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SEC/CORPORATE

Register for Our 2021 Proxy Season Update Webinar

Please join Katten, Ernst & Young and Meridian Compensation Partners on Thursday, December 10 at 12:00 p.m. (CT) for a webinar discussion of key legal, governance and financial reporting developments and trends affecting public companies in the 2021 annual reporting and proxy season. CLE is available.

Further details are available here.

Registration is available here.

SEC Adopts Amendments to MD&A and Other Financial Disclosures

On November 19, the Securities and Exchange Commission announced that it adopted amendments (the Amendments) to certain financial disclosure requirements in Regulation S-K, including with respect to Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A). The Amendments are part of an effort to modernize and simplify Regulation S-K requirements and follow recent amendments to other Regulation S-K items — including those related to business, legal proceedings and risk factor disclosure previously discussed in the August 31, 2020 edition of the *Corporate & Financial Weekly Digest*. According to the SEC, the Amendments are designed to reduce compliance burdens while also improving the quality and accessibility of disclosure to investors, particularly by providing more insight into the information management uses to monitor and manage the business.

The Amendments were adopted generally as proposed on January 30 and previously discussed in the February 7, 2020 edition of the *Corporate & Financial Weekly Digest*. The SEC's vote on the Amendments was split 3-2, with two commissioners dissenting on grounds that the Amendments (1) eliminate certain disclosures and tabular presentation of contractual information that they believe provide important insight into supply chain and risk management, and (2) fail to address climate risk and other factors impacting registrants' long-term sustainability, such as human capital management.

As highlighted in the fact sheet included with the press release, the Amendments, among other things:

1. Eliminate Item 301 Selected Financial Data

The requirement that registrants provide five years of selected financial data has been eliminated, in an effort to modernize and simplify disclosure requirements in light of technological developments since the item's adoption in 1970 that now allow for easy investor access to the historic information otherwise required by this item and contained in the five year table on the SEC's Electronic Data Gathering, Analysis and Retrieval system (EDGAR). The SEC noted that, notwithstanding the elimination of the requirement to provide five years of selected financial data, registrants are encouraged to consider whether trend information for periods earlier than those presented in the financial statements are necessary to satisfy MD&A's objective to provide relevant material information for an assessment of the registrant's financial condition and results or operations and whether a tabular presentation of relevant financial or other information, as part of an introductory section or overview, including to demonstrate material trends, may be helpful to a reader's understanding of MD&A.

2. Revise Item 302 Supplementary Financial Information

Registrants will no longer be required to provide two years of tabular selected quarterly financial data, in order to reduce repetition and focus disclosure on material information. This item has instead been replaced with a "principles-based" requirement for disclosure only when there are material retrospective changes that pertain to income statements for any quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or required to be included.

3. Amend Item 303 Management's Discussion and Analysis of Financial Condition and Results of Operations

The SEC adopted various amendments to the MD&A requirements, including:

- Adding a new Item 303(a) to succinctly state the objectives of MD&A and streamline the various instructions to MD&A, with a goal of providing clarity and focus to registrants as they consider what information to discuss and analyze. New Item 303(a) sets forth objectives stating the overarching requirements of MD&A that apply throughout the amended Item 303. It calls for MD&A to include disclosure of (1) material information relevant to an assessment of the financial condition and results of operations of the registrant, (2) material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be indicative of future operating results or future financial condition and (3) the material financial and statistical data that the registrant believes will enhance a reader's understanding of its financial condition, cash flows and other changes in financial condition and results of operations;

- Amending current Item 303(a)(2) (*Capital Resources*) to require registrants to provide expanded disclosure of all material cash requirements, including, but no longer limited to, commitments for capital expenditures, as of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of such requirements. The amended item is designed to capture disclosure relating to expenditures, beyond conventional capital expenditures, that are increasingly important to companies, such as those for which human capital or intellectual property are key resources;

- Amending current Item 303(a)(3)(ii) (*Results of Operations*) to clarify the item requirement relating to costs and revenues, now requiring disclosure of known events that are "reasonably likely" to cause (rather than those that "will cause") a material change in the relationship between costs and revenue, such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments. This amendment conforms the language to other Item 303 disclosure requirements for known trends and aligns the item with the SEC's existing guidance on forward-looking disclosure;

- Amending current Item 303(a)(3)(iii) (*Results of Operations*) to require a discussion in MD&A of material changes in net sales or revenue, rather than only of material increases in net sales or revenue;

- Eliminating Item 303(a)(3)(iv) (*Results of Operations*), relating to inflation and price changes. The SEC noted registrants are already expected to disclose in MD&A generally the impact of inflation and price changes, if they are part of a known trend or uncertainty that has had or is reasonably expected to have a material impact on net sales, revenue or income from continuing operations;

- Replacing the requirement that a registrant discuss off-balance sheet arrangements with a new requirement for registrants to integrate disclosure of off-balance sheet arrangements within the context of their MD&A (Item 303(a)(4) (*Off-Balance Sheet Arrangements*)). The new rule requires registrants to discuss commitments or obligations, including contingent obligations, that arise from arrangements with unconsolidated entities or persons that have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources;

