference terms requiring further definition, and (2) self-effectuating provisions of the Dodd-Frank Act that repealed existing statutory safe harbors for over-the-counter derivatives transactions. The latest "sunset" date for the Order is July 16, 2012.

In response to comments received on the draft order proposed in October 2011, the CFTC has clarified that the Order does not expand the scope of transactions eligible to be transacted on an exempt commercial market (ECM) or electronic board of trade (EBOT) to include transactions in agricultural commodities. In addition, the Order provides that the relief granted thereby will not expire prior to July 16, 2012 with respect to transactions that are (i) executed on an ECM or EBOT that is operating under, and in full compliance with the conditions of, the ECM/EBOT "Grandfather Order" previously issued by the CFTC in September 2010, and (ii) cleared by a registered derivatives clearing organization.

The CFTC's press release regarding the Order, which includes links to the Order and an accompanying staff no-action letter, is available here.

Approval of Final Rules on Swap Data Recordkeeping and Reporting Requirements

On December 20, 2011, the Commodity Futures Trading Commission approved final rules on swap data recordkeeping and reporting requirements for swap data repositories (SDRs), derivatives clearing organizations (DCOs), designated contract markets (DCMs), swap execution facilities (SEFs), swap dealers (SDs), major swap participants (MSPs), and swap counterparties that are neither swap dealers nor major swap participants (non-SD/MSP counterparties).

Recordkeeping
Under the final rules, DCOs, DCMs, SEFs, SDs, MSPs, and non-SD/MSP counterparties must keep records throughout the existence of a swap and for five years following the termination of the swap. SDRs will be required to keep records throughout the existence of the swap and for fifteen years following termination of the swap.

Reporting
The final rules require electronic reporting to an SDR of specified swap data at the time of the creation of the swap (swap creation data), as well as over the life of the swap until its final termination or expiration (swap continuation data).

Swap creation data includes information regarding all primary economic terms and confirmations for the applicable swap. If a swap is executed on a SEF or DCM, all required creation data is to be reported by the SEF or DCM. For all other swaps, the required data will be reported by either the applicable DCO (for swaps accepted for clearing within the applicable reporting deadline) or the reporting counterparty.

Swap continuation data includes all changes to primary economic terms and all valuation data. Continuation data for cleared swaps will be reported by the DCO, but valuation data will be required to be reported by SD and MSP reporting counterparties. Continuation data for uncleared swaps will be reported by the reporting counterparty.

Compliance Phase-In
The final rules will be phased in by asset class and counterparty type. First, the compliance date for SEFs, DCMs, DCOs, SDs, MSPs, and SDRs with respect to credit swaps and interest rate swaps will be the later of July 16, 2012 or 60 days after adoption by the CFTC and by publication in the Federal Register of the definitions of "swap," "swap dealer," and "major swap participant" (the Initial Compliance Date). The compliance date for such entities and counterparties with respect to equity swaps, foreign exchange transactions, and other commodity swaps is 90 calendar days after the Initial Compliance Date established for credit and interest rate swaps. Finally, the date on which non-

SD/MSP counterparties must comply with respect to swaps in all asset classes is 180 calendar days after the Initial Compliance Date.

A copy of the final rules is available here. The final rules will be effective 60 days after publication in the Federal Register.

Approval of Final Rules Regarding Real-Time Public Reporting of Swap Transaction Data

On December 20, 2011, the Commodity Futures Trading Commission approved final rules governing real-time public reporting of swap transaction data. The final rules cover all interest rate, credit, equity, foreign exchange and "other commodity" swaps, regardless of the method of execution or whether such swaps are cleared.

Although the final rules are substantially similar to the proposed rules, there are a few notable revisions. Among other things, the final rules provide a different definition for "publicly reportable swap transaction" and provide time delays for the public dissemination of swap transaction and pricing data. Further, all swap transaction and pricing data must be reported to an SDR, regardless of whether the swap is executed on a regulated trading platform or bilaterally. Because the proposed recordkeeping requirements are duplicative of other proposed CFTC regulations, the final rules remove all other recordkeeping requirements except for recordkeeping requirements relating to timestamps. Lastly, the final rules do not require the public dissemination of publicly reportable swap transaction data in the "other commodity" asset class if those transactions are not executed on a SEF or DCM and listed in Appendix B to the CFTC's Part 43 rules (which is expected to be a subject of a future CFTC rulemaking).

