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SEC/CORPORATE

SEC Stays Implementation of New NYSE Direct Listing Rules

As discussed in the August 31, 2020 edition of the *Corporate & Financial Weekly Digest*, on August 26, the Securities and Exchange Commission (SEC) approved rules proposed by the New York Stock Exchange (NYSE) to allow companies engaging in a direct listing to raise capital directly through the sale of primary shares upon the direct listing, in addition to, or instead of, facilitating sales of shares solely by existing shareholders.

In a letter to the NYSE, dated as of August 31, the SEC notified the NYSE that it has received a notice of intention to petition the rules. Accordingly, the SEC has stayed implementation of the new NYSE direct listing rules until such time as the SEC orders otherwise.

The SEC's action follows a letter issued by the Council of Institutional Investors (CII) pursuant to which CII stated its intention to petition for a review of the new rules regarding direct listings. CII objects to the direct listing rules out of a concern that companies may attempt to limit their liability to investors for losses associated with false statements of fact or material omissions of fact within the SEC registration statement relating to the direct listing. Particularly, they cite a concern with the ability of aggrieved investors to trace their shares to those offered pursuant to a particular registration statement, given the fact that some direct listings may not include (and prior direct listings have not included) any lockup agreements and both shares sold pursuant to a registration statement and those sold outside of a registration statement may enter the market quickly following the direct listing.

The full text of the SEC's letter staying the implementation of the new direct listing rules is available here.

CFTC

CFTC No-Action Letter 20-23: CFTC Provides Additional Relief to Market Participants Transitioning from LIBOR

On August 31, the Commodity Futures Trading Commission's (CFTC) Division of Swap Dealer and Intermediary Oversight (DSIO) issued a no-action letter (No-Action Letter 20-23) providing additional relief to swap dealers (SDs) and other market participants related to the industry-wide initiative to transition from swaps that reference the London Interbank Offered Rate (LIBOR) and other interbank offered rates (IBORs) to swaps that reference alternative benchmarks.

No-Action Letter 20-23 revises and supersedes previously issued CFTC Staff Letter 19-26, discussed further here, modifying certain no-action positions and providing additional no-action relief: (1) resulting from the announced intention of certain central counterparties (CCPs) to transition the discounting and price alignment interest for USD-denominated interest rate swaps from EFFR to SOFR in Q3 2020; and (2) to facilitate the amendment of Credit Support Annexes (CSAs) to adjust the interest rates paid on posted collateral for uncleared swaps.

In No-Action Letter 20-23, the DSIO states that, if a person amends a swap that uses LIBOR or other IBORs solely to replace that rate with an alternative benchmark, that change will not count as a new swap for purposes of the de minimus threshold at which the person would be required to register as a SD. In addition, DSIO will not recommend enforcement action against any SD for failing to comply with certain other eligibility requirements,

uncleared swap margin requirements, business conduct requirements, documentation and swap processing requirements (including confirmation, swap trading relationship documentation requirements and reconciliation requirements), to the extent that compliance would be required solely as a result of amending certain types of swaps to reference an alternative benchmark instead of LIBOR or another IBOR.

Additionally, DSIO notes that it will not recommend CFTC enforcement action against an SD for failure to comply with certain eligibility requirements resulting from the status of a covered interest rate swap (Covered IRS) "used to hedge or mitigate commercial risk" entered into with a commercial-end user (non-financial entities under regulations 50.50(c) and 50.51.(b)(2)) or cooperative (under section 2(h)(1)(A) of the CEA), if compliance would be required solely to replace that rate with an alternative benchmark.

The letter is available here.

CFTC No-Action Letter 20-24: CFTC Provides Relief from the Trade Execution Requirement

On August 31, the Commodity Futures Trading Commission's (CFTC) Division of Market Oversight (DMO) issued a no-action letter (No-Action Letter 20-24) providing time-limited relief from the trade execution requirement for certain swaps.

No Action Letter 20-24 provides that until December 31, 2021, DMO will exempt from the CFTC's trade execution requirement swaps that are amended or created by an "IBOR Transition Mechanism" for the sole purpose of replacing an interbank offered rate (IBOR) with an alternative benchmark.

Under section 2(h)(8) of the Commodity Exchange Act (CEA), swap transactions that are subject to the clearing requirement must be executed on a designated contract market (DCM), swap execution facility (SEF) that is registered with the CFTC, or a SEF that is exempt from registration under 5h(g) of the CEA (exempt SEF), unless no DCM or SEF "makes the swap available to trade" or the relevant swap transaction is subject to the clearing exception under CEA section 2(h)(7). Swaps that are subject to the trade execution requirement must be executed in accordance with one of the methods listed in § 37.9 for SEF-executed transactions or the requirements to provide a "competitive, open and efficient [trading] market" under DCM Core Principle 9.