- Eliminating the requirement to disclose, in tabular format, all known contractual obligations (Item 303(a)(5) (*Contractual Obligations*)). The SEC stated that eliminating this requirement would not result in a loss of material information to investors given the overlap with information required in the financial statements and in light of the concurrent expansion of the capital resources requirement of amended Item 303(a)(2) discussed above;

- Permitting registrants, when discussing interim results, to compare the most recently completed quarter to either the corresponding quarter of the prior year, as currently mandated, or to the immediately preceding quarter (Item 303(b) (*Interim Periods*)). If in a subsequent Form 10-Q, a registrant changes the comparison from the comparison presented in the immediately prior Form 10-Q, the registrant would be required to explain the reason for the change and present both comparisons in the filing where the change is announced; and

- Adding a new Item 303(b)(3) (*Critical Accounting Estimates*) to clarify and codify the SEC's guidance requiring the disclosure of critical accounting estimates. Registrants must consider whether they have made accounting estimates or assumptions where the nature of such estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change, and whether the impact of the estimates and assumptions on financial condition or operating performance is material. In its discussion in the final rule, the SEC notes that any such disclosure should supplement, not duplicate, the description of accounting policies that are already disclosed in the notes to the financial statements and provide greater insight into the quality and variability of information regarding financial condition and operating performance.

Amendments Relating to Foreign Private Issuers

The SEC also adopted parallel amendments to the financial disclosure requirements applicable to foreign private issuers (FPIs). Corresponding changes were made to the applicable sections of Forms 20-F and 40-F, such that MD&A requirements for FPIs continue to mirror the substantive MD&A requirements in Item 303 of Regulation S-K.

The Amendments will become effective 30 days after they are published in the Federal Register. Registrants will be required to comply with the Amendments beginning with their first fiscal year that ends on or after the date that is 210 days after publication in the Federal Register. For domestic registrants with a December 31 fiscal year end, this means that mandatory compliance is expected to commence with their Annual Report on Form 10-K for the year ended December 31, 2021 to be filed in 2022. Registrants may early adopt compliance with any or all of the items covered by the Amendments any time after the effective date, so long as they provide disclosure responsive to such amended item(s) in their entirety and provide the same disclosure in any applicable filings going forward. For example, if a registrant wishes to adopt early compliance with Item 303(a)(3)(iv), related to inflation and price changes, the registrant must also adopt early compliance with respect to all of the requirements of amended Item 303.

The full text of the final rule is available here.

The full text of the press release is available here.

Glass Lewis Issues 2021 Proxy Season Updates

On November 23, Glass Lewis issued its Proxy Voting Policy Guidelines for 2021. Glass Lewis, like other proxy advisory firms, reviews proposals to be voted on at public company shareholder meetings and makes voting recommendations to its clients based on its voting policies and standards.

Certain significant policy changes for 2021 that Glass Lewis announced are summarized below.

Board Gender Diversity

Glass Lewis will maintain its existing policy of generally recommending voting against nominating committee chairs of companies without at least one female director on the board of directors, and, beginning in 2021, will also note as a concern boards consisting of fewer than two female directors. For shareholder meetings held after January 1, 2022, Glass Lewis will generally recommend voting against nominating committee chairs of boards with fewer than two female directors. However, for boards with six or fewer total directors, the existing policy, only requiring a minimum of one female, will remain in place.

Director Diversity and Skills

Starting in 2021, for companies in the S&P 500, Glass Lewis will include an assessment of company disclosure of

director diverse attributes and skills. Glass Lewis's reports will reflect how a company's proxy statement disclosure presents (1) the board's current percentage of racial and ethnic diversity, (2) whether the board's definition of diversity includes gender, race or ethnicity, (3) whether the board has a adopted a policy requiring women and minorities to be included in the pool of initial candidates when selecting director nominees and (4) board skills disclosure.

Glass Lewis will not make voting recommendations based solely on this analysis but it may inform its assessment of a company's overall governance.

Board Refreshment

Glass Lewis will note as a potential concern in its reports where the average tenure of non-executive directors is 10 years or more, and the company has not added a new independent director in the last five years.

Environmental and Social Risk Oversight

For 2021, Glass Lewis will note as a concern when the board of an S&P 500 company does not provide clear disclosure concerning board-level oversight afforded to environmental or social issues. Starting in 2022, Glass Lewis will generally recommend voting against the governance committee chair of an S&P 500 company where the company fails to provide explicit disclosure concerning the board's role in overseeing these issues.

Special Purpose Acquisition Companies

For 2021, Glass Lewis has added a new policy section relating to special purpose acquisition companies (SPACs).

Where a SPAC seeks shareholder approval to extend the time frame to consummate a business transaction, Glass Lewis will generally defer to the recommendation of the SPAC's management and support reasonable extension requests.

Where a SPAC executive officer becomes a member of the company board following a business combination, Glass Lewis will not automatically consider the former SPAC executive to be affiliated with the combined company when the director's only position on the board of the combined company is that of an otherwise independent director. Absent any evidence of an employment relationship or continuing material financial interest in the combined company, Glass Lewis will consider such a director to be independent.

