Katten

# Corporate & Financial Weekly Digest

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**Due to the Christmas and New Year's holidays, *Corporate & Financial Weekly Digest* will not be published on December 27 and January 3. The next issue will be distributed on January 10, 2020.**

## SEC/CORPORATE

### View Our 2020 Proxy Season Update Webinar

On December 12, Katten partners Lawrence Levin and Mark Reyes, together with panelists from Ernst & Young and Meridian Compensation Partners, participated in a webinar discussing key developments and trends impacting public companies in the 2020 annual reporting and proxy season.

To request access to a replay of the webinar, please click here.

### SEC Announces Proposed Amendments to the Definitions of "Accredited Investor" and "Qualified Institutional Buyer"

On December 18, the Securities and Exchange Commission voted to propose amendments (the Proposal) to the definition of "accredited investor" for purposes of private placements under Regulation D and the definition of "qualified institutional buyer" in Rule 144A under the Securities Act of 1933. The Proposal is intended to update and improve the definitions of those terms in order to more effectively identify both institutional and individual investors with the sophistication to participate in private capital markets transactions. In the SEC's press release announcing the Proposal, SEC Chairman Jay Clayton noted that, "The current test for individual accredited investor status takes a binary approach to who does and does not qualify based only [on] a person's income or net worth. Modernization of this approach is long overdue." As highlighted in the fact sheet included in the press release, the Proposal would, among other things:

1. add new categories of qualifying natural persons to the definition of accredited investor, including (A) individuals with certain professional certifications and designations (such as Series 7, 65 or 82 licensure or other credentials issued by accredited educational institutions); or (B) individuals who are "knowledgeable employees" (as defined under the Investment Company Act of 1940 (the Investment Company Act)) of a hedge fund, venture capital fund or private equity fund for purposes of investing in that fund;

2. add new categories of qualifying entities to the definition of accredited investor, including limited liability companies that meet certain conditions (consistent with existing SEC staff guidance), registered investment advisers and rural business investment companies (RBICs); "family offices" with at least $5 million in assets under management and their "family clients" (as such terms are defined in the Investment Advisers Act of 1940); and, as a so-called "catch-all" category, entities (including Indian tribes) owning in excess of $5 million in "investments" (as such term is defined under the Investment Company Act);

3. permit "spousal equivalents" (in addition to spouses) to pool their finances for purposes of qualifying as accredited investors (as it has not been clear that persons in legally recognized unions, such as domestic partnerships, civil unions and same-sex marriages, would currently be considered spouses for purposes of the accredited investor definition);

4. expressly include limited liability companies and RBICs as entities that are eligible to be considered "qualified institutional buyers" as defined in Rule 144A so long as they meet the $100 million in securities owned and investment threshold in the definition; and

5. permit an institutional accredited investor under Rule 501(a) of Regulation D, of an entity type not already included in the qualified institutional buyer definition, to so qualify if it satisfies the $100 million threshold.

The Proposal would not adjust the current net-income or net-worth standards or impose any limit on the amount that a person may invest under those standards.

The SEC is soliciting comments on the Proposal for a period of 60 days after publication in the *Federal Register*.

The Proposal is available here, and the press release and fact sheet are available here.

### SEC Proposes New Rules to Implement Resource Extraction Disclosure Rules

On December 18, the Securities and Exchange Commission voted to propose new rules to require resource extraction issuers to disclose payments made to foreign governments or the US government for the commercial development of oil, natural gas or minerals, as required by Section 13(q) of the Securities Exchange Act of 1934 (the Exchange Act).

These disclosure rules are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and follow the SEC's 2012 rules, which were vacated by the US District Court for the District of Columbia, and 2016 rules, which were disapproved in part by a joint resolution of Congress pursuant to the Congressional Review Act on the grounds that the compliance burden on issuers was viewed as too significant.

The new proposed rules, applicable to domestic and foreign issuers that engage in the commercial development of oil, natural gas or minerals and that are required to file annual reports with the SEC under the Exchange Act, would require annual disclosure on Form SD of applicable payments made to foreign governments or the US government. The new proposed rules differ from the 2016 rules in that they, among other things, allow for aggregation of payments by applicable jurisdiction, raise the thresholds for excluded *de minimis* payments and include an exemption from disclosure where such disclosure would conflict with applicable foreign law or pre-existing contract terms.

Issuers with a fiscal year ending on or before June 30 would be required to submit the Form SD no later than March 31 in the calendar year following its most recent fiscal year, while issuers with a fiscal year ending after June 30 would be required to submit the Form SD no later than March 31 in the second calendar year following its most recent fiscal year.

The new proposed rules also exempt smaller reporting companies and emerging growth companies from the disclosure requirements.

