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SEC / CORPORATE

SEC Division of Corporation Finance Issues C&DIs Regarding Notices of Exempt Solicitation

On July 31, the staff of the Division of Corporation Finance (the Staff) of the Securities and Exchange Commission released two new Compliance and Disclosure Interpretations (C&DIs), in the Proxy Rules and Schedules 14A/14C section, providing guidance on the use of Notices of Exempt Solicitation.

Under Rule 14a-6(g) of the Securities Exchange Act 1934 (the Exchange Act), a person beneficially owning more than $5 million of a company's securities that conducts a solicitation of the company's shareholders, but does not seek the power to act as proxy, is required to file with the SEC a Notice of Exempt Solicitation, including all written materials used in such solicitation. Although Rule 14a-6(g)(1) sets out when a Notice of Exempt Solicitation is required to be filed, the Staff has accepted voluntary filings from persons who do not meet the rule's ownership threshold. Further, while Rule 14a-6(g)(1) requires a Notice of Exempt Solicitation to contain the information specified in Rule 14a-103 of the Exchange Act, including the name and address of the filer. The Staff had not previously addressed where in the filings such information was required to be included, leaving some investors confused as to whether vague Notices of Exempt Solicitation were filed by the company itself.

In C&DI 126.06, the Staff confirmed that Notices of Exempt Solicitation may be filed voluntarily with the SEC, and clarified that it will not object to a voluntary submission of a Notice of Exempt Solicitation, as long as such notice clearly states that it is being filed voluntarily. The Staff notes that this new guidance will remove ambiguity from such filings by informing investors of the nature of the submission and that the Notice of Exempt Solicitation is being filed by a soliciting party that does not beneficially own more than $5 million of the class of subject securities.

C&DI 126.07 clarifies that all Notices of Exempt Solicitation, whether voluntary or compulsory, must include a cover page containing information about its filer. The Staff states that the Rule 14a-103 information is intended to be a "cover," before any written soliciting materials (including any logo or other graphics used by the soliciting party) are presented. If the information required by Rule 14a-103 is not presented in this manner, the Staff may, depending on the particular facts and circumstances, consider such filing "misleading" within the meaning of Rule 14a-9 of the Exchange Act. This is expected to alleviate some of the investor confusion surrounding Notices of Exempt Solicitation requirements by making it clear to investors the party responsible for a particular filing.

The Staff's new C&DIs is available here.

Delaware Chancery Reiterates Directors' Right to Access Corporation Information

In a recently issued letter decision, the Delaware Court of Chancery reiterated the general rule that directors have an unencumbered right to access corporate information (with certain exceptions). The case involves a dispute between two groups of directors—those affiliated with a controlling stockholder, and those that are not. An affiliated director filed a motion to compel the production of information, including corporate communications between (1) unaffiliated directors and officers of the corporation and company counsel; and (2) members of a special committee formed specifically to negotiate with the controlling stockholder and that committee's own independent counsel. The court largely granted the affiliated director's request, with the exception of communications between the special committee and its counsel.

The letter decision provides a useful reminder of directors' broad rights to information. Directors of Delaware corporations may access corporate information except: (1) where there is an agreement among the parties to the contrary; (2) information subject to attorney-client privilege between a committee that excludes a particular director and such committee's counsel; and (3) when there is sufficient adversity between a director and the corporation that such director could not have a reasonable expectation that such director is a client of the board's counsel.

This right to access can lead to significant tension in numerous scenarios, such as family businesses with directors nominated by antagonistic branches of the family, venture-stage companies with board designees from venture capital firms with potentially competing investments, and private equity-backed companies with former (and disgruntled) owners or executives that have retained their board seats. Investors that are stockholders in corporations should carefully consider board designees' rights to information and the dynamics among the various stockholders, and whether it is appropriate to mandate director access agreements before seating any directors, or to utilize a more flexible entity form, such as a limited liability company, to address potential risks arising from directors' relatively unlimited rights to corporate information.