Vote Results Disclosure

For 2021, Glass Lewis will recommend voting against governance committee chairs where a detailed record of proxy voting results from the last annual meeting has not been disclosed. This requirement will apply to companies incorporated in foreign jurisdictions as well, even if such disclosure is not a legal requirement.

Board Responsiveness

With respect to management resolutions for a shareholder meeting, Glass Lewis will note instances where a resolution received more than 20 percent opposition and may opine on the board's response, or lack thereof, to such shareholder opposition.

Governance Following an IPO or Spin-Off

Glass Lewis's 2021 policy clarifies its approach with respect to newly public companies. For companies that adopt a multi-class share structure with disproportionate voting rights or other anti-takeover mechanisms pre-IPO, Glass Lewis will generally recommend voting against all directors who served on the board at the time of the IPO if the board (1) did not commit to submitting the provision to a shareholder vote at the first shareholder meeting after the IPO or (2) did not provide for a reasonable sunset of these provisions (typically three to five years in the case of a classified board or poison pill, or seven years or less in the case of a multi-class share structure). Where a multi-class share structure exists, Glass Lewis will examine the level of support attributed to unaffiliated shareholders when determining the vote outcome.

Option Exchanges and Repricing

Glass Lewis remains generally opposed to repricing and exchanges of employee and director options. Glass Lewis may not object to such a transaction where macroeconomic or industry trends, rather than specific company issues, cause a stock's value to decline dramatically. The new guidance provides that, in such scenarios, Glass Lewis may opt to support such proposal only if (1) officers and board members cannot participate in the program and (2) the exchange is value-neutral or value-creative to shareholders using conservative assumptions.

Virtual-Only Shareholder Meetings

Glass Lewis has removed its temporary COVID-19 related policy on virtual shareholder meeting disclosures. They have reverted to their standard policy, requiring companies choosing to hold a meeting in a virtual-only format to provide disclosure that addresses the ability of shareholders to participate in the meeting. This includes disclosure of shareholders' ability to ask questions, as well as logistical details for meeting access and technical support. Where such disclosure is not provided, Glass Lewis will generally recommend voting against the members of the governance committee.

The full text of Glass Lewis's 2021 Proxy Voting Policy Guidelines updates is available here.

SEC Staff Issues Statement Regarding Signature Requirements

On November 20, the Staff of the Division of Corporation Finance, the Division of Investment Management, and the Division of Trading and Markets (the Staff) of the Securities and Exchange Commission issued an updated statement on requirements for manual signatures related to SEC filings.

COVID-19 Temporary Relief

Current Rule 302(b) of Regulation S-T requires each signatory to a document filed with the SEC pursuant to its EDGAR filing system to "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing." The manually signed document must be executed before at the time of the EDGAR submission and maintained by the filer for a period of at least five years.

In light of the ongoing COVID-19 pandemic, the Staff has expanded its temporary relief and has indicated that it will not recommend that the SEC take enforcement action with respect to these requirements if:

- a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention;
- the document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

The statement provides that the signatory may also provide to the filer an electronic record (such as a photograph or pdf) of such document when it is signed in order to demonstrate compliance with current Rule 302(b).

Early Adoption of New Electronic Signature Rules

On November 17, the SEC adopted amendments to permit the use of electronic signatures in executing and authenticating documents submitted electronically to the SEC through EDGAR, as more fully discussed in the November 20, 2020 Edition of the *Corporate & Financial Weekly Digest*. These new rules become effective upon publication in the Federal Register.

The Staff has announced that it will not recommend enforcement action with respect to the signature requirements of existing Rule 302(b) in advance of the effective time of the new rules if the signatory complies with the requirements of the amended rules in its entirety.

The full text of the Staff's statement is available here.

Division of Corporation Finance Issues Disclosure Consideration for China-Based Issuers

On November 23, the Division of Corporation Finance (the Division) of the Securities and Exchange Commission issued CF Disclosure Guidance: Topic No. 10 (the Guidance), providing the Division's views regarding disclosure considerations for companies based in or with the majority of their operations in the People's Republic of China (referred to as "China-based" companies).

The Division has identified that, although China-based companies that access the US public capital markets generally have the same disclosure obligations and legal responsibilities as other non-US issuers, there are limitations on the SEC's ability to promote and enforce high-quality disclosure standards for China-based issuers. As a result, the Division identifies in the Guidance, there is substantially greater risk that the disclosures of China-based issuers will be incomplete or misleading and that investors will have substantially less access to recourse than as relates to other non-US issuers.

The Guidance identifies the following specific risks associated with China-based issuers:

- Risks Related to High-Quality and Reliable Financial Reporting. The Public Company Accounting Oversight (PCAOB) is restricted in its ability to inspect audit work and practices of PCAOB-registered public accounting firms in China. Congress has proposed legislation that, if passed, could result in the delisting of companies that use auditors that the PCAOB is not able to inspect; however, to date, no such legislation has been passed.
- Risks Related to Access to Information and Regulatory Oversight. China has often restricted US regulators access to information and their ability to investigate or pursue remedies with respect to China-based issuers.
- Risks Related to a Company's Organizational Structure. Because Chinese law may limit or prohibit foreign investment in Chinese companies operating in certain industries, such as telecommunications, many China-based issuers form non-Chinese holding companies that enter into contractual arrangements intended to mimic direct ownership in a structure known as a variable interest entity (VIE). These VIE structures may pose a risk to US investors, because, among other reasons, exerting control through these contractual arrangements may be less effective than direct ownership. Also, the Chinese government could determine that the VIE structure does not comply with Chinese law and subject the issuer to penalties.
- Risks Related to Regulatory Environment. The Guide notes that China's legal system is substantially different than the US legal system and may raise risks and uncertainties concerning the intent, effect and enforcement of its laws, rules and regulations.

