SHEARMAN & STERLING LLP

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP NEWSLETTER

MAY 2017

Governance & Securities Law Focus: Latin America Edition

This newsletter provides a snapshot of the principal US and selected international governance and securities law developments during the first quarter of 2017 that may be of interest to Latin American corporations and financial institutions.

Click here if you wish to access our Financial Regulatory Developments website.

In this Issue (please click on any title to go directly to the corresponding discussion):

US Developments

SEC and NYSE/Nasdaq Developments

SEC Announces XBRL Requirements Will Apply to Companies Reporting Under IFRS

On March 1, 2017, the US Securities and Exchange Commission ("SEC") announced that foreign private issuers ("FPIs") that prepare financial statements in accordance with International Financial Reporting Standards ("IFRS") will be required to provide a version of their financial statements in interactive data format using eXtensible Business Reporting Language ("XBRL") in addition to providing financial statements in their traditional format. As of now, FPIs may voluntarily file financial data in XBRL format, however, this will be obligatory beginning with their annual reports on Form 20-F filed in 2018 relating to their first fiscal year ending on or after December 15, 2017. Previously, FPIs were not required to comply with XBRL reporting because the SEC had not specified tags for certain pieces of data—known as "taxonomy"—specifically applicable to IFRS.

XBRL enables financial analysts and regulators to easily compare and analyze a company's financial reporting by making the data machine-readable which enables it to be searched, reorganized or downloaded into spreadsheets. Many companies use financial printers or other outside service providers to prepare their financial statements in XBRL format as using software for the XBRL tagging can be both costly and time-consuming.

The inclusion of an XBRL exhibit will be required in the following filings:

- Form 20-F annual reports, more specifically: the balance sheet, the income statement, the statement of cash flows, the statement of stockholders' equity, the statement of comprehensive income (if presented separately), the notes to the financial statements and any applicable schedules to the financial statements; and
- Form 6-K reports that contain interim financial statements which were included pursuant to the nine-month updating requirement of Item 8.A.5 of Form 20-F or a revised version of financial statements previously filed with the SEC.

By the end of the day, on which the report is filed with the SEC or is required to be filed (whichever is earlier), the XBRL data will also need to be posted on the public website and remain on the website for 12 months. Providing issuer's a hyperlink to the SEC's website will not be sufficient.

The relevant SEC announcement is available at:

https://www.sec.gov/news/pressrelease/2017-58.html

SEC Adopts Rules Requiring Hyperlinks for Corporate Exhibits

On March 1, 2017, the SEC adopted rule and form amendments aimed at making access to exhibits in registration statements and periodic reports easier for market participants to locate. The final rules will be effective for filings submitted on or after September 1, 2017.

Currently, someone seeking to retrieve and access an exhibit that has been incorporated by reference to a previous filing must review the exhibit index to determine the filing in which the exhibit is included, and then search through the registrant's filings to locate the relevant filing. This will change under the revised rules, as issuers will now be required to include a hyperlink to each exhibit in the filing's exhibit index.

The new rules apply to companies that file registration statements and periodic and current reports that are subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 or 20-F, but will not apply to exhibits filed with Form 6-Ks. Registrants must also submit all such filings in HTML format to enable the inclusion of hyperlinks, as opposed to ASCII format, which does not support hyperlink capabilities.

Companies will be required to rectify non-functioning or incorrect exhibit hyperlinks. For example, if the Company's Form 20-F contains such an error, its next Form 20-F must contain the correct hyperlink.

The relevant SEC announcement is available at:

https://www.sec.gov/news/pressrelease/2017-55.html

Our related client publication can be found at:

http://www.shearman.com/en/newsinsights/publications/2017/03/sec-adopts-t2-settlement-cycle-for-exhibits

SEC Adopts T+2 Settlement Cycle for Securities Transactions

On March 22, 2017, the SEC adopted a rule amendment to shorten by one business day the standard settlement cycle for most broker-dealer securities transactions following the trade date. The current settlement cycle of three business days, known as T+3, will thus be shortened to two business days, i.e. T+2. This will bring the US settlement cycle in line with most markets in Europe that have already moved to a T+2 settlement cycle.

Express agreements between parties to a transaction to vary the standard settlement cycle will still be permitted. This change will apply the T+2 settlement cycle to the same transactions currently covered by the T+3 settlement cycle, which includes transactions for stocks, bonds, exchange-traded funds, municipal securities and certain mutual funds.

The amended rule is designed to enhance efficiency, to prevent market and liquidity risk arising from unsettled securities trades and ensure a coordinated and expeditious transition by market participants to a shortened standard settlement cycle. Compliance with the amended rule by broker-dealers will be required beginning on September 5, 2017. The SEC further stated that T+1 and end-of-day settlement cycles may be considered in the future.

For further detail, see the SEC’s press release, which is available at:

https://www.sec.gov/news/press-release/2017-68-0

Our related client publication is available at:

http://www.shearman.com/en/newsinsights/publications/2017/03/sec-adopts-t2-settlement-cycle-for-exhibits

Conflict Minerals Rule Update

On January 31, 2017, SEC Acting Chairman Michael S. Piwowar issued a statement directing the SEC’s staff to consider whether the 2014 guidance on the conflict minerals rule is still appropriate and if any relief of the rule is appropriate. The current conflict minerals rule requires companies that manufacture or contract to manufacture products containing tantalum, tin, tungsten or gold to conduct due diligence on their supply chains regarding such minerals in order to provide greater transparency on responsible sourcing.

Acting Chairman Piwowar noted that the conflict minerals rule may have had the unintended consequence of provoking a de facto boycott of minerals from portions of Africa, given the cost to companies of complying with the supply chain due diligence and disclosure requirements, and he questioned whether the rule has had any effect in reducing the influence of armed groups or in easing human suffering in the Democratic Republic of the Congo and surrounding areas.

On April 3, 2017, final judgment was entered in litigation regarding the conflict minerals rule that has worked its way through the US federal courts over the last couple of years. In light of these developments, on April 7, 2017, the SEC issued a statement expressing its determination that it will not pursue enforcement action against companies that do not comply with the requirement to undertake due diligence and prepare and file a conflict minerals report.

Pending further action by the SEC, and notwithstanding the SEC’s updated position on enforcement action, we expect that most companies will continue to comply with the conflict minerals rule for calendar year 2016. Companies are required to file their conflict minerals disclosure for 2016 on Form SD by May 31, 2017.

Interested parties were invited to submit comments on the conflict minerals rule, including the SEC’s 2014 guidance, by March 17, 2017. For further details on the statement comments, please consult the SEC’s public statement, which is available at:

https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html

The comment letters submitted in response to this request for comment are published on the SEC's website, which is available at:

https://www.sec.gov/comments/statement-013117/statement013117.htm

The updated statement by the SEC Division of Corporation Finance on the effect of the Court of Appeals decision on the conflict minerals rule is available at:

https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule

Our related client publication is available at:

http://www.shearman.com/en/newsinsights/publications/2017/02/changing-of-guard-sec-reconsiders-conflict-rule

Congress Vacates SEC Extractive Industries Government Payments Disclosure Rule

On February 14, 2017, President Trump signed legislation that has the effect of overturning the SEC rule promulgated under the 2010 Dodd-Frank financial reform law that would have required resource extraction issuers to disclose payments they make to governments for the commercial development of oil, natural gas or minerals. The SEC's first attempt at implementing this government payments rule was struck down by US federal courts in 2013, but the SEC adopted a new final rule in June 2016, which was scheduled to come into effect beginning in 2018.

Congress used the Congressional Review Act to enact a joint resolution disapproving the SEC government payments rule, which overturned the rule. While the Congressional disapproval does not repeal Section 1504 of the Dodd-Frank Act, which directs the SEC to implement a rule requiring disclosure of payments made to governments by resource extraction issuers, the joint resolution precludes the SEC from reissuing the rule in substantially the same form unless specifically authorized by a new law.

Although extractive industry companies will not be required to disclose payments they make to governments under SEC rules to the extent such companies are listed on a stock exchange in Canada or the EU, or have certain other connections with Canada or the EU, they may still be subject to similar reporting requirements in those jurisdictions.