In addition, the new proposed rules provide that required disclosure be treated as "furnished" and not "filed" for purposes of liability under Section 18 of the Exchange Act and provide that a newly public company would not be required to furnish the resource extraction disclosure until its Form SD for the first fiscal year following the fiscal year in which its initial public offering is completed.

The full text of the SEC's proposing release is available here.

## BROKER-DEALER

### FINRA's Board of Governors Approves Two Rule Proposals

The Financial Industry Regulatory Authority's (FINRA) Board of Governors approved two rule proposals at a meeting held on December 4–5, to be filed with the Securities and Exchange Commission.

One of the proposals would amend FINRA rules governing suitability and non-cash compensation to address inconsistencies with SEC Regulation Best Interest and to mitigate potential confusion over which standards will apply with respect to recommendations to retail customers.

The other proposal deals with obligations that could be imposed on broker-dealers that are identified as a restricted firm by FINRA through a multi-step process. Such obligations include a requirement to maintain a deposit in a segregated account from which withdrawals would be restricted, adhere to specified conditions or restrictions, or comply with a combination of such obligations.

The proposals will be filed with the SEC and will be published for public comment before being approved by the SEC.

The news release regarding the Board of Governors' meeting is available here.

### SEC Adopts Final SBS Cross-Border Rule Amendments and Sets Compliance Date for SBS Dealer Registration

On December 18, the Securities and Exchange Commission adopted some amendments to its rules concerning the cross-border application of certain security-based swap requirements under the Securities Exchange Act of 1934 and issued a statement that it will be allowing some time-limited relief for reporting parties when security-based swap reporting goes into effect.

The amendments are intended to address issues raised concerning the SEC's previous cross-border rulemakings and, more generally, to enhance the effectiveness and efficiency of those rules. The amendments deal chiefly with 1) the definitions of "arrange" and "negotiate" as they relate to swaps involving non-US dealer personnel in the United States; and 2) opinion and certification requirements applicable to the registration of a non-US person as a security-based swap dealer.

The amendments will become effective on the later of March 1, 2020 or 60 days after publication of the adopting release in the *Federal Register*.

The adoption of these amendments fulfills the last condition to the phased roll-out of the full suite of security-based swap rules and sets up the following expected security-based swap rule compliance dates (assuming that March 1 is in fact the effective date of the amendments):

- Security-Based Swap Dealer Registration Compliance Date — September 1, 2021 (18 months after March 1, 2020). However, registration is not required until the end of the second calendar month following the month in which an entity crosses a security-based swap *de minimis* threshold, so the earliest date for registration of any security-based swap dealer will be September 30, 2021 if it exceeds a threshold in July 2021.
- Security-Based Swap *De Minimis* Counting Compliance Date — July 1, 2021 (two months before the Security-Based Swap Dealer Registration Compliance Date). Security-based swaps in existence before this date do not count towards the security-based swap *de minimis* thresholds of $8 billion for credit-default swaps, $400 million for other types of security-based swaps or $25 million of security-based swaps with special entities.
- Security-Based Swap Reporting Compliance Date for any Security-Based Swap Asset Class — The later of 1) 6 months after the registration date of the first swap data repository to accept transaction reports for that asset class; and 2) October 1, 2021. However, the SEC is providing specific no action relief applicable for 4 years after the registration date of the first swap data repository. This will provide parties with some time-limited leeway to comply with the swap reporting rules instead of the security-based swap reporting rules.

The December 18 release is available here.

# DERIVATIVES

*See "CFTC Grants Market Participants LIBOR-Transition Relief" and "CFTC Approves Final and Proposed Rules for DCOs, Swap Dealers, Major Swap Participants and Other Market Participants" in the CFTC section and "SEC Adopts Final SBS Cross-Border Rule Amendments and Sets Compliance Date for SBS Dealer Registration" in the Broker-Dealer section.*

# CFTC

### CFTC Grants Market Participants LIBOR-Transition Relief

On December 18, the Division of Swap Dealer and Intermediary Oversight (DSIO), the Division of Market Oversight (DMO) and the Division of Clearing and Risk (DCR) each issued a no-action letter providing relief to market participants in preparation for the transition away from the London Interbank Offered Rate (LIBOR) and other interbank offered rates (collectively with LIBOR, IBORs). The letters identify the terms and conditions pursuant to which counterparties may be eligible for relief in connection with amending swaps to replace provisions referencing discontinued IBORs with alternative benchmarks.

Specifically, in Letter 19-26, DSIO grants relief to swap dealers from the registration *de minimis* threshold requirements; uncleared swap margin requirements; certain business conduct standards; requirements relating to confirmation, swap trading relationship documentation and reconciliation; and certain other eligibility requirements.

In Letter 19-27, DMO provides time-limited relief from the trade execution requirement under Section 2(h)(8) of the Commodity Exchange Act (CEA) until December 31, 2021, subject to certain conditions.