The Guide addresses differences in shareholder rights and recourse, governance and reporting with China-based issuers. Legal claims, including federal securities law claims, may be difficult or impossible to pursue in US courts against China-based issuers, and investors may be unable to enforce any US court judgements against China-based issuers. In addition, many China-based issuers are organized in jurisdictions outside both the United States and China, such as the Cayman Islands and the British Virgin Islands. There are substantial corporate law and corporate governance differences between these non-US jurisdictions and the United States. Among others, the Guide notes fiduciary duties that directors owe investors may be narrower in scope or less developed. Finally, to the extent that China-based issuers qualify as foreign private issuers, they are exempt from certain reporting requirements under the federal securities laws applicable to US domestic issuers, meaning that they are permitted to provide reduced disclosures in some areas.

The Guidance further addresses specific disclosure considerations for China-based issuers. The Division states that China-based issuers must fully disclose material risks related to their operations in China. Such disclosure should consider the following:

- Does the China-based company provide clear and prominent disclosure of PCAOB inspection limitations and lack of enforcement mechanisms, as well as the risks relating to the quality of the financial statements?
- Does the China-based company use VIEs in its organizational structure? If so, does the company include sufficient disclosure about the related party transactions in the VIE structure and caution investors about the risks associated with the VIE structure employed in China?
- Does the China-based company disclose risks relating to the regulatory environment in China, including risks related to a less developed legal system, which may result in inconsistent and unpredictable interpretation and enforcement of laws and regulations?

- Does the China-based company provide risk disclosure about differing shareholder rights and remedies in the company's country of organization and/or based on where a company's operations are located?

The statements in the Guidance represent the views of the Division. The Guidance is not a rule, regulation or statement of the SEC.

The full text of the Guidance is available here.

Nasdaq Seeks SEC Approval of Board Diversity Rule

On December 1, the Nasdaq Stock Market LLC (Nasdaq) filed a rule proposal (the Proposal) with the Securities and Exchange Commission that, if approved by the SEC, would require all Nasdaq-listed issuers to comply with listing rules concerning board diversity and related disclosure. Specifically, the Proposal would require all Nasdaq-listed issuers (subject to the exceptions for "smaller reporting companies" and foreign private issuers described below) to (1) have, or explain why its board of directors does not include, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either LGBTQ+ or an underrepresented minority, and (2) publicly disclose, on an annual basis (either in the issuer's proxy statement for its annual shareholder meeting or on its website), board-level diversity data using the "Board Diversity Matrix" that is accessible here or a substantially similar format. If the Proposal is approved, a smaller reporting company or foreign issuer would be required to have at least one female director, and a smaller reporting company would be permitted to satisfy the requirement to have a second diverse director with a director who is female, LGBTQ+ or an underrepresented minority. A foreign private issuer would be able to satisfy the requirement to have a second diverse director with a director who is female, LGBTQ+ or a minority based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the issuer's home country jurisdiction.

The SEC will provide at least 21 days from the time the Proposal is published in the Federal Register for public comment. After publication in the Federal Register, the SEC has between 30 and 240 calendar days to approve the Proposal. If the SEC approves the Proposal, a Nasdaq-listed issuer would be required to (1) disclose board-level diversity statistics within one year of the SEC's approval and (2) comply with the board diversity requirements on a timeline based on the issuer's listing tier — all Nasdaq-listed issuers would be required to have one diverse director within two years of the SEC's approval of the Proposal and two diverse directors within four years (if the issuer is listed on the Nasdaq Global Select Market or the Nasdaq Global Market) or five years (if the issuer is listed on the Nasdaq Capital Market). Companies that are not able to meet the composition requirements within the timeframes under the Proposal would not, however, be subject to delisting based upon such failure, if they provide a public explanation of the reasons for their noncompliance.

The full text of the Proposal is available here, and the press release is available here. Nasdaq has also made available related FAQs and a summary of the Proposal that are available here and here, respectively.