Our related client publication is available at:

http://www.shearman.com/en/newsinsights/publications/2017/02/changing-of-guard-sec-reconsiders-conflict-rule

SEC Proposes Amendments to Industry Guide 3—Statistical Disclosure by Bank Holding Companies

On March 1, 2017, the SEC published a request for public comment on the bank holding company ("BHCs") disclosures called for by Industry Guide 3—Statistical Disclosure by Bank Holding Companies. Stating that the financial services industry has changed drastically since Guide 3 was originally published in 1976 and last updated in 1986, the SEC is soliciting public input on whether Guide 3 continues to elicit the information that investors need for informed investment and voting decisions. The SEC also seeks comment on whether there are new types of disclosures about the activities of BHCs that investors would find important.

FPIs that are BHCs or banking organizations generally typically provide the Guide 3 disclosures, although there are some Guide 3 requirements that are not recognized concepts under IFRS. The SEC is seeking comment on whether foreign registrants that are banking organizations should provide the Guide 3 disclosures, whether the disclosures could be better aligned with IFRS and whether investors who rely on Guide 3 disclosures for foreign registrants that are banking organizations would lose important information if the requirements which overlap with US GAAP were eliminated.

The SEC is also considering if:

- new disclosures are needed, in particular with respect to:
- new activities undertaken by BHCs such as commodities, asset management, broker-dealer activities or changes in the industry such as the increasing importance of non-interest income;
- inclusion of disclosures required by other regulatory regimes that might be important for investors, such as call reports required by US prudential regulators, stress tests, resolution plans required for large BHCs by the Dodd-Frank Act or other international or local prudential regulatory reports; and
- outdated or overlapping disclosures can be removed.

The comment period will remain open until May 8, 2017. The request for comment is available at:

https://www.sec.gov/news/pressrelease/2017-54.html

SEC Publishes New C&DI on Regulation D

On November 17, 2016 the SEC issued a new compliance and disclosure interpretation ("C&DI") on Regulation D. The C&DI clarifies that a general solicitation in reliance on Rule 506(c) of Regulation D made within six months after a private placement in reliance on Rule 506(b) of Regulation D will not result in the integration of the two offerings (thereby causing the issuer to lose the exemption for the prior private placement), so long as the applicable requirements of the two rules are satisfied.

The SEC staff clarified that the relationship between Rule 506(c) and Rule 506(b) was analogous to Rule 152 which provides that "a securities transaction that at the time involves a private offering will not lose that status even if the issuer subsequently decides to make a public offering." Therefore, a private offering by an issuer under Rule 506(b) will not be integrated with any subsequent offering that solicits investors under Rule 506(c).

For more information, see the C&DI, available at:

https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#256.34

Noteworthy US Securities Litigation

Marblegate Asset Management, LLC v. Education Management Finance Corp.: Federal Appeals Court Holds That Trust Indenture Act Prohibits Nonconsensual Amendments Only To "Core Payment Terms"

On January 17, 2017, the federal appeals court based in New York held that the prohibition in the Trust Indenture Act of 1939 on impairing a bondholder's right "to receive payment" without the bondholder's consent applies to just the "core payment terms" of a debt agreement, but not to debt restructurings that otherwise affect the bondholder's practical ability to recover. The appeals court thus vacated the lower court's ruling that had held that a restructuring of Education Management Corporation ("EDMC") debt violated the Trust Indenture Act because it limited the practical ability to recover of the sole company creditor that did not agree to the restructuring.

EDMC is a for-profit educational company that in 2014 was in need of restructuring its $1.5 billion in debt, approximately $1.3 billion of which was held by secured creditors and approximately $200 million of which was held by unsecured creditors. The company could not file for bankruptcy because doing so would have prevented it from qualifying for certain government subsidies for educational institutions. EDMC reached an out-of-court restructuring agreement with all of its creditors except Marblegate, which was an unsecured creditor representing just two percent of the company's total debt. This restructuring involved a foreclosure on EDMC's assets that did not affect the "core payment terms" of Marblegate's notes—i.e., the amount of principal and interest owed and the date of maturity—but limited Marblegate's practical ability to recover by transforming the entity responsible for those payments into an empty shell company.

Section 316(b) of the Trust Indenture Act prohibits the impairment of a bondholder's right "to receive payment" under qualifying notes without the bondholder's consent. The court here determined that the statutory language was inconclusive as to whether that prohibition applied to just "core payment terms" or also to a bondholder's practical ability to recover. The court considered the extensive legislative history of the statute. Based on this analysis, the court concluded that Section 316(b) prevents nonconsensual amendments to just the "core payment terms" of a debt agreement (such as amendments adopted by a majority of bondholders), but not to debt restructurings—such as the foreclosure transaction that took place here—that affect only the practical ability to recover. But the court was careful to point out that nonconsenting creditors could still pursue other avenues of relief, such as challenging the restructuring arrangement under fraudulent conveyance law, the Uniform Commercial Code or successor liability principles.

In a dissent, one of the judges on the panel reasoned that the language of Section 316(b) clearly prohibited transactions that impair a nonconsenting creditor's practical ability to obtain payment. According to this judge, even if "[c]ertain undesirable consequences might well arise from the fact that Section 316(b) prohibits actions such as those taken by EDMC in this case," the "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for" the legislature rather than the courts to decide. The majority opinion nevertheless establishes that the law, at least in New York and the two other states covered by decisions of this court, allows for the kind of debt restructuring that EDMC engaged in. This decision returns the law to where much of the business community had understood it to be until the lower court's decisions in this case. Individual bondholders can accordingly no longer singlehandedly hold up necessary debt restructurings.

For more information on the Marblegate case, please see our client note at:

http://www.shearman.com/en/newsinsights/publications/2017/01/appeals-court-overturns-marblegate

Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.: Federal Appeals Court Dismisses Securities Class Action Because CEO's Statements Touting Ethical Standards Were "Transparently Aspirational"

On January 19, 2017, in *Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, the federal appeals court based in California affirmed the lower court's decision to dismiss a securities class action against Hewlett Packard Co. ("HP") and its former chief executive officer. The plaintiffs alleged that HP and its former CEO violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") when the CEO breached HP's code of ethics after he and the company had publicly promoted HP's high ethical standards. The court concluded that the plaintiffs failed to allege an actionable fraud because, among other reasons, the alleged statements about HP's code of ethics were not objectively false, but "transparently aspirational."

The plaintiffs' claims stemmed from the resignation of HP's former CEO after an internal investigation revealed that he had falsified expense reports and lied about his relationship with an independent contractor. According to the plaintiffs, HP's public statements about its business ethics were shown to be demonstrably false based on the CEO's misconduct. The district court, dismissing the action, held that the complaint failed to adequately allege that the statements at issue were objectively false or material. The appeals court affirmed that ruling and said that a code of conduct is "inherently aspirational" because it "expresses opinions as to what actions are preferable, as opposed to implying that all staff, directors and officers always adhere to its aspirations." The court noted that a contrary interpretation would be untenable because it could turn all corporate wrongdoing into securities fraud. The court also ruled that the statements at issue were not material because there was nothing unusual about HP's promotion of business ethics that would have affected a reasonable investor's decision to invest in the company.

The court's decision, which was a matter of first impression for this court, establishes that, where a company's statements do not guarantee absolute compliance with ethical standards, but instead are merely aspirational, they do not give rise to a securities fraud claim if the ethical standards are later breached. In reaching this result, the court here joins several other courts around the country that have reached the same conclusion.

Recent Regulatory Enforcement Matters

In the Matter of Cadbury Limited and Mondelēz International, Inc., Admin. Proc. No. 3 17759: SEC Sanctions Violation Of FCPA Books And Records Requirements For Pre Acquisition Conduct

On January 6, 2017, Mondelēz International, Inc. ("Mondelēz") entered into a settlement with the SEC to resolve charges under the books and records and internal control provisions of the Foreign Corrupt Practices Act ("FCPA") related to the actions of an India subsidiary of Cadbury Limited ("Cadbury"), before being acquired by Mondelēz in 2010. Mondelēz, which neither admitted nor denied the SEC's findings, agreed to pay a $13 million civil monetary penalty to settle the SEC's claims.