Finally, in Letter 19-28, the DCR grants time-limited relief from the swap clearing requirement under Section 2(h)(1)(A) of the CEA and CFTC regulation 50.4(a) for certain swaps executed prior to the compliance date on which swap counterparties were required to begin centrally clearing interest rate swaps. The relief expires on December 31, 2021.

More information is provided in the CFTC press release announcing the issuance of the letters, available here.

### CFTC Approves Final and Proposed Rules for DCOs, Swap Dealers, Major Swap Participants and Other Market Participants

At the Commodity Futures Trading Commission open meeting on December 18, the CFTC approved one final and two proposed rules as follows:

- The CFTC unanimously approved a final rule to amend certain portions of Part 39 of the CFTC's regulations that govern registered derivatives clearing organizations (DCOs). Among other things, the amendments are designed to address DCO risk management and reporting obligations; clarify and codify certain existing regulations, staff relief and guidance; and simplify processes for registration and reporting.
- In a 3-2 vote, the CFTC approved a proposal addressing the cross-border application of swap dealer registration and related requirements for certain foreign entities. The proposed rule also would create a formal process for comparability determinations for such requirements. The comment period for the proposed rule expires 60 days after publication in the *Federal Register*.
- The CFTC unanimously approved a proposal to amend Part 37 of the CFTC's regulations to prohibit post-trade name give-up for swaps executed anonymously on a Swap Execution Facility (SEF) and intended to be cleared. The comment period for the proposed rule expires 60 days after publication in the *Federal Register*.

More information about the final and proposed rules is available here.

### NFA Announces Effective Date for Amendments to CTA Performance Reporting and Disclosures Requirements

On December 18, National Futures Association (NFA) announced that its recent amendments to NFA Compliance Rule 2-34 and two interpretive notices relating to performance reporting and disclosures by commodity pool operators and commodity trading advisors will take effect on February 1, 2020.

More information about the amendments is available in the September 6 edition of the *Corporate & Financial Weekly Digest*.

## UK DEVELOPMENTS

### FCA Updates SM&CR Webpage

On December 13, the UK Financial Conduct Authority (FCA) updated its webpage for the Senior Managers and Certification Regime (SM&CR) for solo-regulated firms. In particular, the FCA added two new sections to the landing page: "Ongoing requirements for firms;" and "Other considerations."

SM&CR went into effect for the remaining FCA-authorized firms on December 9. For more information, please see the December 13 edition of the *Corporate & Financial Weekly Digest*.

Under "Ongoing requirements for firms," the FCA noted that firms need to:

- understand which (if any) Certification Functions apply to them and identify the individuals which need to be certified on an annual basis;
- ensure that fitness and propriety checks, criminal records checks and regulatory references are incorporated into the firm's existing recruitment and other HR processes; and
- consider how staff will be trained on the Conduct Rules, and identify ancillary staff to whom the Conduct Rules do not apply.

Under "Other considerations," the FCA noted the following:

- while senior managers can delegate to others, this does not reduce their accountability, and therefore senior managers should ensure that their delegation is reasonable, to an appropriate person, and with appropriate oversight;
- Senior Management Functions (SMFs) do not need to be held by members of the governing body;
- if a firm did not need a compliance officer or money laundering reporting officer under the Approved Persons Regime (APR), they will not need to fill those roles under SM&CR;
- firms should check the FS Register (available here) to make sure that the correct senior management functions are listed; and
- firms are welcome, although not obliged, to extend the fitness and propriety assessment to those outside of the Certification Regime.

## EU DEVELOPMENTS

### ESMA Publishes AMP Annual Report

On December 13, the European Securities and Markets Authority (ESMA) published their second annual report on the application of the accepted market practice (AMP) regime under the Market Abuse Regulation (MAR). The annual report is available here.

Under MAR, it is illegal to engage in market manipulation on any trading venue in the EU and UK. AMPs are a defense against an allegations of market manipulation, in that the national financial regulator can designate that certain behavior may be "carried out for legitimate reasons," and is therefore not considered to be market manipulation.

ESMA is required to produce an annual report on the functioning of the AMP regime. In the report for 2019, ESMA noted the existing AMPs and commented on their application:

- four jurisdictions (Spain, Portugal, Italy and France) have AMPs for liquidity contracts, whereby an investment firm is paid by an issuer to trade shares with the sole purpose of improving the liquidity of those shares. France is by far the most active user of this AMP, with the French regulator reporting 434 active contracts in July 2019; and
- Italy has two other AMPs — for bond buybacks and for the purchase of own shares to set up a shares warehouse position.

No other jurisdictions have made use of the AMP regime to date.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.


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UK/EU DEVELOPMENTS

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