SEC Announces Proposed Amendments to Rule 701 and Form S-8

On November 24, the Securities and Exchange Commission voted to propose amendments (the Proposal) to (1) Rule 701 under the Securities Act of 1933, as amended (Securities Act), which exempts certain compensatory equity offerings by non-reporting issuers from registration under the Securities Act, and (2) Form S-8, which is a registration statement form available for compensatory securities offerings by reporting issuers. The Proposal is intended to modernize the framework for compensatory securities offerings based on developments related to, and the evolution of, compensatory offerings and the composition of the workforce since the SEC last amended Rule 701 and Form S-8. In the SEC's press release announcing the Proposal, SEC Chairman Jay Clayton noted that, the Proposal would enhance the ability of issuers to include "company securities in worker-company compensation arrangements so that workers have the opportunity to share in the growth of the business." As highlighted in the fact sheet included in the press release, the Proposal would, among other things:

(1) With respect to Rule 701:

a) revise the limits under Rule 701 so that the maximum amount of securities that may be offered in reliance on Rule 701 in any consecutive 12-month period is the greatest of: (1) 15 percent of the outstanding amount of the class of securities being offered, which would be unchanged from the current rule; (1) an amount equal to the value of 25 percent of the issuer's assets (or, if the offering

is guaranteed by the issuer's parent, 25 percent of the value of the issuer's parent's assets), which would result in an increase from 15 percent under the current rule in each instance; and (3) $2 million, which would result in an increase from $1 million under the current rule;

b) eliminate the current requirement that a subsidiary of the issuer or its parent be majority-owned in order for the subsidiary's employees to be eligible to participate in Rule 701 offering;

c) modify the existing requirement that an issuer provide certain financial disclosures to "all persons participating in the offering" if aggregate sales made by an issuer in reliance on Rule 701 during any 12-month period exceed $10 million to provide that the additional disclosure is only required to be provided in respect of sales that occur after the $10 million threshold has been exceeded;

d) provide an issuer with alternatives to satisfy the disclosure requirements if the $10 million threshold is exceeded, including to permit an issuer to provide financial statements that are not more than 270 days old (compared to the requirement under the current rule that such financial information be not more than 180 days old) and, if the issuer is a foreign issuer, to allow such financial statements to be prepared in accordance with the rules of the issuer's home country (rather than in accordance with US GAAP or IFRS) without a US GAAP reconciliation, if financial statements reconciled to US GAAP or IFRS are not available; and

e) for derivative securities that do not involve a volitional act by the recipient to exercise or convert (e.g., restricted stock units), provide that the disclosure required under Rule 701(e) must be delivered a reasonable period of time before the date the award of derivative securities is made, which modifies the current requirement that such disclosure be delivered a reasonable period of time before the date of exercise or conversion.

(2) With respect to Form S-8:

a) clarify that an issuer (x) may register on a single Form S-8 offers and sales pursuant to multiple employee benefit plans, (y) may add additional plans to an existing Form S-8 by filing a post-effective amendment if the new plan does not require authorization and registration of additional securities for offer and sale, and (z) is not required to allocate registered securities among employee benefit plans on a single Form S-8;

b) permit an issuer to add securities or classes of securities by post-effective amendment;

c) simplify related share-counting and fee payments for registration statements filed related to defined contribution plans (e.g., a 401(k) plan) by allowing the registration of an indeterminable number of shares, in which case, the registration fee would be based on the number of shares actually sold (which fee would be paid annually, in arrears, following the end of the issuer's fiscal year); and

d) eliminate the requirement in Item 1(f) of Form S-8 to describe the tax effects of plan participation on the issuer.

The Proposal would also expand the application of, and eligibility requirements under, Rule 701 and Form S-8 from employees, consultants and advisors who are natural persons to also include securities issuances to entities that provide a service to the issuer, so long as substantially all of the activities of such entity consist of the performance of services, and the ownership of the entity meets certain criteria specified in the Proposal. In addition, the Proposal would allow an issuer to, in reliance on Rule 701 or Form S-8, as applicable, issue securities (1) to former employees and other persons who provided services to the issuer, its parents, its subsidiaries or subsidiaries of its parent, even if the securities are issued after such person's resignation, retirement or other cessation of services, so long as the issuance is made as compensation for services rendered during a performance period that ended within 12 months preceding such person's resignation, retirement or other cessation of services, or (2) as a "substitute award" to former employees of an entity the issuer acquires so long as the award held at the time of the acquisition was properly issued in reliance on Rule 701 or Form S-8, as applicable.

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

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

In a separate proposal also issued by the SEC on November 24, the SEC proposed to amend Rule 701 and Form S-8, for a temporary five-year period, in order to permit issuers to grant equity compensation to so-called "gig economy" workers or "platform workers" who provide services to those issuers. Specifically, if the temporary amendment is approved, an issuer would be permitted to offer and sell compensatory securities pursuant to Rule 701 to platform workers who provide bona fide services to the issuer, pursuant to a written contract or agreement, by means of the issuer's "internet-based platform or other widespread, technology-based marketplace platform or system," so long as:

1) the issuer operates and controls the platform;

2) the securities issuance to the platform worker(s) is pursuant to a written compensatory arrangement (e.g., a written compensation plan, contract or agreement), and not for services that are in connection with the offer or sale of securities in a capital-raising transaction or services that directly or indirectly promote or maintain a market for the issuer's securities;

3) no more than 15 percent of the value of the participating worker's compensation received from the issuer for services during a 12-month period, and no more than $75,000 of such compensation received from the issuer during a 36-month period, consists of securities (with the securities valued at the time of the grant, using any reasonable, recognized valuation methodology, so long as the same methodology is used during the 12-month period or the 36-month period);

4) the amount and terms (e.g., the vesting schedule) of any securities issuance to a platform worker may not be subject to bargaining or negotiation or provide for the worker's ability to elect to be paid in securities or cash; and

5) the issuer must take reasonable steps to prohibit the securities issued to the platform worker pursuant to Rule 701 from being transferred, other than a transfer to the issuer or by operation of law.

