Katten
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SEC/CORPORATE

SEC Proposes Amendments to Financial Disclosure in Regulation S-K and Issues New Guidance

On January 30, the Securities and Exchange Commission voted to propose amendments to certain financial disclosure requirements in Regulation S-K, in an effort to modernize and simplify such requirements. The SEC also issued new guidance relating to key performance indicators and metrics.

The SEC has proposed the following amendments and guidance to Regulation S-K:

Elimination of Items 301 Selected Financial Data and 302 Supplementary Financial Information

To simplify disclosure requirements in light of modern technological developments and reduce the repetition of non-material information, the SEC proposed eliminating the requirements that registrants provide 1) five years of selected financial data and 2) two years of selected quarterly financial data.

Amendments to Item 303 Management's Discussion and Analysis of Financial Condition and Results of Operations

The SEC proposed various amendments to Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A), including:

- adding a new Item 303(a) to succinctly state and clarify the principal purposes of MD&A and streamline the instructions;
- eliminating the specific requirement to discuss the impact of inflation and price changes, though a discussion of such matters would still be required if the trend shows they have had or are reasonably expected to have a material impact on net sales, revenue or income from continuing operations (Item 303(a)(3)(iv) Results of Operations (Inflation and Price Changes));
- replacing the requirement that a registrant discuss off-balance sheet arrangements with a requirement to integrate disclosure of off-balance sheet arrangements within the broader context of MD&A (Item 303(a)(4), Off-Balance Sheet Arrangements);
- eliminating the requirement to provide a contractual obligations table (Item 303(a)(5) Contractual Obligations);
- permitting registrants 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); and
- requiring disclosure of critical accounting estimates.

Other proposed amendments to MD&A would require disclosure of known events reasonably likely to cause a material change in costs and revenues; codify existing interpretive guidance requiring the discussion of reasons underlying material changes in net sales or revenues and require disclosure of material cash requirements (including capital expenditures commitments); and the anticipated source of funds and general purpose of such material cash requirements.

Amendments Relating to Foreign Private Issuers

The proposed revisions include parallel amendments to Forms 20-F and 40-F relating to foreign private issuers (FPIs), intending that MD&A requirements for FPIs continue to mirror the substantive MD&A requirements in Item 303 of Regulation S-K.

Guidance

The SEC also issued new guidance providing that, where registrants disclose key performance indicators or metrics, they should also consider the extent to which additional disclosure relating to the metrics is necessary in light of existing MD&A requirements and to ensure that the presentation of the indicators or metrics, in light of the circumstances under which they are presented, is not misleading. The guidance further provides a reminder for registrants to consider whether they have effective controls and procedures in place to process information related to the disclosure of key performance indicators and metrics to ensure consistency and accuracy.

Commenters have 60 days following publication in the *Federal Register* to submit comments to the proposed amendments, which is available here. The guidance is available here.

BROKER-DEALER

FINRA Requests Comments on Proposed Amendments to the Capital Acquisition Broker Rules

On January 30, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-04 requesting comment on the proposed amendments to the Capital Acquisition Broker (CAB) rules.

CABs are firms that only engage in a limited number of activities, such as acting as placement agents for sales of unregistered securities to institutional investors and advising companies and private equity funds on capital raising and corporate restructuring. Firms electing CAB status are subject to fewer restrictions on specified activities such as advertising and have less burdensome supervisory requirements. However, CAB firms are not permitted to engage in other broker-dealer activities, such as accepting customers' trading orders, carrying customer accounts, handling customers' funds or securities, or engaging in proprietary trading or market-making.

The proposed amendments would:

- allow CABs to register as investment advisers, so long as the advisory services are provided only to institutional investors;
- broaden the definition of institutional investor to include "knowledgeable employees" under Rule 3c-5 of the Investment Company Act of 1940 and persons performing similar roles at other private issuers for which CABs act as placement agents;
- expand the ability of CABs to act as placement agent for secondary trades of unregistered securities;
- allow CABs to be compensated in the form of securities issued by a privately held client, rather than in cash, provided that the receipt, exercise or subsequent sale of such securities will not cause the CAB to engage in activities prohibited under CAB Rule 016(c)(2); and
- require CABs whose business model creates potential insider trading risks to establish, maintain and enforce written policies and procedures that are reasonably designed to mitigate and prevent those risks.

Comments must be received by FINRA by March 30. The Notice is available here.

New Rate for Fees Paid Under Section 31 of the Exchange Act

On February 3, the Financial Industry Regulatory Authority (FINRA) issued an Information Notice regarding fees paid under Section 31 of the Securities Exchange Act of 1934 (the Exchange Act).

The Information Notice states that effective February 18, the Section 31 fee rate applicable to specified securities transactions on the exchanges and in the over-the-counter markets will increase from its current rate of $20.70 per million dollars in transactions to a new rate of $22.10 per million dollars in transactions.

Section 31 of the Exchange Act requires the SEC to annually adjust the fee rates applicable under Section 31 and, FINRA obtains its Section 31 fees from member firms, in accordance with Section 3 of Schedule A to its By-Laws.

A copy of the Information Notice is available here.

CFTC

CFTC's Technology Advisory Committee to Meet on February 26

The Commodity Futures Trading Commission (CFTC) announced that its Technology Advisory Committee (TAC) will host a public meeting at 10:00 a.m. on February 26, at the CFTC's Washington, DC headquarters.