The *In re CBS Corporate Litigation* letter decision is available here.

DERIVATIVES

See "CFTC Proposes Rules to Simplify Process for Foreign Clearing Organizations to Obtain DCO Registration Exemptions" and "NFA Announces the Effective Date of Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities" in the CFTC section and "ESMA Updates TTC Calculations for MiFID II/ MiFIR" in the EU Developments section.

CFTC

CFTC Proposes Rules to Simplify Process for Foreign Clearing Organizations to Obtain DCO Registration Exemptions

On August 8, the Commodity Futures Trading Commission announced that it has proposed rules pursuant to which a clearing organization located outside of the United States may obtain an exemption from registration as a derivatives clearing organization (DCO) in order to provide swaps clearing services to certain US persons. The proposed rules codify the CFTC's existing policies and procedures for granting such exemptions. To date, the CFTC has exempted four non-US clearing organizations from registration: ASX Clear (Futures) Pty Limited, Japan Securities Clearing Corporation, Korea Exchange, Inc., and OTC Clearing Hong Kong.

The CFTC is permitted to exempt a non-US clearing organization from registration as a DCO for clearing swaps to the extent the CFTC determines the clearing organization is subject to comparable, comprehensive supervision and regulation by its home country authorities. The CFTC is proposing to use a clearing organization's compliance with the Principles for Financial Market Infrastructure (PFMIs) as the standard for making such determination as it finds the PFMIs to be comparable to the core principles set forth for DCOs in the Commodity Exchange Act and CFTC regulations.

In order to qualify for an exemption, a non-US clearing organization must be subject to regulation in its home country consistent with the PFMIs, observe the PFMIs in all material respects, and be in good standing with its home regulator. The CFTC and a clearing organization's home regulator also must have entered into a memorandum of understanding pursuant to which the home regulator agrees to provide the CFTC relevant information, and the clearing organization must consent to jurisdiction in the United States and appoint an agent in the United States. On an annual basis, within 60 days following the end of its fiscal year, the clearing organization must provide the CFTC a certification of its material compliance with the PFMIs as well as report on various metrics, including margin, volume, open interest and the clearance of swaps.

As is the case under the existing policies and procedures, a clearing member of a clearing organization that qualifies for an exemption as a DCO would be permitted to clear swaps only for itself and any affiliate that meets the definition of a "proprietary account" in CFTC Rule 1.3; the clearing member could not clear for "cleared swaps customers" as defined in CFTC Rule 22.1.

The proposed rules are available here. Comments with respect to the proposed rules are due 60 days after the proposed rules are published in the *Federal Register*.

NFA Announces the Effective Date of Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities

On August 9, the National Futures Association (NFA) announced the effective date of its recently adopted Interpretive Notice, *Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities*. The Interpretative Notice will go into effect on October 31 ("Effective Date").

The Interpretive Notice establishes disclosure requirements for futures commission merchants (FCMs), investment banks (IBs), commodity pool operator (CPOs) and commodity trading advisor (CTAs) that engage in activities related to virtual currencies or virtual currency derivatives. Beginning on the Effective Date, FCM and IBs that are NFA members must provide virtual currency derivative customers with certain NFA and Commodity Futures Trading Commission advisories at or before the time they trade a virtual currency derivative and must provide the advisories to customers that traded virtual currency derivatives prior to the Effective Date by November 30. There is also standardized disclosure that must be provided in relation to spot trades. The Interpretive Notice also requires CPO and CTAs that are NFA members to review and make any necessary updates to disclosure or offering documents for pools, exempt pools, or managed account programs that trade virtual currencies or virtual currency derivatives by November 21.

The NFA's announcement is available here.

The *Corporate & Financial Weekly Digest* previously covered the NFA's submission of the Interpretive Notice to the CFTC for approval here.

In addition, more details relating to the interpretive notice are available in Gary DeWaal's July 27, 2018 Between Bridges issue of *Bridging the Week*.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

See "NFA Announces the Effective Date of Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities" in the CFTC section.

