

SEC/CORPORATE

SEC Expands Nonpublic Review of Draft Registration Statements

On June 29, the Division of Corporation Finance (Division) of the Securities and Exchange Commission announced that, beginning on July 10, the Division will permit all issuers to confidentially submit to the Division, for nonpublic review, draft registration statements in connection with initial public offerings (IPOs) and in certain other cases. This was previously only available to emerging growth companies (EGCs) under the Jumpstart Our Business Startups Act for their IPOs. Specifically, the Division will review on a nonpublic basis:

- a draft initial registration statement (and related revisions) under the Securities Act of 1933, as amended (Securities Act), in connection with an IPO, so long as the issuer publicly files its registration statement and nonpublic draft submissions at least 15 days prior to any road show (or, in the absence of a road show, at least 15 days prior to the requested effective date of the registration statement);
- a draft registration statement for the initial registration of a class of securities under Section 12(b) of the US Securities Exchange Act of 1934, as amended (Exchange Act), so long as the issuer publicly files its registration statement and nonpublic draft submissions at least 15 days prior to the expected effective date of the registration statement for its listing on a national securities exchange; and
- draft registration statements submitted within 12 months of the effective date of (1) an issuer's initial registration statement under the Securities Act or (2) an issuer's Exchange Act registration statement under Section 12(b), in each case, so long as the issuer makes such registration statement and nonpublic draft submission publicly available on EDGAR at least 48 hours prior to any requested effective time and date. In such case, the Division will only review the initial submission, and an issuer should respond to comments from the staff of the SEC in a public filing (not with a revised draft registration statement). Any subsequent review will be conducted by the Division in accordance with its normal procedures.

The Division noted that a foreign private issuer (including a Canadian issuer filing under the Multijurisdictional Disclosure System) may elect to proceed pursuant to the procedures (1) outlined in its announcement and described above, (2) available to EGCs (if the issuer otherwise qualifies as an EGC) or (3) outlined in the SEC's prior statement on nonpublic submissions from foreign private issuers (which is accessible [here](#)).

The Division indicated that it will not delay processing of a nonpublic draft registration statement if an issuer omits financial information that the issuer reasonably believes will not be required at the time the registration statement is publicly filed (similar to the relief granted to EGCs under the Fixing America's Surface Transportation Act).

The Division also issued FAQs with respect to its expanded nonpublic review procedures, which, among other things, provide the following:

- an issuer may request confidential treatment of its draft registration statement and, in such case, should include a legend at the top of each page of the draft registration statement indicating that it has requested confidential treatment pursuant to Rule 83;

- the staff of the SEC will publicly release its comment letters and issuer responses to comment letters on nonpublic draft submissions on EDGAR no less than 20 business days after the registration statement is effective;
- an issuer may not use the expedited nonpublic review process to submit a draft post-effective amendment to an effective registration statement;
- an issuer of asset-backed securities is not permitted to utilize the SEC's expanded nonpublic review process;
- an issuer that is not an EGC may not use test-the-waters communications with qualified institutional buyers and institutional accredited investors pursuant to Securities Act Section 5(d);
- an issuer that submits a draft registration statement for nonpublic review may not make a public communication about its offering in reliance on the safe harbor provided by Rule 134 under the Securities Act because the safe harbor is not available until an issuer files a registration statement that satisfies the requirements of Rule 134; and
- an issuer that submits a draft registration statement for nonpublic review may make a public communication about its offering in reliance on Rule 135 under the Securities Act, but such a public statement may impact the SEC's ability to withhold the draft registration statement in response to a Freedom of Information Act request.

The full text of the announcement is available [here](#), and the FAQs are available [here](#).

DERIVATIVES

See "CFTC Issues Conditional No-Action Relief From Swap Data Repository Report," "NFA Publishes Information For CTAs Using Third-Party Recordkeeping" and "CFTC Grants SEF Registration to LedgerX" in the CFTC section.

CFTC

CFTC Issues Conditional No-Action Relief From Swap Data Repository Reporting

On June 30, the Commodity Futures Trading Commission's Division of Market Oversight and Division of Clearing and Risk (Divisions) provided conditional no-action relief to Cantor Futures Exchange, L.P. (CX), Cantor Clearinghouse, L.P. (CC) and the North American Derivatives Exchange, Inc. (Nadex) from reporting certain information to a swap data repository (SDR), subject to certain conditions. Specifically, CX, CC and its participants are not required to report to an SDR data associated with binary option transactions executed on or subject to the rules of CX and cleared by CC. Similarly, Nadex and its participants are not required to report to an SDR data with respect to binary options and spread contracts traded on or pursuant to the rules of, and cleared by, Nadex. The no-action relief also exempts CX, CC and Nadex from retaining records related to such transactions required by Part 45 of the CFTC's regulations.

The Divisions provided their relief in two separate letters. The CFTC Staff Letter 17-31 is available [here](#). The CFTC Staff Letter 17-32 is available [here](#).

NFA Publishes Information For CTAs Using Third-Party Recordkeeping

On June 30, the National Futures Association (NFA) published Notice to Members I-17-11, establishing an electronic process for a registered commodity trading advisor (CTA) to notify the NFA where the CTA uses a third-party recordkeeper. This notice is effected through the NFA's electronic Exemptions System by claiming a "4.7(c)(2)" or "4.33" exemption, as applicable, and identifying the relevant third-party recordkeeper(s) used by the CTA.

