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SEC / CORPORATE

Dodd-Frank Legislation Directs SEC to Amend Rule 701 and Regulation A+

On May 24, President Trump signed into law the Economic Growth, Regulatory Relief and Consumer Protection Act. While the Act primarily serves to relieve smaller financial institutions from the burden of complying with certain requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Act also directs the Securities and Exchange Commission to adopt amendments to Rule 701 under the Securities Act of 1933 (Securities Act) and so-called “Regulation A+,” as summarized below.

Rule 701 generally provides an exemption from the registration requirement imposed by the Securities Act for issuances of securities by a company that is not subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act) to its employees, directors and consultants under compensatory benefit plans. Pursuant to Section (e) of Rule 701, if the aggregate sales price or amount of securities sold by an issuer to investors in reliance on Rule 701 during any 12-month period exceeds $5 million, the issuer is required to deliver to investors an additional disclosure, including specified financial statements and risk factors. Section 507 of the Act directs the SEC to, within 60 days after the enactment of the Act, adopt an amendment to increase the threshold for providing enhanced disclosure from $5 million to $10 million (subject to inflation adjustment every five years).

Regulation A+ provides an exemption from the registration requirement imposed by the Securities Act for offerings of securities in qualifying smaller public offerings by private companies, as summarized in the March 27, 2015 edition of *Corporate and Financial Weekly Digest*. An issuer in a so-called “Tier 2” offering under Regulation A+ (involving an aggregate offering of up to $50 million in any 12-month period) is required under Rule 257 of Regulation A+ to file with the SEC certain periodic and current reports. Section 508 of the Act directs the SEC to make Regulation A+ available to companies that are already subject to SEC reporting requirements under Sections 13 or 15(d) of the Exchange Act and, for Tier 2 offerings, to deem an issuer that has complied with SEC reporting requirements to also have complied with the reporting requirements under Rule 257 of Regulation A+.

Currently, reporting companies with securities that are not listed on a national exchange (for example, issuers with securities traded in the over-the-counter markets) are required to comply with state blue sky securities registration requirements in connection with offerings registered under the Securities Act (except to the extent state specific exemptions are available), whereas the Securities Act preempts such requirements in the case of offerings of securities listed on a national exchange (as well as senior securities). Regulation A+ provides that securities offered in Tier 2 offerings are entitled to state blue sky preemption; the amendment of Regulation A+ as mandated by Section 508 of the Act would allow those Exchange Act reporting companies without securities listed on a national exchange to publicly offer securities in Tier 2 offerings and avail themselves of this state blue sky preemption.

The complete text of the Act is available here.

DERIVATIVES

See "CFTC Announces Open Commission Meeting on June 4" in the CFTC section.

CFTC

CFTC Announces Open Commission Meeting on June 4

The Commodity Futures Trading Commission will hold a meeting on June 4 at 9:30 a.m. (ET), which will be open to the public. The meeting will cover the following topics:

- Final Rule: Indemnification (Amendments to the Swap Data Access Provisions of Part 49 and Certain Other Matters);
- Proposed Rule: Volcker Rule (Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds);
- Proposed Rule: De Minimis Exception (Amendments to Swap Dealer Registration De Minimis Exception); and
- Establishment of Subcommittees for the CFTC Technology Advisory Committee.

The meeting will take place at the CFTC headquarters, and a live webcast will be offered. More information is available here.

BANKING

Economic Growth, Regulatory Relief and Consumer Protection Act

On May 24, Public Law No. 115-74 was signed by President Trump. The law, also known as the Economic Growth, Regulatory Relief and Consumer Protection Act, has six parts:

- Title I—Improving Consumer Access to Mortgage Credit
- Title II—Regulatory Relief and Protecting Consumer Access to Credit
- Tile III—Protections for Veterans, Consumers and Homeowners
- Title IV—Tailoring Regulations for Certain Bank Holding Companies
- Title V—Encouraging Capital Formation
- Title VI—Protections for Student Borrowers

The law deals with many issues, but its most publicized provisions are ones that reduce some of the regulatory requirements that have been imposed on banks since the credit crisis. In particular, the law (1) exempts from the Volcker Rule banks with total assets of less than $10 billion (provided trading assets and liabilities comprise not more than 5 percent of total assets); (2) eases Volcker Rule name sharing restrictions; (3) increases the asset threshold for the application of certain enhanced prudential standards to certain bank holding companies and nonbank financial companies from $50 billion to $250 billion; (4) increases the asset threshold at which company-run stress tests are required from $10 billion to $250 billion; and (5) directs the Securities and Exchange Commission to deliver a report to Congress on the risks and benefits of algorithmic trading in capital markets.

The text of the new law is available here.