The TAC intends to hear presentations on stablecoins, audit trails, compliance solutions, cryptocurrency self-regulatory organizations, insurance, and custody. In addition, the TAC will vote on a subcommittee recommendation regarding the Financial Services Sector Coordinating Council Cybersecurity Profile.

The meeting is open to the public. More details about the meeting are available here.

NFA Announces Effective Date for Various Rule Amendments

National Futures Association (NFA) recently amended several of its rules and Interpretive Notices related to discretionary customer accounts, customer information, risk disclosures and bunched orders. These amendments will become effective on March 1.

More information concerning the NFA amendments can be found in the December 6, 2019 edition of *Corporate & Financial Weekly Digest*.

ANTITRUST

FTC Releases Revised Hart-Scott-Rodino Filing Thresholds for 2020

The Federal Trade Commission (FTC) recently announced new filing thresholds that will apply to mergers and acquisitions under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, as amended (the Act). These new thresholds will go into effect on February 27.

Under the revised notification thresholds, transactions valued above $94 million will require HSR notification when they satisfy other requirements of the Act. This threshold is an increase from the current threshold of $90 million. The FTC adjusted the filing thresholds for larger transactions as well. The current $180 million threshold will be increased to $188 million, and the current $899.8 million threshold will be increased to $940.1 million. Under the new thresholds, the filing fee for notifiable transactions valued: 1) above $94 million but less than $188 million, remains at $45,000; 2) above $188 million but less than $940.1 million, remains at $125,000; and 3) above $940.1 million remains at $280,000.

Transactions valued between $94 million and $376 million also must satisfy the "size of person" test in addition to the "size of transaction" test for a filing to be required. The FTC also announced new size of person thresholds. Under the new thresholds, one party to the transaction must have net sales or total assets of at least $18.8 million, and another party to the transaction must have net sales or total assets of at least $188 million. Transactions valued greater than $376 million under the HSR rules will require a filing regardless of the size of the persons involved.

The FTC's announcement on the revised thresholds is available here.

UK DEVELOPMENTS

AML: JMLSG Proposes Amended Guidance

On February 4, the UK's Joint Money Laundering Steering Group (JMLSG) announced proposed amendments to its anti-money laundering (AML) and counter-terrorist financing (CTF) guidance (the Guidance). The JMLSG is a UK-focused group of trade bodies which produces AML and CTF guidance to assist the financial services industry.

In the press release accompanying the Guidance, the JMLSG noted that the proposed amendments are a response to the updated Money Laundering Regulation 2017 (the Regulation), which itself is the UK's implementation of the EU's fifth Money Laundering Directive (for more information, please see the January 10 edition of *Corporate & Financial Weekly Digest*). The proposed amendments also are a response to the Financial Action Task Force's updated standards (please see the July 12, 2019 edition of *Corporate & Financial Weekly Digest*).

The JMLSG's proposed amendments include the following:

- updating customer due diligence (CDD) guidance to clarify the "e-money-specific exemption" and incorporate the International Tax Compliance Regulations 2015 requirement to apply CDD to existing customers in certain circumstances;
- constricting the situations to which simplified due diligence (SDD) can be applied, and requiring firms to document their decision to apply SDD. The amendments also clarify when and how enhanced due diligence should be applied;
- adding four more illustrative risk factors, concerning beneficiaries of life insurance policies with no "obvious links" to the policy holder; third-country nationals buying EEA residence rights or citizenship; the use of "electronic identification;" and transactions related to oil, arms, precious metals, tobacco, cultural artefacts, ivory, or other items of archeological, historical, cultural and religious significance;
- updating guidance relating to electronic identification, digital identity and other electronic data sources;
- adding "anonymous safe-deposit boxes" to the list of prohibited anonymous products;
- adding guidance relating to the beneficial ownership register and other provisions to monitor the registration of companies; and
- adding letting agents, antiquities and art market participants, cryptoassets exchange providers and custodian wallet providers to the list of financial sector firms to whom the Regulation applies.

The proposed amendments to the Guidance are available here, and the consultation closes on April 3.

EU DEVELOPMENTS

ESG: ESMA Publishes Strategy on Sustainable Finance

On February 6, the European Securities and Markets Authority (ESMA) published its Strategy on Sustainable Finance (the Strategy). This continues work initiated by the European Commission (the Commission) concerning sustainable finance and the incorporation of environmental, social and governance (ESG) factors into European financial services (for more information, please see the January 10 edition of *Corporate & Financial Weekly Digest*).

In the Strategy, ESMA outlined the following "key priorities":

- develop the Sustainable Finance Platform (as mandated by the Commission's Action Plan on Financing Sustainable Growth), and undertake other work mandated by the Disclosure Regulation and Taxonomy Regulation. This will allow for the incorporation of sustainability factors into ESMA's technical standards and advice, and ultimately the integration of sustainability factors into the European Banking Authority's "single rulebook;"
- assist the Commission with the fulfilment of the European Green Deal, in particular by providing advice in relation to "greenwashing;"

- help national competent authorities incorporate ESG factors into local supervisory practices by mapping current requirements, building awareness, and developing tools and advice;
- develop technical advice to require greater transparency regarding ESG factors from credit rating agencies, which are directly supervised by ESMA;
- use regulatory data to monitor ESG-related market developments, with the longer-term goal of developing a comprehensive analytical framework for ESG. This will include a dedicated ESG chapter in ESMA's 2020 Report on Trends, Risks and Vulnerabilities; and
- generally assist the other institutions of the European Union and international groups such as the International Organization of Securities Commissions (IOSCO) in achieving their sustainable finance goals.

The Strategy 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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