Mondelēz, a US-based food, beverage and snack manufacturer formerly known as Kraft Foods, Inc., purchased Cadbury for $19 billion in February 2010. The SEC alleged that shortly before the acquisition, in January 2010, a Cadbury subsidiary in India ("Cadbury India") engaged an agent to help it obtain licenses and approvals to expand the company's operations at a chocolate factory there. Cadbury India allegedly retained the agent after a single meeting, without performing any other diligence on the agent. Between February and July 2010, the agent allegedly submitted five invoices totaling $110,446 to Cadbury India for work related to the application for government licenses. According to the SEC, the agent did not provide adequate documentary support for this work and did not have a written contract with Cadbury India. The license applications at issue were allegedly prepared by Cadbury India employees rather than the agent. After receiving payments from Cadbury India totaling approximately $91,000 (after the deduction of withholding taxes), the agent allegedly withdrew most of the funds in cash. During the time that Cadbury India engaged this agent, it received some of the licenses that it was seeking. As a result of this arrangement, Cadbury India's books allegedly did not reflect the agent's services adequately and the company's inadequate internal controls created a risk that the funds paid to the agent might be used for improper purposes.

Mondelēz did not have the opportunity to conduct complete due diligence, including anti corruption due diligence, prior to its acquisition of Cadbury. While Mondelēz conducted extensive post-acquisition diligence between April and December 2010 that covered Cadbury's activities in India, this diligence allegedly failed to identify the relationship between Cadbury India and the agent until an internal investigation in October 2010 related to the agent. Mondelēz then required Cadbury India to terminate its relationship with the agent, cooperated with the SEC and undertook extensive remedial actions, including implementing its global compliance program at Cadbury and reviewing services provided by third parties to Cadbury India.

Mondelēz was held accountable for Cadbury India's activities here as a result of Mondelēz's acquisition of Cadbury. In addition, the SEC sought the sanctions here even though it alleged only books and records and internal control violations, but not that the funds were actually used for any improper purpose. This matter highlights the SEC's vigilance in pursuing FCPA violations of all kinds, and the need for sufficient anti-corruption due diligence in advance of a corporate merger or acquisition.

Securities and Exchange Commission v. Cooperman: Court Holds That Misappropriation Theory of Insider Trading Applies Even When Duty of Trust And Confidence Arose After Inside Information Was Communicated

On March 20, 2017, in *Securities and Exchange Commission v. Cooperman*, the federal district court based in Pennsylvania denied a motion to dismiss an insider trading claim brought by the SEC against a hedge fund manager and his investment advisory firm. The court explained that this case turned on the novel issue of whether, to be liable under the "misappropriation theory" of insider trading, a trader must owe a duty of trust and confidence to the source of the misappropriated confidential information at the time the source discloses that information to the trader. The court ruled that, as long as the trader owed that duty of trust and confidence at some point before the trade in question, the trader may be liable under the misappropriation theory of insider trading.

The SEC alleged that Leon Cooperman and his firm, Omega Advisors, Inc., violated Section 10(b) of the Exchange Act by trading in advance of an announcement of a $650 million asset sale by Atlas Pipe Partners LP ("Atlas") based on confidential information that Cooperman, one of Atlas's largest shareholders, obtained directly from an Atlas executive. The SEC alleged that after the Atlas executive told Cooperman about the upcoming asset sale, Cooperman promised that he would not trade in Atlas's stock, but he proceeded to do so anyway. Under the misappropriation theory of insider trading, a corporate outsider is liable for trading in a company's securities based on material nonpublic information in breach of a duty of trust and confidence owed to the source of the information. Cooperman argued that because he allegedly promised not to trade in Atlas stock after he received the confidential information, and thus did not owe the Atlas executive a duty of trust and confidence at the time he received the information, he could not be liable under the misappropriation theory.

The court here noted that "[w]hether liability under the misappropriation theory of insider trading may be premised on a post disclosure agreement is a novel issue" that no court has "squarely addressed." The court went on to conclude that the misappropriation theory applies as long as a duty of trust and confidence arises before the outsider trades based on material nonpublic information, even if that duty did not arise until after the outsider received that information. This conclusion was based on several factors, including SEC Rule 10b5-2, which describes the circumstances that can give rise to a duty of trust and confidence; case law addressing the misappropriation theory of insider trading, which explains that the deception "occurs at the time the outsider uses material nonpublic information to trade;" the principle that liability under Section 10(b) should be construed "broadly, not technically;" and the goal of avoiding a loophole that, under Cooperman's theory, would allow corporations and outsiders to avoid liability by communicating confidential information at a time when the duty of trust and confidence did not apply.

Much attention has been focused recently on other aspects of insider trading law, such as the scope of tipper/tippee liability. This case begins to clarify another part of the relevant legal framework by addressing the underdeveloped issue of when liability attaches under the misappropriation theory of insider trading.

SEC Settles Enforcement Action Relating to Non-GAAP Measures

On January 18, 2017, the SEC announced that New York-based MDC Partners ("MDC") had agreed to pay $1.5 million to settle charges that it failed to disclose executive compensation and violated non-GAAP financial disclosure rules. Non-GAAP financial measures are financial measures that do not conform either to US generally accepted accounting principles ("GAAP") or international financial reporting standards, as applicable.

As discussed in previous issues of this memorandum, in May 2016, the SEC updated its C&DIs regarding the use of non-GAAP financial measures. Since then, the SEC has focused on compliance with non-GAAP disclosure rules, both in SEC comment letters, as well as in enforcement actions.

The MDC action related to the company's use of the non-GAAP measure "organic revenue growth," which was defined to exclude the effects of currency fluctuations and acquisitions, but which in fact also excluded the effect of a shift in revenue recognition policy for two subsidiaries. This had the effect of boosting reported organic revenue growth in 2012 and 2013.

MDC also failed to disclose the relevant GAAP measures with equal or greater prominence to the non-GAAP measures, as required by Regulation G and Item 10 of Regulation S-K.

For further detail, see the SEC's order at:

> https://www.sec.gov/litigation/admin/2017/33-10283.pdf

US Sanctions Compliance

Q4 2016 Sanctions Round-Up

On January 31, 2017, we published our quarterly Sanctions Round Up focusing on developments in US economic sanctions laws and enforcement in the fourth quarter of 2016, as well as in connection with the new Trump Administration. The main developments included:

- President Donald J. Trump's inauguration and its implications for US sanctions policy, especially related to Iran and Russia;
- termination of Burma-related sanctions;
- President Obama and Europe's continued support for Russian sanctions; and

- US authorities continue to enforce sanctions through settlements for violations of Iranian and Cuban sanctions.

For further detail, our client publication is available at:

- http://www.shearman.com/en/newsinsights/publications/2017/01/4th-qtr-2016-president-trump

EU Developments

General

Company Law Codification Directive: European Parliament Publishes Outcome of its First Reading

On April 5, 2017, the European Parliament passed a resolution to adopt the text of its first reading of a proposed directive to codify certain aspects of company law. The proposed directive would codify and replace a number of existing directives with respect to company law. No substantial changes will be made to any provisions of company law as a result of the codification.

The proposed directive would codify and replace the following with a single text:

- First Company Law Directive (Codified) (*Directive 2009/101/EC*) relating to the disclosure of company documents, the validity of obligations entered into by a company and nullity;
- Second Company Law Directive (Recast) (*Directive 2012/30/EU*) relating to the formation of public limited liability companies and rules on maintaining and altering their capital;
- Eleventh Council Directive (*Directive 89/666/EEC*) relating to disclosure requirements for foreign branches of companies;
- Third Company Law Directive (Codified) (*Directive 2011/35/EU*) relating to mergers between public limited liability companies in a single EU country;
- Sixth Company Law Directive (*Directive 82/891/EEC*) relating to the division of public limited liability companies in a single EU country; and
- Cross Border Mergers Directive (*Directive 2005/56/EC*) relating to rules to facilitate mergers of limited liability companies involving more than one country.

The full text of the proposed directive is available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0616

ESMA Report on Shareholder Identification and Communication Systems Under the Shareholder Rights Directive

On April 5, 2017, the European Securities and Markets Association ("ESMA") published its report intended to assist the European Commission ("Commission") in implementing the requirements of Articles 3(a)(8) and 3(b)(6) of the Shareholder Rights Directive, relating to the process, format and timeline for shareholder identification and transmission of information.

In the report, ESMA proposes that the Commission's implementing acts achieve harmonization across national regulatory frameworks for the identification of and communication with shareholders. The report assesses the current national regulatory requirements to assess the current level of harmonization and suggests ways in which the new requirements could be best implemented.