"Publicly reportable swap transactions" include (1) any swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or (2) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. If a publicly reportable swap transaction is executed on or pursuant to the rules of a SEF or DCM, the SEF or DCM is responsible for reporting the swap transaction and pricing data to the appropriate SDR for public dissemination. In other cases, the parties to the transaction are required to report to the appropriate SDR as follows (unless the parties agree otherwise prior to execution):

- If only one party is a SD or MSP, the SD or MSP must report.
- If one party is a SD and the other party is a MSP, the SD must report.
- In all other situations, the parties must designate which party should report.

Generally, swap transaction and pricing data must be reported to a SDR as soon "as technologically practicable" after execution; that data must, in turn, be publicly disseminated by the SDR "as soon as technologically practicable" after receipt (each as further described in the CFTC rules).

A copy of the final rules is available here. The final rules will be effective 60 days after publication in the Federal Register.

CFTC to Hold Open Meeting to Consider Final Rules, a Proposed Rule, and an Order

The Commodity Futures Trading Commission will hold a public meeting on January 11, at 9:30 a.m. (Eastern Time) to consider the following matters:

- Final Rule: Registration of Swap Dealers and Major Swap Participants
- Final Rule: Protection of Cleared Swaps Customer Contracts and Collateral: Conforming Amendments to the Commodity Broker Bankruptcy Provisions
- Final Rule: Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties
- Proposed Rule: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds
- Delegation of Authority Order: Performance of Registration Functions by National Futures Association with Respect to Swap Dealers and Major Swap Participants.

Further information regarding the open meeting is available here.

CFTC Rejects Motion for Stay of Position Limits Rules

On January 3, the Commodity Futures Trading Commission issued an order rejecting a motion filed by the International Swaps and Derivatives Association (ISDA) and the Securities Industry and Financial Markets Association (SIFMA) requesting that the CFTC stay the effective date of its final and interim final position limit rules pending resolution of the judicial challenge filed by ISDA and SIFMA on December 2, 2011. The CFTC rejected the motion by a vote of 3 to 2. A copy of the CFTC order is available here.

On January 4, the CFTC filed a motion requesting the U.S. Court of Appeals for the District of Columbia Circuit dismiss for lack of subject matter jurisdiction the "petition for review" that was filed on December 2, 2011 by ISDA and SIFMA, seeking judicial review of the CFTC's recently promulgated position limit rules. In addition, the CFTC also filed a motion to hold the judicial proceedings in abeyance pending the court's resolution of the motion to dismiss.

LITIGATION

Delaware Standing Requirements Do Not Apply to Derivative Suit Involving Spanish Corporation's Delaware Subsidiary

The plaintiff, Sagarra Inversiones, S.L. (Sagarra), the minority shareholder in Corporación Uniland S.A. (Uniland), a Spanish Corporation, sought to rescind the sale to Uniland of Giant Cement Holdings, Inc. (Giant), a company controlled by the defendant, Cementos Portland Valderrivas (CPV), the majority shareholder of Uniland. Sagarra asserted that the price paid for Giant was inflated and that CPV caused Uniland to acquire Giant solely to further its own interests, in breach of its fiduciary duties to Uniland. To challenge the sale, Sagarra brought a derivative action in Delaware on behalf of Uniland Acquisition Corp. (UAC), a Delaware subsidiary of Uniland that was created to facilitate the sale. The Delaware Court of Chancery held that Sagarra did not have standing to challenge the sale because it had not satisfied the demand requirements of Spanish law.