Issuers would also be permitted to make registered securities offerings to platform workers using Form S-8, subject to the same conditions described above, other than the proposed restriction on transfer. Notably, the proposed temporary amendment would not permit issuers to issue securities to platform workers for activities related to the sale or transfer of permanent ownership of discrete, tangible goods.

In the proposal for the temporary amendment, the SEC expressed the view that temporarily permitting platform workers to receive equity grants under Rule 701 and using Form S-8 would allow the SEC to assess whether such issuances are being made for appropriate compensatory purposes (and not for capital-raising purposes), which will inform the SEC's efforts to modernize its rules to reflect changing economic and market conditions.

The SEC is soliciting comments on the proposed temporary amendment for a period of 60 days after publication in the Federal Register.

The full text of the proposal is available here, and the press release and fact sheet are available here.

DERIVATIVES

See "Possible Life After 2021 for Some US Dollar LIBOR Tenors" in the Banking section.

New NFA Interpretation Requires Approval of Swap Marketing Materials

On December 2, the National Futures Association (NFA) submitted a new Interpretive Notice to the Commodity Futures Trading Commission (CFTC) for approval. The notice, which is entitled "NFA Compliance Rule 2-9(d): Swap Dealer and Major Swap Participant Supervision of the Use of Marketing Materials," requires that all marketing materials used by a swap dealer member must be reviewed and approved by appropriate supervisory personnel. For purposes of the notice, marketing materials "include standardized documents in the form of pitch

books, reports, letters, circulars, memoranda, presentations, publications, or brochures or other similar standardized documents (delivered via either hard copy or electronically, e.g., by email, text, or instant message) used for the purpose of soliciting a counterparty to enter into swap transactions."

The notice recognizes that swap dealers may use marketing materials that are general in nature, as well as marketing materials that are tailored to or focused on a particular type or group of counterparties (e.g., counterparties interested in a specific swap product). Although all marketing materials must be reviewed and approved, the timing of the review and approval may vary based on the type of material and/or the swap dealer's relationship with the counterparty.

The notice could become effective as early as 10 days after submission to the CFTC unless the CFTC notifies the NFA that it wants to delay effectiveness, but the compliance date is likely to be later than the effective date.

The Interpretive Notice is available here.

CFTC

See "New NFA Interpretation Requires Approval of Swap Marketing Materials" in the Derivatives section.

CFTC Staff Grants Temporary Relief to DTCC Data Repository LLC and Related Entities from Reporting Requirements

On November 24, the Commodity Futures Trading Commission's (CFTC) Division of Data (DOD) granted temporary no-action relief to DTCC Data Repository LLC (DDR) from certain requirements of the swaps data repository (SDR) rules in Part 49 of the CFTC's regulations. DDR requested relief because it planned to implement revisions to its infrastructure and applications consistent with recent amendments to the CFTC's reporting rules prior to the effective date of such rules. The relief stipulates that DOD will not recommend the CFTC take an enforcement action against DDR for:

1. failure to accept and promptly record certain swaps and swap data fields as required by CFTC Regulation 49.10(a); or
2. failure to confirm the accuracy of data by notifying both swap counterparties as required by CFTC Regulation 49.9(a)(2) and Part 49.11(a) and (b).

The relief also states that DOD will not recommend that the CFTC take an enforcement action against a registered entity or swap counterparty reporting swaps data to DDR for failure to report certain swap data fields as required by the swaps data reporting rules in Parts 45 and 46 of the CFTC's regulations.

This temporary relief expires 60 days following publication of the SDR and swaps data reporting final rules in the Federal Register. The final rules were published in the Federal Register on November 25.

The press release is available here.

CTFC Staff Letter 20-38 is available here.

CFTC Staff Publishes Interim Report on NYMEX WTI Crude Contract

On November 23, the Commodity Futures Trading Commission (CFTC) published an interim report regarding the circumstances leading up to the negative settlement price on April 20 of the West Texas Intermediate Light Sweet Crude Oil futures contract (WTI Contract) traded on the New York Mercantile Exchange. The report outlines the events of the WTI Contract market between January 1 and April 21, and also sets forth data on the geopolitical and fundamental economic drivers, as well as certain technical factors, preceding and coinciding with the negative settlement price of the WTI Contract on April 20, the first time the WTI Contract traded at a negative price since being listed for trading 37 years ago. Importantly, the report does not consider whether forces outside of supply and demand impacted prices leading up to, on, or around April 20 and does not identify the root cause(s) of any price movement of the WTI Contract leading up to, on, or around April 20.

The press release is available here.

Access to the interim report is available here.