ESMA's report is available at:

http://www.esma.europa.eu/file/22013/download?token=a4Ufo60f

Amendment to the Shareholder Rights Directive

On March 14, 2017, the European Parliament adopted the text of a proposed directive to amend the Shareholder Rights Directive (2007/36/EC). This was adopted by the Council of the European Union (with only some very minor amendments) on April 3, 2017.

The key elements of the amending Directive are that:

- Companies will have greater disclosure obligations with respect to their remuneration policy, and shareholders will have an advisory vote on the remuneration policy.
- Shareholders will have increased voting power over related party transactions which represent more than 5% of a company's assets or which could have significant impact on profits or turnover. Related party transactions which represent more than 1% of a company's assets must also be publically announced together with the publication of an independent third-party report.
- Proxy advisors will be required to disclose certain information regarding the preparation of their voting recommendations and any conflict of interests that might influence their voting recommendations.
- Institutional investors and asset managers must disclose, amongst other things, their voting and engagement policies.
- Companies will be able to require greater transparency in the identification of shareholders and in transmitting certain information by intermediaries to the ultimate beneficial shareholders.
- The text of the Directive must be transposed into national legislation within 18 months after the Directive enters into force, which will take place after the text has been published in the Official Journal.

The full text of the proposal is available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0213

European Parliament Adopts New Prospectus Regulation

On April 5, 2017, the European Parliament voted to adopt the Commission's proposed new Prospectus Regulation, which repeals and replaces the existing Prospectus Directive (2003/71/EC) and the existing Prospectus Regulation (809/2004).

We covered in detail the Commission's proposal for the new Prospectus Regulation in our publication of February 2016, which is available at:

http://www.shearman.com/en/newsinsights/publications/2016/02/prospectus-directive-the-commission-proposal

Some of the key changes include:

- Increasing the upper limit for the total consideration for offers that may be exempt from the prospectus regime from €5 million to €8 million.
- A restriction on combining over a 12-month period the two prospectus exemptions with respect to the admission of securities to trading on a regulated market and relating to (i) shares that represent less than 20% of securities of the same class already admitted to trading and (ii) shares resulting from the conversion or exchange of other securities.
- Certain changes to the risk factors section of the prospectus, including a requirement to rank each risk factor by materiality in each category.
- Reducing the maximum permitted length of the summary from 15 to seven sides of A4.

The new regulation will apply from two years after it enters into force (which follows its publication in the Official Journal) although certain provisions will apply from one year after it enters into force.

The full text of the Parliament's adopted text is available on the Parliament's website at the below link, pending its publication in the Official Journal:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0110+0+DOC+PDF+V0//EN

Commission Consultation on Technology in Financial Services

On March 23, 2017, the European Commission published a consultation paper seeking views to develop its policy approach towards technological innovation in financial services.

The paper outlines a range of potential uses of distributed ledger technology ("DLT") in financial services, including:

- Allowing the primary issuance of securities to be performed directly onto a distribution ledger with common reference data. Holders of such securities could use DLT to vote in the general meeting of shareholders.
- Supporting automated financial reporting to investors and regulatory authorities.

The Commission is seeking views on matters including the main regulatory or supervisory obstacles (stemming from both EU and national law) to the deployment of DLT solutions in the financial sector. The deadline for responses is June 15, 2017.

The full consultation paper is available at:

https://ec.europa.eu/info/sites/info/files/2017-fintech-consultation-document_en_0.pdf

Commission Consultation on Operations of the European Supervisory Authorities

On March 21, 2017, the European Commission published a consultation on the operation of the European Supervisory Authorities ("ESAs").

The Commission is seeking a wide range of views on matters concerning the ESAs. These include:

- How respondents assess ESAs' work in promoting a common supervisory culture and fostering supervisory convergence and how any weaknesses are best addressed.
- Whether to adjust ESAs' tasks and powers in relation to breaches of EU law by individual entities.
- Whether to strengthen ESAs' role in implementation and monitoring following the adoption of an equivalence decision.

The Commission has noted that this consultation may lead to further legislation. Responses are due by May 16, 2017.

The full consultation paper is available at:

https://ec.europa.eu/info/sites/info/files/2017-esas-operations-consultation-document_en.pdf

Transparency Directive: ESMA Guide to EEA National Rules on Major Holdings Notifications

On February 3, 2017, ESMA published a practical guide to the national rules across the European Economic Area ("EEA") on major holdings notifications under the Transparency Directive. The guide is intended to help market participants understand the differing notification requirements across the EEA. Shareholders with notification obligations under the Transparency Directive may particularly benefit from the guide.

ESMA has created the guide with input from national regulators. The guide is split into two parts:

- a fact sheet for each EEA country, with the exception of Liechtenstein, summarizing the national requirements relating to making and publishing notifications of major holdings; and
- a table setting out information on rules and practices to enable market participants to compare rules across different jurisdictions.

The guide will be updated in accordance with any changes to national rules and practices.

The full text of the guide is available at:

https://www.esma.europa.eu/sites/default/files/library/practical_guide_major_holdings_notifications_under_transparency_directive.pdf

Alternative Performance Measures; ESMA Q&A

On January 27, 2017, ESMA published a new Q&A on the implementation of its guidelines for issuers when presenting alternative performance measures ("APMs") in prospectuses as well as in documents available in the public domain which contain regulated information.

Notable points from the Q&A are as follows:

- **Application**: The APM guidelines apply to a set of defined financial measures that are disclosed outside financial statements but in documents within the scope of regulated information.
- **Intermediate measures**: How to apply the guidelines when constituent parts of a prospectus straddle the date on which the guidelines came into force (July 3, 2016). The applicability of the guidelines will be determined by reference to the publication date of the prospectus. The examples of how to apply the guidelines in such cases replicate those set out in new question 101 in the 26th version of ESMA's Q&A on prospectuses, which was added to the prospectuses Q&A in December 2016.
- **Disclosure**: Where APMs directly identifiable from financial statements are also disclosed outside financial statements, the issuer or the persons responsible for the prospectus:
  - do not need to provide a reconciliation between the APM used and the most directly reconcilable line item, total or subtotal presented in financial statements; and
  - where applicable, may use the compliance by reference principle (paragraphs 45 to 48 of the APM guidelines) and refer to the specific page or section in the financial statements, where this information is readily and easily accessible to users.
- **Interim reporting**: The APM guidelines apply to interim financial reporting if it falls under the definition of regulated information set out in the Transparency Directive (as amended). Therefore, the APM guidelines apply to:
  - additional periodic financial information, when this information is published in accordance with Article 3(1a) of the Transparency Directive;
  - half-yearly financial reports, as required by Article 5 of the Transparency Directive; or
  - any financial information published in accordance with Article 17 of the Market Abuse Regulation (such as ad-hoc disclosures).

Where interim financial reports or the additional periodic financial information are regulated information, the APM guidelines only apply to the information accompanying financial statements (such as the interim management report), as the APM guidelines exclude from their scope the financial statements.

- **Labels**: The APM guidelines apply to all labels of APM used by issuers or the persons responsible for a prospectus (and not only to the labels "non-recurring," "infrequent" or "unusual," which are specifically referred to in paragraph 25 of the guidelines).
- How the concept of "corresponding previous periods" in relation to financial reports, ad-hoc disclosures or prospectuses should be applied by issuers or the persons responsible for the prospectus. Essentially, issuers should disclose figures for all periods presented, that is, where the financial reports or prospectuses have more than one comparative period, comparatives on the APMs should be provided for all prior periods presented.

The full text of the Q&A is available at:

https://www.esma.europa.eu/file/21236/download?token=I5WVQq27

Market Abuse Regulation (MAR); ESMA Q&A

On January 27, 2017, ESMA published an updated version of its Q&A on the Market Abuse Regulation ("MAR"). Changes since the last version include a new question and answer in which ESMA confirms:

- the rules to be followed to calculate the price of options granted for free to managers or employees for the purpose of the notifications and disclosure of managers' transactions under Article 19 of MAR;
- that the value of these transactions needs to be taken into account when calculating the cumulative amount of the transactions of a PDMR or a person closely associated with a PDMR, to assess whether the threshold (EUR5,000 or EUR20,000) referred to in Article 19(8) and (9) of MAR has been crossed, thereby triggering the duty to notify and disclose all subsequent transactions; and
- various other more detailed points relating to the determination of the relevant price in relation to certain notifiable manager's transactions in certain circumstances.