The Commodity Futures Trading Commission Division of Swap Dealer and Intermediary Oversight (DSIO) previously provided relief to registered CTAs from the CFTC regulations, requiring books and records to be kept at the CTA's main business office. As provided in the CFTC Exemptive Letter No. 17-24, a CTA may use a third-party recordkeeper as long as the CTA files a notice of claim with the DSIO containing the representations set forth in the exemptive letter. More information regarding Letter No. 17-24 is available in the April 28 issue of the [Corporate and Financial Weekly Digest](#).

The NFA is now requiring notice of the third-party recordkeeping through the NFA's Exemptions System. Detailed instructions for the Exemptions System are available in [Notice I-17-11](#).

CFTC Grants SEF Registration to LedgerX

The Commodity Futures Trading Commission has issued an order of registration as a swap execution facility (SEF) to LedgerX LLC. As an SEF, LedgerX intends to list options on Bitcoin and other swaps based on digital currencies.

As noted in the order, LedgerX additionally has applied for registration as a derivatives clearing organization.

More information is available [here](#).

UK DEVELOPMENTS

FCA Publishes Second Policy Statement on MiFID II Implementation

On July 3, the UK Financial Conduct Authority (FCA) published its second policy statement (PS17/14) on implementation of the revised Markets in Financial Instruments Directive (MiFID II) into FCA rules. PS17/14 follows the first policy statement on MiFID II published in March 2017 (for further information see the April 7 [Corporate Financial Weekly Digest](#)).

PS17/14 covers feedback received from a number of the FCA's previous consultation papers in relation to MiFID II and provides draft amendments to the FCA's rules. Topics covered include a number of different conduct-related areas, highlights of which are:

- Inducements in relation to research. The FCA will extend the scope of MiFID II rules on inducements to apply the provisions to collective portfolio managers (i.e., Undertakings for Collective Investment in Transferable Securities (UCITS) managers and alternative investment fund managers (AIFMS)), and not only to those investment firms that are subject to MiFID II. In response to consultation feedback, the FCA amended its guidance on how quickly research charge deductions should be passed into a research payment account (RPA) to allow greater flexibility. The FCA also clarified that it does not intend to require investment managers to have a single RPA per research budget, and offers concessions on trial periods for research and the issue of whether *ex-ante* pricing of research is required.
- Client categorization. The FCA is revising its proposals for criteria for local authorities, opting up to professional client status. The revised criteria have a lower threshold for the size of portfolio that a local authority has to have, and makes it easier for local authorities investing on behalf of a local government pension scheme pension fund to opt-up to professional client status, if they wish.
- Best execution. The FCA will not apply the changes in the best execution rules in MiFID II to AIFMs. The FCA will, however, apply the MiFID II best execution standards to firms authorized under the UCITS Directive.
- Taping. The FCA will remove the current partial exemption in its taping rules for discretionary investment managers and make some modifications to the way the rule applies.

Alongside PS17/14, the FCA has also published its sixth consultation paper (CP17/19) on the implementation of MiFID II. CP17/19 covers small issues the FCA has not previously consulted on, such as the Financial Services Compensation Scheme cover for trading venues. The consultation period for CP17/19 closes on September 7, and the FCA aims to finalize the necessary rules changes by November 2017.

PS17/14 and CP17/19 are available [here](#) and [here](#).

EU DEVELOPMENTS

ESMA Publishes Opinion on Ancillary Activity Calculations

On June 30, the European Securities and Markets Authority (ESMA) published an opinion providing guidance on the ancillary activity market size calculation for the purposes of the exemption to the revised Markets in Financial Instruments Directive (MiFID II), available under Article 2(1)(j) of the same.

MiFID II will not apply to any person that can qualify for the exemption available under Article 2(1)(j) (Ancillary Exemption). The Ancillary Exemption provides that certain persons dealing with their own account or providing investment services relating to commodity derivatives will not be subject to MiFID II, if such activity is “ancillary” to their main business activity (provided that certain conditions are met). Market participants are therefore required to measure their own activity against total market sizes in commodity derivatives to determine if the exemption applies. Those calculations are to be based on historical data. Market participants exceeding a certain market share are required to apply for an authorization as an investment firm, and those below the market share and relying on the exemption to MiFID II are required to notify their national regulator.

Due to a lack of publically available records of on- and off-venue transactions in commodity derivatives, ESMA published the opinion with the intention of helping firms to determine the market sizes. ESMA collected data for the calculation of the on-venue market size from the trading venues located in the European Economic Area, which it provides for the total year of 2015 and for the second half of 2016. In addition, ESMA also looked at the size of the over-the-counter market for the second half of 2016 based on data from trade repositories. The opinion contains a table setting out the estimated value of market sizes in relevant commodities.

The opinion was updated on July 6, to correct a typing error, and is available [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

For more information, contact:

SEC/CORPORATE

Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com

UK DEVELOPMENTS

Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@kattenlaw.co.uk

.....
* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.
©2017 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at kattenlaw.com/disclaimer.