CFTC Staff Extends Existing Brexit-Related Relief to Provide Market Certainty

On November 24, the Commodity Futures Trading Commission's (CFTC) Market Participants Division (MPD) and Division of Market Oversight (DMO) announced an extension of two previously granted no-action letters to provide greater certainty to the global marketplace in connection with the withdrawal of the United Kingdom (UK) from the European Union (EU). CTFC Staff Letter 20-39 stipulates that MPD and DMO will provide temporary relief to ensure the continued availability of substituted compliance and regulatory relief under CFTC comparability determinations and exemptive orders the CFTC originally issued for EU entities. CTFC Staff Letter 20-40 ensures the omnibus relief provided by MPD to EU entities in certain staff letters continues to be available for UK entities following the end of the transition period.

The press release is available here.

CTFC Staff Letter 20-39 is available here.

CTFC Staff Letter 20-40 is available here.

CFTC and Italy's CONSOB Sign MOU for Supervision of Cross-Border Firms

On November 30, the Commodity Futures Trading Commission (CFTC) and Italy's Commissione Nazionale per le Società e la Borsa (CONSOB) announced the signing of a memorandum of understanding (MOU) regarding cooperation and information exchange in connection with supervising regulated firms that operate in the United States and Italy. The MOU includes a framework for cooperation, contemplates information sharing and provides procedures for examinations.

The press release with a link to the MOU is available here.

CFTC Extends Timing Requirements for Certain SEF Year-End Reports

On November 30, the Commodity Futures Trading Commission's (CFTC) Division of Market Oversight extended previously provided no-action relief for swap execution facilities (SEF) from certain timing requirements to file fourth-quarter financial reports and annual compliance reports. The no-action relief extends from 60 days to 90 days the time within which a SEF must file its fourth quarter annual report and a SEF Chief Compliance Officer (CCO) must file the CCO's annual compliance report.

The no-action relief will now expire on November 30, 2021, unless the CFTC provides a permanent extension or takes other action.

The press release is available here.

CFTC Staff Letter No. 20-41 is available here.

CFTC to Hold an Open Commission Meeting on December 8

The Commodity Futures Trading Commission (CFTC) will hold a virtual open meeting on Tuesday, December 8 at 9:30 a.m. (ET).

At the meeting, the CFTC will consider, among other things, final rules on (1) electronic trading risk principles, (2) audit trail, financial resources and CCO requirements for swap execution facilities, (3) exemptions from swap trade execution requirement, (4) Part 190 bankruptcy regulations, and (5) margin requirements for uncleared swaps for swap dealers and major swap participants.

Members of the public can access the meeting via live feed on the CFTC's YouTube channel or by telephone.

Access and other information is available here.

BANKING

Possible Life After 2021 for Some US Dollar LIBOR Tenors

On November 30, ICE Benchmark Administration Limited (IBA) announced that it will hold a consultation on its intention to (1) cease the publication of the one week and two month USD LIBOR settings after December 31, 2021, but (2) continue publishing the remaining USD LIBOR settings until June 30, 2023. This treatment of USD LIBOR stands in contrast to IBA's previously announced intention to cease the publication of all GBP, EUR, CHF and JPY LIBOR settings after December 31, 2021.

According to IBA, the consultation will begin "in early December" and will close "for feedback by the end of January 2021."

This possible postponement of the demise of the overnight and one, three, six and 12 month tenors of USD LIBOR to June 30, 2023 has been endorsed by Alternate Reference Rate Committee and the UK Financial Conduct Authority. US banking regulators issued a joint statement that is supportive of the postponement but which stresses that US banks should transition away from LIBOR transactions "as soon as is practicable" but should certainly not enter into new USD LIBOR transactions after December 31, 2021.

The IBA announcement is available here.

The ARRC announcement is available here.

The announcement from the UK Financial Conduct Authority is available here.

The statement of the US banking regulators is available here.

UK DEVELOPMENTS

FCA Proposes Fees for SMCR Changes and Newly-Authorized Firms

On November 19, the UK's Financial Conduct Authority (FCA) published a consultation paper proposing an increase to application fees paid by new businesses seeking its authorization and application changes made under the Senior Managers Certification Regime (SMCR) (the Consultation Paper).

In the Consultation Paper, the FCA proposes to increase fees for straightforward applications from £1,500 to £2,500 and for moderately complex ones from £5,000 to £10,000 for newly-authorized firms. The FCA states it would help "redress the balance of cost recovery" away from existing fee-payers and recover further monies towards the total cost of authorizations.

The FCA also proposes to introduce fees for changes in control and applications and charge firms for changes made to its personnel under the SMCR. According to the FCA, these fees would compensate itself for the amount of work undertaken when approving applications.

Furthermore, the FCA is looking to introduce a £2,500 fee for claims management companies (CMCs) that apply for permission to seek out people who want to make a claim. These companies act as lead generators, which puts these "lower risk" CMCs in the same bracket as financial advisers and mortgage brokers. The FCA clarifies that the new fee does not apply to lead generators who seek the higher risk permission of 'advice, investigation or representation.'

Application fees were last reviewed by the FCA in 2014.

The Consultation Paper is available here.

UK's Treasury Committee Publishes Further Inquiry Into Future of Financial Services Post-Brexit

On November 20, the UK's House of Commons Treasury Committee published a press release announcing the launch of a further inquiry into the future of the UK's financial services sector following the end of the Brexit transition period (the Press Release).