The full text of the Q&A is available at:

https://www.esma.europa.eu/sites/default/files/library/esma70-21038340-40_qa_on_market_abuse_regulation.pdf

Further European Commission Consultation on Capital Markets Union:

On January 20, 2017, the Commission published a further consultation on the Capital Markets Union ("CMU") action plan in connection with its planned mid-term review. The consultation document seeks feedback on how the current CMU program can be updated and completed.

The Commission does not envisage fundamental changes to the conception or strategic focus of the action plan, which had previously been the subject of a comprehensive consultation. Rather, some 15 initiatives, or almost half of the actions envisaged in the plan, have already been completed. Several more will be launched in the coming months and will be finalized by 2019.

The Commission envisages targeted changes to update and reframe the program of actions required. Among actions that the Commission is keen to identify are those that:

- **Strengthen non-bank sources of finance for innovative companies and EU businesses with high-growth potential**.

For example:

- while the online alternative finance market (including crowdfunding and peer-to-peer lending) is growing, it is concentrated in a few member states. Cross-border activity is low;
- in addition, there was a reduction in both venture capital funding and venture capital deals in 2016. EU VC funds lack both scale, relative to their US counterparts, and geographical reach. In the Commission's view, other options could be explored;
- private placements of debt are also concentrated in a handful of member states; and
- pre-IPO non-bank finance remains largely absent, particularly in the smaller member states.
- **Make it easier for companies to enter and raise capital on public markets**. The size of EU public equity and debt markets lags behind other developed economies. There are currently limited equity raisings by EU companies, especially the smallest ones. The potential of public markets is under-utilized for small and mid-cap companies. IPO costs, already high, fall on them disproportionately. There is a need to speed up the legislative process, specifically mentioning in this context the implementing measures of the Prospectus Regulation.
- **Facilitate cross-border investment**. The Commission notes that there remain many long-standing and deep-rooted obstacles to cross-border investment. These include, but are not limited to, divergences in corporate governance frameworks that may deter equity investment across borders and impede the exercise of efficient oversight over companies'

managements and boards. The Commission cites evidence that better corporate board accountability is necessary for long-term value creation.

The consultation ended on March 17, 2017. The results will feed into the mid-term review of the action plan which the Commission aims to publish in June 2017.

The full text of the consultation is available at:

https://ec.europa.eu/info/file/76178/download_en?token=ExUjYyWy

EU Financial Markets Regulation Developments

EMIR Exemptions for Central Banks in Six Countries

On March 3, 2017, the European Commission published a report on the international treatment of Central Banks and public entities managing public debt with regard to OTC derivatives transactions. The European Market Infrastructure Regulation ("EMIR") imposes clearing, reporting and risk mitigation obligations for derivatives. EU central banks and EU public bodies managing public debt are exempt from EMIR. The European Commission may exempt central banks and public bodies managing public debt from other countries following analysis of the international treatment of the relevant entities in a particular country. In the first of these reviews conducted in 2013, the Commission added central banks and public bodies responsible for the management of debt in the United States and Japan to the list of exempted bodies through a Commission Delegated Regulation.

The Commission has concluded in its second report that central banks and public bodies managing debt in Australia, Canada, Hong Kong, Mexico, Singapore and Switzerland should also be exempt from certain parts of EMIR. These new exemptions will come into effect once the new Commission Delegated Regulation is published in the Official Journal of the European Union. The Commission will continue to monitor the progress of other countries in implementing similar requirements for OTC derivatives.

The Commission's report available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:104:FIN

EU Corrections to Regulatory Technical Standards on Margin Requirements for Uncleared Transactions Enter Into Force

On February 27, 2017, a Commission Delegated Regulation amending the Regulatory Technical Standards ("RTS") on margin requirements for uncleared derivatives was published in the Official Journal of the European Union. The amending RTS relate to the phase-in of the variation margin requirements for intra-group transactions and supplement the EMIR. EMIR requires counterparties to uncleared over-the-counter ("OTC") derivative transactions to implement risk-mitigation techniques to reduce counterparty credit risk. The original RTS prescribe how margin should be posted and collected and the methodologies by which the minimum amount of initial margin and variation margin should be calculated, as well as specifying a list of securities eligible as collateral for the exchange of margins, such as sovereign securities, covered bonds, specific securitizations, corporate bonds, gold and equities.

The original RTS on risk mitigation techniques for uncleared OTC derivatives were published in the Official Journal of the European Union on December 15, 2016. This correction is due to a technical error in the adoption process, which resulted in the omission of two paragraphs on the phase-in of variation margin requirements to intra-group transactions. The amending RTS update the original RTS by inserting two new paragraphs specifying the phase-in schedule for variation margin requirements for intra-group transactions. Where an intra-group transaction takes place between a Member State entity and a third-country entity, the exchange of variation margin is not required until three years after entry into force of the amended RTS, but only where there is no equivalent decision for that third country. Where there is an equivalent decision, the variation margin requirements will apply either four months after the entry into force of the equivalent decision, or according to the timeline outlined in the original RTS, whichever is later.

The amending RTS entered into force on February 27, 2017 and applied retroactively from January 4, 2017 so as to coincide with the dates of the original RTS.

The amending RTS is available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0323&from=EN

The original RTS is available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485801630726&uri=CELEX:32016R2251&_sm_au_=iVVH7SZ6qZ1wDsMj

Proposed EU Guidelines on Transfer of Data Between Trade Repositories

On January 31, 2017, ESMA launched a consultation on proposed Guidelines on the transfer of data between trade repositories. The EMIR requires counterparties and central counterparties ("CCPS") to report trades to a trade repository while ensuring that details of their derivatives contracts are reported without duplication. EMIR also requires trade repositories to maintain reported information for a period of 10 years following the termination of the derivative.

Where a trade repository's registration with ESMA is withdrawn, the trade repository is required to ensure the transfer of data to other trade repositories and the redirection of reporting flows to other trade repositories. Data may also be transferred between trade repositories at the request of a counterparty to a derivative or the entity reporting on its behalf. The proposed Guidelines set out the related requirements for the transfer of data between trade repositories, including the requirements for trade repositories to develop a migration plan, fees and communications with the relevant national authorities.

The proposed Guidelines would apply to counterparties to derivatives contracts, CCPs and trade repositories. The consultation closed on March 31, 2017. ESMA intends to publish a report and the final Guidelines by the end of Q2 or beginning of Q3 2017.

The consultation paper is available at:

https://www.esma.europa.eu/press-news/esma-news/esma-consults-future-guidelines-portability-between-trade-repositories

European Securities and Markets Authority Requests a Review of its Sanctioning Powers Under the European Market Infrastructure Regulation

On January 30, 2017, the ESMA published an open letter to the European Commission asking it to consider several issues relating to its supervisory and sanctioning powers under the EMIR and emphasizing similar aspects relating to Credit Rating Agencies ("CRAs"). The letter follows the Commission's Report, published on November 23, 2016, assessing the issues arising from the implementation of the requirements of EMIR in which the Commission proposed a legislative review of EMIR in 2017. ESMA submitted four reports to the Commission in 2015 on the functioning of EMIR, which included recommendations on how EMIR could be enhanced. The letter highlights the areas in those reports that ESMA considers the Commission should consider as part of the EMIR review this year.

ESMA recommended in 2015 that its sanctioning powers and the level of trade repository fines should be increased by 10 times to make them more comparable with those in place for Credit Ratings Agencies. ESMA requests the inclusion of the following enhanced supervisory tools: (i) the possibility for ESMA to oppose material changes to the conditions of registration; (ii) an obligation for trade repositories to submit periodic information to ESMA; and (iii) sanctions for the breaches of the obligation to notify periodic information and material changes to the conditions of registration. ESMA also identifies what it views as some essential additional requirements for trade repositories relating to data quality and data access which should be included as part of the reporting requirement, such as an alignment with the Securities Financing Transactions and Re-use Regulation logic of reporting the trade by both counterparties, but with certain exemptions (for instance, non-financial counterparties).

ESMA also highlights other recommendations made in its four reports, such as amendments to the clearing obligation framework and a review of the language of Articles that set the default management and protections, redefining and recalibrating the categories of large and small non-financial counterparties and their related obligations, improving the transparency and predictability of margin requirements and revising the third country CCP recognition framework to put in place a timely and risk based process.