Sagarra appealed to the Delaware Supreme Court, arguing that because the transaction was effected though a Delaware subsidiary, Delaware law should apply to determine derivative standing and, even if Delaware law would not normally apply, public policy required its application in order to avoid a Delaware corporation being used to facilitate an abusive transaction. The Supreme Court rejected both arguments, ruling that even though multi-level derivative suits are permissible, because Sagarra only held stock in Uniland, in order to proceed with a derivative suit, Sagarra must satisfy Spain's demand requirements, which it failed to do.

In particular, the Court held that the internal affairs doctrine required that the law of the state (or in this case, the country) of incorporation of the entity in which Sagarra held shares was applicable to its claims. Because Sagarra failed to make a pre-suit demand to convene a shareholders' meeting on Uniland's board as required under Spanish law, it lacked standing to proceed with its derivative claims. In addition, the Court rejected Sagarra's request to disregard the internal affairs doctrine and apply Delaware law for public policy reasons. In doing so, the Court pointed out that whatever policy arguments there were in Sagarra's favor were trumped by the fact that Sagarra only held shares in a Spanish corporation. As a result, Delaware could not, as a matter of comity, apply its own standing rules in place of Spain's to Sagarra's claims.

Sagarra Inversiones S.L. v. Cementos Portland Valderrivas, S.A., et. al., No. 425, 2011, C.A. No. 6179 (Del. Dec. 28, 2011).

Federal District Court Stays State Court Discovery Pursuant To SLUSA

The plaintiff filed a class action suit in the U.S. District Court for the Southern District of California, alleging that the defendants omitted material facts from a proxy statement, breaching their fiduciary duties and violating the Securities Exchange Act of 1934. In the District Court, defendants moved to stay discovery in three related state court proceedings until a motion to dismiss the federal suit was resolved. The defendants argued that the Court should exercise its power under the Securities Litigation Uniform Standards Act, which permits a district court to stay discovery proceedings in state court in aid of the district court's jurisdiction.

The court held that a stay of discovery was warranted finding that even though based solely on state law claims, the state court proceedings concerned nearly identical factual allegations to those before it. As a result, the court determined that a stay would reduce the chance of duplicative judicial effort and excessive burden on the defendants. The court was also concerned that the plaintiff in the federal case might receive the benefit of information revealed in state court discovery through "public channels" despite the presence of a protective order from the state court judge that prohibited the sharing of that information. Therefore, the court granted the defendants' motion and granted the stay of discovery.

Good v. De Lange, Civ. No. 11cv2826 JAH (BGS), 2011 WL 6888649 (S.D. Cal. Dec. 29, 2011).

BANKING

Obama Appoints Cordray as CFPB Head

On January 4, President Obama appointed former Ohio Attorney General Richard Cordray as Director of the Consumer Financial Protection Bureau (the CFPB). The appointment was made without Senate approval while "in recess," even though the Senate had not been in recess for more than three business days, the long-accepted standard of what constitutes a recess. Republican senators, who had vowed to block the confirmation of any CFPB director unless the bureau's structure and funding are changed, had been holding pro forma sessions to prevent such an appointment. It is expected that the President's action will spur a legal challenge based on the President's alleged disregard of the "advice and consent" requirements for his nominees. American Bankers Association president, Frank Keating, was critical of the appointment, stating, "The controversial nature of [the] recess appointment reinforces the banking industry's concerns about the bureau's structure and lack of accountability. It puts the bureau's future actions in constitutional jeopardy, threatening its work, complicating compliance efforts of banks, and further undermining the entity's authority and credibility."

To read the press release, click here.

Agencies Extend Comment Period on Volcker Rule Proposal

On December 23, 2011, four federal agencies, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission, extended until February 13, the comment period on a proposal to implement the so-called Volcker Rule of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).

The Dodd-Frank Act requires regulators to implement certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund. The comment period was extended as part of a coordinated interagency effort to allow interested persons more time to analyze the issues and prepare their comments. Originally, comments were due by January 13.

For more information, click here.

FinCEN Delays New Currency Transaction Report and Suspicious Activity Report Deadlines

The Financial Crimes Enforcement Network (FinCEN) announced on December 20, 2011 that the deadline for financial institutions to utilize FinCEN's new Currency Transaction Report (CTR) and Suspicious Activity Report (SAR) for reporting purposes will be extended to March 31, 2013.