Regulators Propose Changes to Volcker Rule

On May 30, the five Federal regulators responsible for the Volcker Rule approved the publication for comment of numerous proposed changes to the rule. The notice of proposed rulemaking, entitled Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, was jointly developed by the Federal Reserve Board, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission. The proposed changes are intended to streamline the rule by eliminating or modifying requirements that are not necessary to effectively implement the statute, without diminishing the safety and soundness of banking entities.

As summarized by the Federal Reserve Board, the proposed changes would:

- Tailor the rule's compliance requirements based on the size of a firm's trading assets and liabilities, with the most stringent requirements applied to firms with the most trading activity;

- Provide more clarity by revising the definition of "trading account" in the rule, in part by relying on commonly used accounting definitions;

- Clarify that firms that trade within appropriately developed internal risk limits are engaged in permissible market making or underwriting activity;

- Streamline the criteria that apply when a banking entity seeks to rely on the hedging exemption from the proprietary trading prohibition;

- Limit the impact of the Volcker Rule on the foreign activity of foreign banks; and

- Simplify the trading activity information that banking entities are required to provide to the agencies.

The comment period will be open for 60 days after publication of the notice in the Federal register.

The text of the 373-page notice is available here.

EU DEVELOPMENTS

ECON Publishes Report on EMIR 2.2

On May 25, the European Parliament's Economic and Monetary Affairs Committee (ECON) published a report on the proposal for a regulation amending the European Securities and Markets Authority (ESMA) Regulation, and the European Market Infrastructure Regulation (EMIR) in relation to the authorization of central counterparties (CCPs) and recognition of third-country CCPs (EMIR 2.2).

EMIR 2.2 would allow ESMA to classify third-country CCPs based on their level of systemic importance, and impose more stringent measures on those deemed "substantially systemically important"—extending to a requirement that such CCPs can only provide services in the European Union if they are established and authorized within the European Union. The European Commission first published its proposal for EMIR 2.2 in June 2017 (see the June 16, 2017 edition of *Corporate & Financial Weekly Digest* for further details).

Three-way negotiations between the European Parliament, European Commission and Council of the European Union will follow, once the member states (which comprise the Commission) agree their position.

ECON's report is available here.

ECON's press release of May 16, 2018, following adoption of the report, is available here.

ESMA Guidelines on EMIR Anti-Procyclicality Margin Measures for CCPs

On May 28, the European Securities and Markets Authority (ESMA) published its final report with guidelines on the European Market Infrastructure Regulation (EMIR) anti-procyclicality margin measures for central counterparties (CCPs). The guidelines aim to establish consistent, efficient and effective supervisory practices and to ensure a common, uniform and consistent application of EMIR in order to limit procyclicality of CCP margins.

Coverage of the consultation phase for the guidelines is contained in the January 12 edition of *Corporate & Financial Weekly Digest*. The final report includes details of the feedback ESMA received in relation to the consultation.

ESMA's final report is available here.

ESMA's accompanying press release is available here.

MiFID II/MiFIR Q&As Updated and Guidelines Published on MiFID II Suitability Requirements

The European Securities and Markets Authority (ESMA) recently updated its questions and answers on the following topics:

- On May 29, the revised Markets in Financial Instruments Directive (MiFID II) Q&As on transparency and market structures topics (available here and here, respectively one for transparency and one for market structures). Among other things, ESMA clarifies how it expects post-trade data to be published 15 minutes after publication free of charge and in an easily accessible manner that can be easily copied. Data published by approved publication arrangements and consolidated tape providers must be in a machine readable format; and

- On May 25, Q&As on data reporting under the Markets in Financial Instruments Regulation (MiFIR), (available here). The Q&As clarify the requirements for submission of transaction reports and reference data under MiFIR, particularly in relation to complex trades and national client identifiers for natural persons.

On May 28, ESMA also published guidelines on MiFID II suitability requirements (available here). Investment firms providing investment advice or portfolio management must, under MiFID II and its delegated regulation, provide suitable personal recommendations to their clients or make suitable investment decisions on behalf of their clients.

ESMA's accompanying press releases are available here, here and here respectively.

MiFID II/MiFIR Q&A Updates Concerning Best Execution and Client Categorization

On May 25, the European Securities and Markets Authority (ESMA) updated its questions and answers on the revised Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) investor protection and intermediaries topics, with nine new or updated Q&As.

While the clarifications impact investment firms more widely, ESMA expressly contemplates providers of contracts for difference in the Q&As as an example of an "other liquidity provider" that will need to comply with best execution requirements under the relevant MiFID II regulatory technical standard, RTS 27.

In addition, the updated Q&As clarify the conditions under which a firm may treat, to a certain extent, a private individual investor as a professional client. Crucially, firms must not implement any practice "that aims at incentivizing, inducing or pressuring a private individual investor to request to be treated as a professional client."

The updated Q&As from ESMA are available here.

ESMA's press release announcing the updated Q&As 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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