ESMA submitted to the Commission two sets of technical advice and a report on the regulation of CRAs on October 2, 2015. The papers provide an overview of the industry and the impact of specific provision of the CRA Regulation. The Commission published a report on October 19, 2016, which assessed the state of the credit rating market, including issues of competition and governance. Further to the CRA reports, ESMA highlights amendments equivalent to those proposed for EMIR, including an extension of the types of enforcement decisions that can be adopted by ESMA.

The letter is available at:

https://www.esma.europa.eu/press-news/esma-news/esma-letter-emir-review-and-sanctioning-powers-european-commission

EU Legislation Amending Technical Standards on the Format and Frequency of Trade Reporting Published

On January 21, 2017, a Commission Implementing Regulation amending Implementing Technical Standards ("ITS") on the format and frequency of trade reports submitted to trade repositories was published in the Official Journal of the European Union. The original ITS, published in the Official Journal on December 21, 2012, supplements the reporting requirements in the EMIR. The ESMA provided final draft amending ITS to the European Commission in November 2015. ESMA considered that the original standards needed to be updated to incorporate the feedback and Q&As during implementation of the reporting requirement under EMIR since 2013. The text of the final amending ITS differs from the text of ESMA's final draft ITS, however, the changes are minor. The revisions to the original ITS include, among other things:

- specific rules to assist in the determination of who are the buyer and seller to various types of swap derivative contract for reporting purposes;
- rules for reporting collateralization for a given derivative contract or portfolio;
- criteria for the generation of unique trade identifiers where two counterparties cannot agree on responsibility for generating a unique identifier within the reporting timeline;
- extension of the period for reporting terminated trades from three to five years from the commencement date of reporting; and
- updated standards and formats to be used in trade data reports. The amending ITS entered into force on February 10, 2017. The revised reporting obligations will apply from November 1, 2017, which should allow counterparties enough time to prepare for the incoming changes.

The amending ITS is available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0105&from=EN&_sm_au_=iVVH7SZ6qZ1wDsMj

The original ITS is available at:

- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1247&from=EN&_sm_au_=iVVH7SZ6qZ1wDsMj

UK Developments

SFO Update—Fourth UK DPA Approved

On April 10, 2017, the English High Court approved the UK's fourth DPA between the Serious Fraud Office ("SFO") and Tesco Stores Limited ("TSL"), a subsidiary of the UK supermarket giant Tesco Plc ("Tesco").

The SFO initiated its investigation into Tesco following allegations against TSL of false accounting between February and September 2014. Tesco subsequently admitted that, in a trading statement published on August 29, 2014, it had overstated its profits by £326 million.

Under the terms of the DPA (which, for reasons explained below, has not been made public), TSL is required to pay a financial penalty of £129 million, together with the SFO's legal costs. The DPA relates only to TSL's potential criminal liability and does not address whether liability of any sort attaches to Tesco or any current or former employee or agent of Tesco or TSL.

In addition to the financial penalty under the DPA, Tesco has agreed with the UK Financial Conduct Authority ("FCA") that it will pay a further £85 million in compensation to Tesco's investors who were adversely affected by the false trading statement, as part of the FCA's compensation scheme. Tesco will also pay the FCA's associated legal costs.

As a result of the SFO's and FCA's investigations into Tesco and TSL, Tesco will pay a total of £235 million in penalties, compensation and legal costs.

The SFO has charged three former TSL executives—Carl Rogberg, Christopher Bush and John Scouler—in relation to this affair. Each has been charged with one count of Fraud by Abuse of Position, contrary to sections 1 and 4 of the UK Fraud Act 2006, and one count of False Accounting, contrary to section 17 of the UK Theft Act 1968. All three have pleaded not guilty and the trial is scheduled to commence on September 4, 2017.

In order to prevent prejudicing the trial, the Court has imposed reporting and publication restrictions on: (1) the DPA itself; (2) the statement of facts in support of the DPA; (3) any report of the hearing at which the DPA was approved; and (4) the Court's reasons for approving the DPA.

The restrictions will remain in force until after the conclusion of the trial.

This is the first time reporting restrictions of this nature and extent have been imposed on an approved UK DPA. In July 2016, the English Court approved and published the UK's second DPA between the SFO and a UK SME, referred to only as "XYZ Ltd" as reporting restrictions prevented the disclosure of the company's name due to ongoing and related criminal proceedings.

The first three UK DPAs differed markedly from one another, not only in terms of the factual context, offences committed and quantum, but also as regards the Court's reasons for approving each of those DPAs and the calculation and rationale for the quantum of the disgorgements and financial penalties. Until the reporting restrictions are lifted, and TSL's DPA and the Court's reasons are published, it remains to be seen whether TSL's DPA breaks any new ground (and, if so, how) and whether there are any lessons to be learnt from TSL's experience.

Acas and the Government Equalities Office ("GEO") Publish Revised Final Guidance on Gender Pay Gap Reporting

On April 6, 2017, Acas and GEO published their non-statutory guidance dealing with the requirements for gender pay gap reporting under the Equality Act 2010 (Gender Pay Gap Information) Regulations (SI 2017/172) ("GPG") and the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) ("SDPA" and with the GPG, the "Regulations").

Under the GPG Regulations and the SDPA Regulations, employers are required to analyze their pay and bonus information on a particular "snapshot date" in each reporting year. For public authorities subject to the SDPA Regulations, this is March 31, and for all other employers, this is April 5. Employers must publish their gender pay gap reports within 12 months of the snapshot date.

On January 28, 2017, Acas and the Government Equalities Office jointly published draft non-statutory guidance on the GPG Regulations. Acas and the GEO have now produced a final version of the guidance which has been expanded to cover both the GPG Regulations and the SDPA Regulations.

The guidance includes the following key points:

- Partners and LLP members will not have to include their earnings in the calculations of the pay gap
- The Regulations apply to each legal entity within a group of companies
- Employers may wish to separate divisions within the same legal entity where jobs are not directly comparable

- The application of the Regulations to overseas employees follows the tests developed in UK case law for the application of employment rights
- Various more detailed points about which elements of remuneration will fall within the definition of "pay" and how to carry out the relevant calculations

Compliance with these Regulations is enforced by the Equality and Human Rights Commission ("EHRC") which has accepted the government's view that a company's failure to comply with the Regulations will be an "unlawful act" under the Equality Act 2006.

The full guidance can be found at:

http://www.acas.org.uk/media/pdf/m/4/Gender_Pay_Reporting_GUIDE3.pdf

Financial Conduct Authority ("FCA") Publishes Consultation Paper on Availability of Information in the IPO Process

On March 1, 2017, the FCA published Consultation Paper (CP17/5**) on reforming the availability of information in the UK equity IPO process.

The FCA is proposing two significant changes to the way in which certain information is currently made available to potential investors in a UK equity IPO. These are to encourage more independent pre-IPO analyst research and to require the much earlier publication of a largely complete prospectus.

Currently (and for a long time), the key information opportunities for potential investors in UK IPOs have been the publication of:

- analyst research on the issuer—this is virtually always produced by "connected analysts" (i.e. analysts from the banking syndicate engaged to market the IPO), followed by
- the issuer's detailed "Intention-to-Float" announcement (the ITF), which then starts a "black-out" period of (typically) two weeks during which no further information (including a draft prospectus) about the IPO is published,
- a price-range/pathfinder prospectus following expiry of the "black-out" period and the running of the management roadshows and start of the book-building exercise, and
- the final, approved prospectus.

This long-established process has led to growing complaints that the UK IPO process, if not broken, is not functioning as well as it could do and that, in particular: (i) there is an information asymmetry that favors issuers and sell-side firms, at the expense of investors who do not get access to detailed information about the issuer and the IPO proposition as early on in the IPO process as they would like and (ii) the marked lack of independent analyst research, when compared to "connected analyst" research, that is typically available to investors in an IPO.

The FCA is proposing addressing these two concerns by requiring:

- effectively equal treatment by the issuer and its advisers, of connected and unconnected or independent analysts, and
- publication of the "registration document" component of the prospectus before the issuer's Intention to Float announcement.

Comments are due on the FCA's proposals by June 1, 2017. Subject to feedback received, it expects to publish a Policy Statement setting out any Handbook changes later in 2017.