The key objectives addressed by the Treasury Committee in the Press Release include:

- examining how financial services regulations should be set and scrutinized by Parliament as EU directives will cease to govern new rules and regulations;
- considering the government's financial services priorities while negotiating trade agreements with third countries;
- considering how regulators are funded and whether financial services regulations should be consumer-focused; and
- recommending how the government, public bodies and the financial services sector can ensure that the United Kingdom remains a leading financial center.

The Treasury Committee published a call for evidence which offers further detail on the scope of the inquiry and an associated webpage.

The deadline for the call for evidence is January 8, 2021.

The Press Release is available here.

FCA Launches Data on Directory Persons on Financial Services Register

On November 23, the UK's Financial Conduct Authority (FCA) updated its webpage confirming that data on certified and assessed persons (Directory Persons) submitted by dual-regulated firms under the Senior Managers and Certification Regime (SM&CR) is now live on the Financial Services Register (FS Register) (the Webpage). On the Webpage, the FCA reiterates that solo-regulated firms are to submit their data on Directory Persons via the FCA's online portal — 'Connect' by March 31, 2021 using the single-entry submission form. Solo-regulated firms that wish to use the multiple entry submission form or that would like their data to appear from December can apply (see the October 16, 2020 Edition of *Corporate & Finance Weekly Digest* for further details.)

Under the SM&CR, data on Directory Persons will operate alongside the FS Register, and information will be made public on key individuals in SM&CR firms that carry out roles which are not pre-approved by the FCA.

The Webpage is available here.

FCA Publishes Draft Transitional Direction for Share Trading Obligation Under MiFIR

On December 2, the UK's Financial Conduct Authority (FCA) published a draft transitional direction alongside an explanatory note, for share trading obligation under the Markets in Financial Instruments Regulation (600/2014) (MiFIR) in preparation for the end of the Brexit transition period (the Direction).

The Direction will allow UK firms to continue trading all shares on EU trading venues and systematic internalisers (SIs), if they choose to do so and where the regulatory status of those venues and SIs permits such activity (see the November 6, 2020 edition of *Corporate & Financial Weekly Digest*). The FCA hopes the Direction will mitigate the compliance disruption that may arise with onshored obligations.

The Direction will take effect following the end of the transition period at 23:00 on December 31 under Part 7 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) and may be subject to amendments or revocation.

The FCA consulted with HM Treasury, the Bank of England and the Prudential Regulation Authority to draft the Direction.

The Direction is available here.

EU DEVELOPMENTS

ESMA Publishes Final Report on EMIR RTS Clearing Obligation Regarding Intragroup Transactions and Novations From UK to EU Counterparties

On November 23, the European Securities and Markets Authority (ESMA) published a final report on regulatory technical standards (RTS) on the risk mitigation techniques for OTC derivative contracts not cleared by central counterparties detailing bilateral margin requirements under the European Market Infrastructure Regulation (EMIR) (the Report).

The key amendments considered by ESMA in the Report include:

- extending the deferred application date of clearing obligation for 18 months for intragroup transactions;
- extending the temporary exemption for single-stock equity or index options in respect of bilateral margin requirements for three years;
- preserving the characteristics of contracts from UK counterparties novated to EU counterparties without triggering bilateral margin or clearing obligation requirements under certain conditions. This limits situations where the original UK counterparty is no longer able to provide certain services within the European Union after the end of the transition period; and
- altering the Clearing Delegated Regulations for Brexit-related novations of OTC derivative contracts to EU counterparties within a 12-month timeframe and updating the Regulations to harmonize with the changes introduced by EMIR Refit Regulation.

ESMA submitted the Report to the European Commission for endorsement.

ESMA expects national competent authorities to apply the EU framework regarding clearing obligations, intragroup OTC derivative contracts and OTC derivative contract novated from the United Kingdom to the European Union in a proportionate manner before the enactment of the RTS.

The Report is available here.

ESMA Publishes Statement Regarding Post-Brexit Impact on MiFIR Derivatives Trading Obligation

On November 25, the European Securities and Markets Authority (ESMA) published a statement regarding the impact on the derivatives trading obligation (DTO) under Article 28 of the Markets in Financial Instruments Regulation (600/2014) (MiFIR) following the United Kingdom's withdrawal from the European Union on December 31 (the Statement).

In the Statement, ESMA determines that the application of DTO will continue to apply without changes in the event of a no-deal Brexit or the absence of an equivalence decision issued by the European Commission following the end of the transition period. However, ESMA commits to monitoring the situation closely.

ESMA confirms that most UK trading venues that offer trading in derivatives subject to the DTO have established new trading venues in the European Union. Although trading activity on these venues is currently limited, the venues have on-boarded participants and members which should facilitate EU investment firms' compliance with the DTO after the end of the transition period.

ESMA recognizes that in the absence of an equivalence decision, this system may create challenges for EU counterparties who have UK branches of EU investment firms. These EU counterparties are likely to be subject to the DTO in both the United Kingdom and the European Union and may require changes to their current business practices to ensure compliance with both.

The Statement 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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