FinCEN is extending the deadline partly in response to industry concern about having sufficient time to transition to the new reports, including any necessary changes to their internal processes and/or IT systems. FinCEN proposed that the new reports be implemented by June 30, 2012, the same date proposed for ending the paper filing option for FinCEN forms. FinCEN expects this extended timeframe for incorporating the new CTR and SAR to ease the industry's transition to these new reports. Hence, for a period of over a year, financial institutions will be able to file either the legacy forms or the new reports.

For more information, click here.

Banking Agencies Release Annual CRA Asset-Size Threshold Adjustments

On December 19, 2011, the federal bank regulatory agencies announced the annual adjustment to the asset-size thresholds used to define small bank, small savings association, intermediate small bank, and intermediate small savings association under the Community Reinvestment Act (CRA) regulations. The annual adjustments are required by the CRA rules. Financial institutions are evaluated under different CRA examinations procedures based upon their asset-size classification.

Those meeting the small and intermediate small asset-size threshold are not subjected to the reporting requirements applicable to large banks.

Annual adjustments to these asset-size thresholds are based on the change in the average of the Consumer Price Index (CPI) for urban wage earners and clerical workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million.

As a result of the 3.43 percent increase in the CPI index for the period ending in November 2011, the definitions of small and intermediate small institutions for CRA examinations will change as follows:

- "Small bank" or "small savings association" means an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion.

- "Intermediate small bank" or "intermediate small savings association" means a small bank or savings association with assets of at least $290 million as of December 31 of both of the prior two calendar years, and less than $1.160 billion as of December 31 of either of the prior two calendar years.

These asset-size threshold adjustments became effective on January 1.

Agencies Seek to Modify Market Risk Capital Rules

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (the Board), and Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) are seeking comment on an amendment to the notice of proposed rulemaking (NPR) to modify the agencies' market risk capital rules, published in the Federal Register on January 11, 2011 (January 2011 NPR). The January 2011 NPR did not include the methodologies adopted by the Basel Committee on Banking Supervision (BCBS) for calculating the standard specific risk capital requirements for certain debt and securitization positions, because the BCBS methodologies generally rely on credit ratings. Under section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, all federal agencies must remove references to and requirements of reliance on credit ratings from their regulations and replace them with appropriate alternatives for evaluating creditworthiness. In this NPR, the agencies are proposing to incorporate into the proposed market risk capital rules certain alternative methodologies for calculating specific risk capital requirements for debt and securitization positions that do not rely on credit ratings. The proposed creditworthiness standards include the use of country risk classifications published by the Organization for Economic Cooperation and Development for sovereign positions; company-specific data related to leverage, cash flow, and the volatility of the company's monthly stock market returns for corporate debt positions; and a supervisory formula for securitization positions.

The agencies expect to finalize this proposal, together with the January 2011 NPR, in the coming months after receipt and consideration of comments.

For more information, click here

EXECUTIVE COMPENSATION AND ERISA

IRS Updates Guidance on Reporting Employer-Sponsored Healthcare Coverage

In the December 16, 2011, edition of *Corporate and Financial Weekly Digest*, we reported on Internal Revenue Service guidance regarding informational reporting to employees, via form W-2, of the cost of their employer-sponsored health coverage.

Earlier this week, the IRS updated that guidance by issuing IRS Notice 2012-9 (the Notice), which supersedes the IRS guidance discussed in our prior article mentioned above.

The Notice, similar to the previous guidance, emphasizes that the reporting to employees is for their information only. It is intended to inform them of the cost of health care coverage provided by their employer and does not cause excludable employer-provided health care coverage to be taxable.

The Notice is generally applicable beginning with 2012 Forms W-2 (i.e., forms required for 2012 that employers are generally required to give employees by the end of January 2013). Employers may rely upon the guidance provided in the Notice until further guidance is issued.