BREXIT/UK DEVELOPMENTS

FCA Publishes Dear CEO Letter on Cross-Border Booking Arrangements

On August 8, the UK Financial Conduct Authority (FCA) published a "Dear CEO" letter concerning cross-border booking arrangements.

In the letter, the FCA explains that the UK's impending withdrawal from the EU has resulted in firms needing to put in place contingency plans that, when executed, will impact current business models, legal entity strategies and booking arrangements. The FCA states that it appreciates the information firms have already provided to it on their plans, and reminds firms of the importance of continuing to provide all necessary information. The FCA further states that firms should not make decisions without first speaking to the FCA.

The FCA expects that firms expanding their presence elsewhere in the EU should ensure that the structures they put in place enable the FCA to supervise the conduct of their UK business effectively. Firms also must ensure continued compliance with the FCA's Threshold Conditions and assess whether the proposed changes are in their clients' best interests.

In contrast with some EU supervisors, which have set out specific business model requirements, the FCA states that it is open to a broad range of legal entity structures and booking models. This includes those making use of back-to-back and remote booking models, as long as the associated conduct risks are effectively controlled and managed. The FCA's stated focus is not on business models, but on understanding the principles and practices involved, and how the conduct risks arising from them are managed. The FCA sets out six principles that booking models should comply with, as follows:

- Firms should set out a clear rationale for their booking arrangements, document them and have them approved by their boards.
- Risk management should be appropriate for the firm's booking activities including hedging arrangements.
- There should be a broad alignment of risk and returns at the entity level.
- Firms should have adequate systems and controls in place to ensure that booking arrangements are followed.
- Firms should consider whether responsibility for oversight of booking arrangements are explicit in statements of responsibilities.
- Booking arrangements should not be an impediment to the firm's recovery and resolution.

The FCA expects UK boards and senior managers to ensure that effective governance is in place to identify and mitigate the potential harm that could arise from modified booking arrangements. Firms also should be able to demonstrate to the FCA (whenever requested) how the principles have been observed and implemented.

The FCA's letter is available here.

EU DEVELOPMENTS

GFXC Publishes Updated Version of Its FX Global Code

On August 6, the Global Foreign Exchange Committee (GFXC) published a paper looking back over the first year of the FX Global Code (Code), as well as an updated version of the Code.

The paper highlights the GFXC's priorities, including:

- continuing the GFXC working group on disclosures to strengthen the landscape of FX disclosures;
- continuing the GFXC working group on "cover and deal" arrangements;
- establishing a GFXC working group on buy-side outreach; and
- establishing a GFXC working group to focus on the embedding and integration of the Code into the fabric of the FX market.

A related press release explains that the new version of the Code adds an illustrative example to Principle 11, which concerns pre-hedging. The example highlights negative behavior, in contrast to the two existing examples of positive behavior.

The GFXC was established in May 2017 as a forum to bring together central banks and private sector participants, with the aim of promoting a robust, liquid, open and transparent FX market. The code, which was originally published in May 2017, comprises a set of global principles of good practice in the FX market (for more information, see the ***Corporate & Financial Weekly Digest*** edition of May 26, 2017).

The paper is available here.

The new version of the Code is available here and the related press release, here.

ESMA Updates TTC Calculations for MiFID II/ MiFIR

On August 6, the European Securities and Markets Authority (ESMA) published an updated version of the transitional transparency calculations (TTC) for the purposes of the revised Markets in Financial Instruments Directive (MiFID II) and the associated Markets in Financial Instruments Regulation (MiFIR).

The TTC is a series of calculations in relation to equity and non-equity instruments which National Competent Authorities (NCAs) are responsible for performing (for more information, see the ***Corporate & Financial Weekly Digest*** edition of December 8, 2017).

ESMA's latest update relates to the TTC for:

- equity derivatives;
- equity and equity-like instruments; and
- tick size band assessment.

EU trading venues are expected to apply the TTC results starting August 13.

ESMA's press release is available here.

The updated TTC 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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