Katten

Corporate & Financial Weekly Digest

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SEC/CORPORATE

SEC Approves Extension of Temporary NYSE Waiver of Stockholder Approval Rules

Recently, the Securities and Exchange Commission issued a release (the Release) approving, with immediate effectiveness, the New York Stock Exchange's (NYSE) proposal to extend through September 30 the NYSE's temporary and partial waivers from the requirement that NYSE-listed companies obtain stockholder approval in connection with certain related party and 20 percent equity issuances (the Waiver). As discussed in the April 17, 2020 edition of *Corporate & Financial Weekly Digest*, the SEC previously approved the Waiver of such shareholder approval requirements for NYSE-listed companies through June 30 in the wake of the disruptions caused by the coronavirus (COVID-19) pandemic, and the great likelihood that many listed companies would experience urgent liquidity needs and require access to additional capital that was unavailable in the public equity or credit markets. The Waiver provides NYSE-listed issuers with greater flexibility to engage in capital raising transactions, such as private investments in public equity (PIPE) transactions and registered direct offerings, that may otherwise be constrained by the NYSE's existing stockholder approval rules. In the Release, the SEC noted that, "[s]ince the implementation of the Waiver, a number of listed companies have completed capital raising transactions that would not have been possible without the flexibility provided by the Waiver." The SEC also indicated in the Release that, although the equity indices have recovered from much of the decline associated with COVID-19, continued economic disruption and uncertainty have caused many listed companies to continue to "face circumstances in which their businesses and revenues are severely curtailed . . . and experience difficulty in accessing liquidity from the public markets."

A chart summarizing the NYSE's shareholder approval requirements applicable to certain related party and 20 percent equity issuances by NYSE-listed companies, as well as the related changes temporarily effectuated by the Waiver, as extended through September 30, is available here. The full text of the Release is available here.

BROKER-DEALER

FINRA Proposes to Increase Positions Limits on Certain Options

On July 14, the Financial Industry Regulatory Authority (FINRA) filed a proposed rule change to amend Rule 2360 (Options) to increase position limits on options on certain exchange-traded funds. FINRA has indicated that increasing the position limits for conventional options subject to the proposed rule change could lead to a more liquid and competitive market for these options, which will benefit customers interested in these products.

Rule 2360(b)(3)(A)(iii) establishes position limits for conventional equity option contracts. FINRA is now proposing to amend the rule by adding new position limits for options on certain ETFs and increasing the existing position limits for other options on ETFs as indicated below.

Security Underlying Option	Position Limit
The DIAMONDS Trust (DIA)	300,000 contracts

The Standard and Poor's Depositary Receipts Trust (SPY)	3,600,000 contracts
The iShares Russell 2000 ETF (IWM)	1,000,000 contracts
The PowerShares QQQ Trust (QQQ)	1,800,000 contracts
The iShares MSCI Emerging Markets ETF (EEM)	1,000,000 contracts
iShares China Large-Cap ETF (FXI)	1,000,000 contracts
iShares MSCI EAFE ETF (EFA)	1,000,000 contracts
iShares MSCI Brazil Capped ETF (EWZ)	500,000 contracts
iShares 20+ Year Treasury Bond Fund ETF (TLT)	500,000 contracts
iShares MSCI Japan ETF (EWJ)	500,000 contracts
iShares iBoxx High Yield Corporate Bond Fund (HYG)	500,000 contracts
Financial Select Sector SPDR Fund (XLF)	500,000 contracts

FINRA has filed the proposed rule change for immediate effectiveness.

The rule filing is available here.

CFTC

CFTC Welcomes Standardized Approaches to Assessing Cybersecurity Preparedness

In a release on July 16, the Commodity Futures Trading Commission (CFTC) encourages financial institutions to use a standardized approach to assess and improve their cybersecurity preparedness. Although the CFTC does not endorse any particular tool, the CFTC specifically identifies various organizations providing best practices to the industry, including the National Institute of Standards and Technology, the International Organization for Standardization, the Information Systems Audit and Control Association and the Information Technology Infrastructure Library. The CFTC also lists a number of standardized tools that support financial institutions in their self-assessment activities, including the Financial Services Sector Coordinating Council Cybersecurity Profile, the NIST Cybersecurity Framework, the ISO Cybersecurity Standard, and the ISACA COBIT Framework. The CFTC added that regulated entities should assess their cybersecurity and system safeguards programs using the standardized cybersecurity tool that they believe best fits their particular risks and circumstances.

For its part, the CFTC noted that it uses all generally accepted cybersecurity standards and best practices in its oversight of regulated entity cybersecurity and system safeguards.

For more information, the full release is available here.

UK DEVELOPMENTS

London Weekly Fireside Chat

Katten hosts a weekly 15-minute fireside chat podcast series on notable UK and European developments from the prior week's *Corporate and Financial Weekly Digest*. In this week's edition, Nathaniel Lalone lauds the potential "game-changer" of allowing more clearinghouses to open deposit accounts at the Fed, while Carolyn Jackson notes the successful launch of Securities Financing Transactions Regulation (SFTR) reporting and European

Securities and Markets Authority's (ESMA) updated opinion on the MiFID II "ancillary exemption." Special guest Chris Collins walks through updated European Commission Brexit notices which, in his view, are useful preparatory checklists for affected firms.

To listen to the podcast recording, click here.

FCA Statement on New Enhanced Financial Services Register

On July 13, the UK Financial Conduct Authority (FCA) published a statement announcing that it will replace its existing financial services register with an enhanced financial services register on July 27 (the Statement).

In the Statement, the FCA also noted that it intends to add a directory of certified and assessed persons to the register later this year.