The Notice contains 39 Q&As, several of which make changes to the previous guidance or which address new topics. Among other points of interest:

- Employers that are required to file fewer than 250 2011 Forms W-2 will not be subject to the reporting requirement for 2012 Forms W-2.

- The reporting requirement does not apply to coverage under a healthcare flexible spending account if contributions occur only through employee salary reduction elections.

- The reporting requirement does not apply to payments or reimbursements of health insurance premiums for a 2% shareholder-employee of an S-corporation who is required to include the premium payments in gross income.

- Employers are not required to report the cost of coverage under an employee assistance program (EAP), wellness program or on-site medical clinic if the employer does not charge a premium with respect to that type of coverage when it is provided under COBRA.

IRS Notice 2012-9 can be found here.

UK DEVELOPMENTS

AIM Imposes Record Fine on NOMAD

On December 21, 2011, the London Stock Exchange announced that the disciplinary committee of its Alternative Investment Market (AIM) had imposed a fine of £400,000 (approximately $620,000) and a public censure on Seymour Pierce, a nominated advisor (NOMAD) for breaches of the AIM rules applicable to NOMADs.

AIM said that Seymour Pierce had failed to meet the standards required of a nominated adviser in relation to two client companies. In one case it failed to provide proper advice and guidance to its AIM listed client in relation to the company's obligation to inform the market promptly of material changes in its financial situation. In the other case it failed to carry out proper due diligence on a company planning to list on AIM.

Nilam Statham, Head of AIM Regulation said: "The role of the NOMAD is central to AIM's regulatory framework. NOMADs have key responsibilities, both in terms of assessing the suitability of companies for the public market and in properly advising and guiding companies once admitted to AIM."

Half of the fine is payable immediately, half is suspended and will be payable if at any time in the next 24 months Seymour Pierce's performance falls materially below the standard required of it as a NOMAD.

For more information, click here.

EU DEVELOPMENTS

ESMA Publishes Automated Trading Guidelines

On December 22, 2011, the European Securities and Markets Association (ESMA) published its final Guidelines on systems and controls in an automated trading environment. These were based on a consultation that ended in October 2011.

The Guidelines affect firms:

- authorized under the EU Markets in Financial Instruments Directive (MiFID) and non-MiFID firms who access markets through direct market access (DMA) or sponsored access (SA) or as direct members (including those trading for their own account) and certain other market participants, including out-sourcing companies which provide services to the market participants affected, and

- operating "electronic systems," including electronic systems used to send trading orders to platforms, trading algorithms and smart orders routers only from the perspective of the risks involved in order entry.

ESMA stated that it was happy with its definition of "trading algorithm" (which is broad) and that it considers that its approach is necessary to avoid regulatory arbitrage. ESMA has revised its descriptions of what constitutes market abuse. ESMA has noted that the review of MiFID (the MiFID II review) is on-going but considers that it is appropriate to introduce the Guidelines now, although it is made clear that the review of regulation surrounding algorithmic trading is ongoing and does not stop with the Guidelines – in particular, work will continue on conflicts of interest between market operators and market participants and micro-structural issues not covered by the Guidelines.

ESMA states that compliance/regulatory staff at firms should be responsible for providing clarity on the firm's regulatory obligations and introduce policies and procedures that seek to ensure the use of trading systems comply with the firm's regulatory obligations and any failures to comply are detected.

ESMA has amended the Guidelines from the draft published for consultation in relation to organizational requirements for trading platforms to, among other things, highlight that measures to consider include message traffic rather than order flow, set out in more detail the due diligence to be undertaken by trading platforms on market participants and more clarity on the circuit-breaker obligations and volatility interruptions protections and information to be provided to the UK Financial Services Authority (FSA) and other competent authorities regarding significant risks that may affect the operation of a fair and orderly market.

The Guidelines state that trading platforms should consider allotting individual trading codes to clients accessing markets through SA/DMA.

The Guidelines will become effective one month after publication by the relevant competent authority (in the UK, the FSA), with a long-stop date of May 1, 2012. The FSA has indicated that it will broadly implement the Guidelines in the form published by ESMA.

The full Guidelines may be found here.

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