The full consultation paper can be found at:

https://www.fca.org.uk/publication/consultation/cp17-05.pdf

Financial Reporting Council ("FRC") Announces Review of UK Corporate Governance Code

On February 16, 2017, the FRC announced that it plans to carry out a fundamental review of the UK Corporate Governance Code (the "Code"). The review will take account of work done by the FRC on corporate culture and succession planning, and the issues raised in the Department for Business, Energy and Industrial Strategy ("BEIS") Green Paper on corporate governance reform.

The review will consider the appropriate balance between the Code's principles, provisions and guidance while seeking to preserve and build on the recognized strengths of UK governance: the unitary board, strong shareholder rights, the role of stewardship and the "comply-or-explain" approach.

To guide the review, the FRC will seek input from a range of stakeholders, including its recently established Stakeholder Advisory Panel.

The FRC will commence a consultation on its proposals later in 2017, based on the outcome of the review and the government's response to its Green Paper.

The announcement of the review is available at:

> https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2017/February/FRC-to-review-the-UK-Corporate-Governance-Code.aspx

Financial Conduct Authority ("FCA") Consultation on Amendments to the Listing Regime

On February 14, 2017, the FCA published its Consultation Paper entitled "Review of the Effectiveness of Primary Markets: Enhancements to the Listing Regime" (CP17/4), which are aimed at enhancing certain aspects of the Listing Rules. Most of the proposals relate to the premium segment of the listing regime.

Many of the proposals are technical in nature and are broadly divided into three main areas:

- Clarifying the requirements in LR 6 which apply to commercial companies applying for a premium listing of their shares.
- The treatment of transactions that are outside the ordinary course of business and which are, or are proposed to be, undertaken by listed issuers. The proposed changes relate to the class tests used to assess the size of the transaction relative to the issuer; more specifically, the profits test which can trigger the need for shareholder approval.
- The FCA's approach to suspending an issuer's listing where the issuer has announced a reverse takeover, or where details of such a transaction have leaked.

The FCA proposes to re-order LR 6 and amend certain provisions with the aim of simplifying and clarifying those provisions and giving market participants a better understanding of the premium listing eligibility requirements. Although many of the changes proposed are technical in nature, the FCA does not propose to change any of its underlying policies.

The FCA proposes to introduce two new technical notes covering the following areas:

- Eligibility for premium listing—financial information and the track record requirements (UKLA/TN/102.1)
- The independent business requirements for companies applying for premium listing—interpretation of LR6.4, LR 6.5 and LR 6.6 (UKLA/TN/103.1).

The FCA has also made a number of other more detailed changes to LR 6. These include:

- introducing a new concessionary route to premium listing for certain types of property companies;
- amending the requirements of the "class tests" to allow issuers to disregard the profits test in circumstances where the results are anomalous compared to the results of the other tests; and
- removing the presumption that a reverse takeover should lead to an automatic de-listing.

Responses to the consultation are requested by May 14, 2017. The FCA plans to publish its amended rules in a policy statement in the second half of 2017.

The full text of the consultation paper is available at:

https://www.fca.org.uk/publication/consultation/cp17-04.pdf

NEX Exchange Reissued Growth Market Rules for Issuers and Corporate Adviser Handbook

NEX Exchange (formerly ISDX) has reissued the ISDX Growth Market Rules for Issuers and the ISDX Corporate Adviser Handbook as, respectively, the NEX Exchange Growth Market Rules for Issuers and the NEX Exchange Corporate Adviser Handbook.

The NEX Exchange Growth Market is a multilateral trading facility under the Markets in Financial Infrastructure Directive rules.

The reissue of the rules follows the renaming of ISDX as NEX Exchange on December 30, 2016. References to ISDX have been amended to NEX Exchange throughout the rules and the handbook.

The full text of the new rules and the handbook are available at:

http://www.nexexchange.com/assets/pdfs/NEX%20Exchange-Growth%20Market%20Rules.pdf and

http://www.nexexchange.com/assets/pdfs/NEX%20Exchange-Corporate%20Adviser%20Rulebook.pdf

Investment Association ("IA") Issues Audit Tender Guidelines

On February 8, 2016, the IA published guidelines on audit tenders, setting out the expectations of its members when companies tender their audits. They are aimed at companies whose shares are admitted to the premium and standard segments of the Official List, trading on AIM or the High Growth Segment of the Main Market.

The guidelines include various general points on the role of the audit committee and the tendering process and also specifically note that:

- A company should make a RNS announcement regarding a proposed tender and should contact its major shareholders giving the proposed timetable.
- Conflicts should be identified well in advance. Investors' general preference is that at least three years should have elapsed from when a director of the company was a partner or employee in an audit firm before the firm can be considered for appointment as auditor.
- The IA's members generally support the incumbent auditor being invited to tender.
- Investors welcome audit committees being transparent about how they decided on the candidates invited to tender.
- Clear objectives should be set as to what the audit committee wants to achieve and what is looked for in an auditor.
- The audit committee should consider seeking the views of the company's major investors before making the appointment.

The full text of the guidelines is available at:

http://www.theinvestmentassociation.org/assets/files/ivis/20170208%20-%20CG-%20Audit%20tenders%20guidelines%202017.pdf

Financial Reporting Council ("FRC") Publishes Updated Best Practice Note on Audit Tenders

On February 7, 2016 the FRC published updated notes on best practice in conducting an audit tender.

The updated notes include various general points about the role of the audit committee and the conduct of an audit tender. They also specifically state, amongst other things, that:

- Audit committees should aim to limit the proposal document to a certain number of pages and should consider carefully what it should contain and how it will be used as part of the decision-making process.
- Companies should consult with the incumbent auditor in determining the most useful information to include in a data room. The incumbent auditor's most recent audit plan and audit scope were felt by audit firms to be extremely useful.
- When providing access to management, it is best practice to make the same people available to all firms.
- In setting technical challenges, audit committees should beware of opinion shopping.
- The whole audit committee should attend presentations by firms.
- Audit committees should be prepared to give comprehensive feedback to the firms on the reasons for the decision.
- Audit committees should seek views on audit fees in their engagement with major investors regarding the tender process.

The full text of the note is available at:

https://www.frc.org.uk/Our-Work/Publications/Audit-Quality-Review/Audit-Tenders-notes-on-best-practice.pdf

Department for Business, Energy and Industrial Strategy ("BEIS") Publishes Guidance on Duty to Report on Payment Practices and Performance

On January 31, 2017, BEIS published its guidance to reporting on payment practices and performance. The guidance is for companies and LLPs that must comply with the statutory reporting duty for payment practices and performance in relation to financial years beginning on or after April 6, 2017.

Among other things, the guidance sets out:

- Which companies and LLPs will come within the scope of the reporting requirement and when parent companies and parent LLPs will be required to report.
- Details about the information that businesses must provide in respect of their payment terms and their payment performance.
- When and where information must be reported.

The guidance states that the reporting requirement applies to large companies (which is subject to a number of other more detailed tests), whether private, public or quoted, and LLPs. No company or LLP will be required to report in its first financial year. However, any company or LLP that exceeds two or all of the thresholds in its first financial year will be in scope of the duty in its second financial year.

Companies and LLPs that are incorporated outside the UK are not required to report. The guidance also provides other more detailed notes on when the requirements will apply to other members of the parent's group, what contracts qualify under the reporting requirements and what information needs to be disclosed. Broadly speaking, the information required to be disclosed includes various narrative statements and statistics on the company's payments terms and timeframes.

The Reporting on Payment Practices and Performance Regulations 2017 and the Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017 come into effect on April 6, 2017,and they will apply to qualifying companies and LLPs in financial years beginning on or after April 6, 2017.

The full text of the guidance is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587465/payment-practices-performance-reporting-requirements.pdf

Economic Secretary to the Treasury Issues Written Statement on Proposed Prospectus Regulation

The government has decided not to opt in to the provision requiring co-operation between competent authorities where the criminal sanctions regime within the proposed Prospectus Regulation is adopted.

On January 24, 2017, the Economic Secretary to the Treasury issued a written statement confirming that the government has decided not to opt in to a provision of Article 31(1) of the proposed new Prospectus Regulation. Informal trialogue agreement was reached on the proposed new Prospectus Regulation in December 2016, and it must now be formally adopted by the European Parliament and Council. Article 31(1) requires that where member states have chosen to pursue a criminal sanctions regime for breaches of the proposals, those member states must ensure that information can be shared between competent authorities across the EU. The written statement confirms that, as the provision requires co-operation involving law enforcement bodies, the government believes that these are Justice and Home Affairs obligations and therefore the UK's opt-in is triggered.