The Statement is available here.

EU DEVELOPMENTS

ECB Blog on Preparation for the End of the Brexit Transition Period

On July 9, the European Central Bank (ECB) published a blog by Yves Mersch, member of the Executive Board of the ECB and vice-chair of the Supervisory Board of the ECB, on the preparations of European Union (EU) banks for the end of the Brexit transition period (the Blog).

The ECB notes that banks in the EU and United Kingdom (UK) post-Brexit will no longer enjoy the benefits of the single EU market. Consequently, it is crucial that banks focus on progressing towards their target post-Brexit operating models.

In the Blog, the ECB welcomes the European Commission's announcement regarding the temporary equivalence of UK central counterparties, but banks must nonetheless prepare for post-Brexit in this area. The temporary equivalence should provide the industry with more time to adjust clearing operations to the UK's new status as a third country. For more information on this topic, please see the advisory prepared by Katten, available here.

The ECB also clarifies that banks, which have failed to hire staff with sufficient seniority and skills, neglected to make necessary transfers of material assets or unduly split trading desks across multiple legal entities, will not be considered as complying with the ECB's requirements. The ECB believes that its expectations are very clear: all activities related to EU products or EU customers should, as a general principle, be managed and controlled from entities located in the EU.

The Blog is available here.

ESMA Publishes Updates on SFTR and EU CCPs

On July 13, the European Securities and Markets Authority (ESMA) published the following updates:

- a press release regarding the success of the first day of reporting under the Securities Financing Transactions Regulation (the Press Release); and
- the results of its third stress test exercise regarding central counterparties (CCPs) in the European Union (EU), which confirmed the overall resilience of EU CCPs to common shocks and multiple defaults for credit, liquidity and concentration stress risks.

The Press Release is available here.

The Results are available here.

European Commission Adopts EMIR 2.2 Provisional Delegated Acts

On July 14, the European Commission (the Commission) adopted several implementing and delegated acts relating to central counterparties (CCPs) established in third countries (TCs) under the so-called "EMIR 2.2" revisions to the European Market Infrastructure Regulation (the Delegated Acts).

The Delegated Acts address the following issues:

- the criteria that ESMA should consider when determining if a TC CCP is, or is likely to become, systemically-important and consequently the tier to which it should be assigned;
- the minimum elements to be assessed by ESMA when considering a request for comparable compliance from a TC CCP and the modalities and conditions of that assessment; and
- the types and amount of fees and the manner in which fees are to be paid by TC CCPs applying for recognition and by recognized TC CCPs.

The Delegated Acts are to be considered by the Council of the European Union (EU) and the European Parliament before being published in the *Official Journal of the EU* and becoming effective.

The Delegated Acts are available here.

European Commission Publishes Updated Brexit Notice to Stakeholders on Post-Trade

On July 14, the European Commission (the Commission) published an updated version of its notice to stakeholders on the consequences of the United Kingdom's (UK) withdrawal from the European Union (EU) (Brexit) on the EU's rules in the field of post-trade financial services (the Notice).

The Notice has been updated to address the legal situation and practical implications that the end of the Brexit transition period on December 31 will have on the financial services sector. It covers derivatives, trade repositories and reporting, and central securities depositories and securities settlement systems.

The Notice is available here.

ECJ Judgement on the EU-US Privacy Shield

On July 16, the European Court of Justice (ECJ) published its judgement on the adequacy of the protection provided by the European Union (EU)-United States (US) Privacy Shield (the Judgement).

In the Judgement, the ECJ held that the current EU-US arrangement for the transfer of personal data between the two jurisdictions is invalid. This means that companies can no longer rely on this mechanism for transferring personal data from the EU to the US, which could have far reaching consequences on financial market participants and companies more generally.

Contrastingly, the ECJ has upheld the validity of standard contractual clauses (SCC) as a means of transferring personal data between the EU and third countries (i.e. non-EU countries), provided that the relevant EU regulator has not prohibited the transfer of personal data to a third country where, in light of all the circumstances of that transfer, the standard EU data protection clauses are not, or cannot, be complied with.

In practice, companies using the SCCs should carry out due diligence before transferring personal data to a third country where the SCCs are being used. Recipients of that data have an obligation to inform the exporter where their local laws mean that they cannot comply fully with the SCCs, such as local laws with high levels of surveillance powers.

The Judgement is available here.

ESMA Publishes Reports on the MiFID II/MiFIR Transparency Regime

On July 16, the European Securities and Markets Authority (ESMA) published two reports that review the key provisions of the MiFID II/MiFIR transparency regime (the Reports).

The Reports put forward proposals to simplify the current complex transparency regime while aiming to improve the level of transparency available for market participants.

The first report relates to the transparency regime for equity instruments (the First Report) and its key proposals include:

- restricting the use of the reference price waiver to larger orders for equity instruments;
- increasing the minimum quoting obligations and a revised methodology for determining the standard market sizes relevant for quoting by systematic internalisers (SIs);
- simplifying the double cap spending mechanism into a single volume cap and lower thresholds; and
- clarifying the scope of the trading obligation specifically in relation to third-country shares.

The second report concerns pre-trade transparency obligations applicable to systematic internalisers in non-equity instruments (the Second Report). The noteworthy proposals in the Second Report are set out below:

- maintaining the publication of the quotes by SIs in liquid non-equity instruments;
- deleting the requirements to provide quotes to other clients and to enter into transactions with multiple clients; and
- harmonizing the way in which SIs publish their quotes in equity and non-equity instruments.

The First Report is available here, and the Second Report 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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SEC/CORPORATE

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UK/EU DEVELOPMENTS

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