In No-Action Letter 20-24, DMO provides that IBOR Transition Mechanisms including "fallback" amendments to swap terms, which are triggered when the IBOR the swap references becomes unavailable, is permanently discontinued, or is determined to be non-representative by the benchmark administrator or the authority in the relevant jurisdiction will not be subject to the trade execution requirement under section 2(h)(8) of the CEA. DMO specifies that this includes amendments to benchmark rates in swaps made bilaterally by counterparties and new swap transactions that reference alternative benchmarks instead of IBORs.

The letter is available here.

CFTC No-Action Letter 20-25: CFTC Provides Time-Limited Relief from the Swap Clearing Requirement

On August 31, the Commodity Futures Trading Commission's (CFTC) Division of Clearing and Risk (DCR) issued a no-action letter (No-Action Letter 20-25) relating to the swap clearing requirement promulgated pursuant to section 2(h)(1)(A) of the Commodity Exchange Act (CEA) and codified in Part 50 of the CFTC's regulations (Clearing Requirement). No-Action Letter 20-25 revises and supersedes in its entirety previously issued CFTC Staff Letter 19-28, which was requested by the Alternative Reference Rates Committee (AARC) and applied to uncleared interest rate swaps (IRS) that were executed prior to an applicable Clearing Requirement compliance date for which swap counterparties subsequently amend certain terms as part of an industry-wide initiative to amend swaps that reference the London Interbank Offered Rate (LIBOR) and other interbank offered rates (collectively with LIBOR, the IBORs) to reference alternative benchmarks, including risk-free rates.

No-Action Letter 20-25 is in response to AARC's request to revise CFTC Staff Letter 19-28 primarily relating to: (1) swaps that were executed prior to the relevant compliance date on which swap counterparties were required to comply with the CFTC's IRS Clearing Requirement and thus have not been cleared (Uncleared Legacy IRS); and (2) uncleared swaptions that, upon exercise, would result in an IRS of a type subject to the CFTC's IRS Clearing Requirement, but where the swaption was executed prior to the relevant compliance date on which swap counterparties would have been required to comply with the IRS Clearing Requirement applicable to such IRS (Uncleared Legacy Swaptions).

AACR primarily requested the following: (1) CFTC Staff Letter 19-28 be broadened to allow swap counterparties more discretion in amending the fallback provisions in Uncleared Legacy IRS and Uncleared Legacy Swaption, (2) relief should be granted for amendments made to Uncleared Legacy IRS to replace IRRs with an alternative reference rate, (3) new relief be granted for amendments to the terms of Uncleared Legacy Swaptions based on expected changes to applicable discount rates that are used to value the swaptions, (4) CFTC Staff Letter 19-28 be broadened to apply to ancillary modifications and follow-on amendments to Uncleared Legacy IRS and Uncleared Legacy Swaptions and (5) relief to entities relying on the end-user exception and the exemption for co-operatives under Part of the CFTC's regulations.

In response, DCR provided, among other things, that (1) the amendment of fallback provisions to an Uncleared Legacy IRS or Uncleared Legacy Swaption should not cause the loss of legacy status resulting in the swap becoming subject to the Clearing Requirement, and (2) amendments made to the Uncleared Legacy IRS to replace any reference rate that is expected to be discontinued will generally be permitted.

For a more detailed overview, please refer to No-Action Letter 20-25, available here.

EU DEVELOPMENTS

ISDA and AFME Request for an Extension of Relief on Brexit-Related Novation

On August 27, the International Swaps and Derivatives Association (ISDA) and the Association for Financial Markets in Europe (AFME) (together, the Joint Associations) wrote a letter (Letter) to the European Commission and the European Supervisory Authorities to express gratitude for the mitigation of the impact on both European Union (EU) and United Kingdom (UK) market participants, in anticipation of the UK's departure from the EU.

Commission Delegated Regulations (EU) 2019/564 and Commission Delegated Regulations 2019/565 (together, the Novation RTS) provide that the novation of non-centrally cleated over-the-counter (OTC) derivatives contracts for the sole purpose of replacing a counterparty established in the UK with a counterparty established in a Member State does not trigger margin or clearing obligations, as would normally be required. However, the relief under the Novation RTS is transitional and is only available for a period of 12 months from December 31. The Joint Associations have requested that the relief become applicable as soon as possible and remain available for the original 12 month period. The Joint Associations have also requested to have the Novation RTS extended, to permit relief "where non-centrally cleared OTC derivative contracts are novated for the sole purpose of replacing a counterparty established in the UK, or operating from the UK (emphasis added), with a counterparty established in a Member State." The requested change would enable Non-UK third country firms that have been supporting their business from the UK to novate their contracts to a European entity.

Commencing the relief period under the Novation RTS to be available as soon as possible would ensure that the Novation RTS achieves its intended objective if the transitional period under the withdrawal agreement comes to an end on December 31, without an agreement on the long-term relationship between the UK and EU.

The Letter 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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