The written statement notes that the obligation to share information will fall on member states that have a relevant criminal sanctions regime, and UK competent authorities will be able to access this data regardless of the decision to opt in. The statement notes that the government does not intend to introduce a criminal sanctions regime in a way that would lead to the new Prospectus Regulation imposing an obligation on the UK or on its competent authorities.

The government plans to inform the Council of its decision not to exercise its right to opt in to the relevant provision.

The text of the proposal is available at:

https://hansard.parliament.uk/commons/2017-01-24/debates/17012478000006/EUProspectusRegulation

Department for Business, Energy and Industrial Strategy ("BEIS") Publishes Green Paper on the UK's Industrial Strategy

On January 23, 2017, BEIS published a Green Paper, "Building our Industrial Strategy," in which it sets out the 10 pillars underpinning the government's new approach to industrial strategy, together with its proposals in each area. These include:

- Supporting businesses and entrepreneurs across the UK, to ensure that they can access finance and wider support to grow and have the right conditions for companies to invest long-term. The Green Paper confirms that the government plans to consider whether any measures need to be taken to promote a more long-term approach to funding. It also invites comments on, among other things, how to address the factors constraining quoted companies and fund managers from making long-term investment decisions.
- In order to understand better where there are barriers to the growth of long-term investment, the government has launched a new Patient Capital Review led by HM Treasury. The review plans to publish a consultation document in the Spring to consider all aspects of the financial system affecting the provision of long-term finance to growing innovative firms looking to scale up.
- The Green Paper notes that the FCA plans to release a discussion and consultation paper in the first quarter of this year, reviewing the structure of the UK's listed markets. As well as discussing whether changes to the listing regime are desirable, the review will also explore how the UK's primary markets can further support the provision of patient capital to science and technology businesses, which the Green Paper notes are crucial to the long-term success of the UK.
- The Minister for Small Business will take on a new role of Scale-Up Champion, overseeing a task force to support high-growth, scale-up businesses across the UK. The Green Paper confirms that the government plans to explore how data, such as that held by HMRC and Companies House, can be used to identify scale-up businesses and be made available to enable local public and private sector organizations to better identify, target and evaluate their support to scale-up businesses.
- Investing in science, research and innovation. In order to ensure that university spin-outs have the best chance to survive, attract investment and grow over the long term, the government plans to commission research on different institutions'

principles and practices on commercialization of intellectual property and taking equity in spin-outs. The Green Paper notes that the size of equity stakes taken in spin-outs varies considerably with little consensus over what is appropriate.

- Cultivating world-leading sectors by way of “sector deals” to address sector-specific challenges and opportunities. This may, among other things, involve addressing regulatory barriers.

The full text of the Green Paper is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585273/building-our-industrial-strategy-green-paper.pdf

The Pensions and Lifetime Savings Association (“PLSA”) Has Published its Updated Corporate Governance Policy and Voting Guidelines 2017

On January 18, 2017, the PLSA published a revised version of its Corporate Governance Policy and Voting Guidelines. The new Guidelines differ from the version published in 2015 in a number of ways, but principally so as to call for:

- More accountability over executive pay. Among other things, pay policies likely to result in awards that could bring the company into public disrepute or foster internal resentment, owing to their excessive value and/or the overly generous incentives and rewards that they offer, justify a vote against the remuneration policy. A vote against the remuneration policy should be accompanied in most circumstances by a vote against the chair of the remuneration committee if they have been in post for more than one year. Similarly, in most circumstances shareholders should vote against the re-election of the remuneration committee chair if they have been in post for more than one year, and other committee members as appropriate if they vote against the remuneration report.
- Further advances in diversity. For example, there is still considerable room for improvement in some cases towards meeting the target of 33% of women on FTSE 100 boards set out in the Davies report. If there is no clear evidence that diversity is being sufficiently considered by the board, a vote against the chair or, if not the same individual, the chair of the nominations committee may be warranted.
- Better reporting about a company’s corporate culture, workforce and working practices.
- The Guidelines include few substantial amendments to the 2015 version. The principal changes include the following:
- Leadership—The new Guidelines state that, in addition to a board’s accountability to shareholders for protecting and generating sustainable value over the long term, directors are required under the Companies Act 2006 to have regard to other stakeholders, including workers, customers, suppliers, wider society and the environment, and that boards should be aware of these requirements when carrying out their work.
- Accountability—Numerous changes are made to highlight the importance of a company’s workforce to its long-term success. Improvements are necessary, in the PLSA’s view, to the reporting of corporate culture and working practices.
- Remuneration—The new Guidelines cite growing concern both at the size of executive pay packages and their structure. Pay policy should be mindful of wider societal expectations. The PLSA believes that the evidence that pay incentives is necessary to motivate or reward executives and to achieve success for companies is questionable, and urges remuneration committees to take a critical and challenging approach to pay increases and to be prepared to exert downward pressure on executive pay.

The full text of the guidelines is available at:

http://www.plsa.co.uk/PolicyandResearch/DocumentLibrary/~/media/Policy/Documents/0611-Voting-%20Guidelines-%202016-17.pdf

Institute of Chartered Secretaries and Administrators ("ICSA") and Investment Association ("IA") Propose Guidance on Board Engagement With Stakeholders

On January 13, 2017, ICSA and the IA announced that they are proposing to publish joint guidance to assist boards in improving their engagement with, and understanding of the views of, their employees and other stakeholders.

The aim of the guidance is to address concerns that the voices of employees, customers, suppliers and other stakeholders are not being heard by the boards of British companies, as identified in BEIS's Green Paper on corporate governance reform. ICSA and the IA will work with a range of stakeholders to identify existing best practice and publish practical guidance, which will identify different approaches to stakeholder engagement for companies to consider (including those identified in the Green Paper).

The guidance will include:

- How companies can identify non-executive directors with relevant stakeholder experience.
- The process by which boards can receive the views of key stakeholders.
- How directors' understanding of their duties and the interests of different stakeholders can be enhanced by training and induction.
- Options on the way companies can report on how the directors have fulfilled their duties in this area.
- It is proposed that the guidance will be published in the second quarter of 2017.

The announcement is available at:

https://www.icsa.org.uk/about-us/press-office/news-releases/investors-and-companies-unite-to-help-boards-take-account-of-employee-and-other-stakeholder-views

Takeover Panel Imposes "Cold-Shouldering" Sanction for Breaches of the Takeover Code

On January 10, the Panel Hearings Committee imposed a "cold-shouldering" sanction on two individuals for what the Committee ruled were serious breaches of the Takeover Code—failing, through a fabrication and invented story, to take reasonable care not to provide incorrect, incomplete or misleading information to the Panel. The cold-shouldering sanction involves the Panel ruling that a person is, in its opinion, someone who is not likely to comply with the Code. Such a ruling requires, while it remains in force, that under the rules of the FCA and certain professional bodies, their members become obliged in certain circumstances not to act for the person in question in a transaction subject to the Code.

The significance of this particular ruling is that it is only the third case of a cold-shouldering penalty ever having been imposed by the Panel. The facts of the case are also a salutary reminder that ignorance of the Takeover Code (and a lack of openness and readiness to discuss things with the Panel) can be very dangerous and can end up creating problems that would not have arisen if the Panel had been properly consulted.

A copy of the Committee's ruling is available at:

http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/01/2017-1.pdf

Market Abuse: FCA Final Notice for False or Misleading Impression

The Financial Conduct Authority ("FCA") has published a final notice requiring Tesco plc and Tesco Stores Limited to pay compensation to investors who suffered loss as a result of market abuse committed by Tesco in relation to a trading update which gave a false or misleading impression as to the value of publicly traded shares and bonds.

On August 29, 2014 Tesco published a trading update which stated that it expected trading profit for the first half of the year to be in the region of £1.1 billion (the "August Statement"). In September 2014, Tesco published a further trading update on an urgent basis after the board discovered the August Statement contained information that gave a false or misleading impression as to shares in Tesco plc and certain Tesco group bonds (the "September Statement"). The false or misleading information created a false market in the securities which substantially came to an end when the September Statement was published. The September Statement announced that Tesco had identified an overstatement of its expected profit for the half year principally due to the accelerated recognition of commercial income and delayed accrual of costs.

Tesco plc admitted that the expected profit figure for H1 of 2014/2015 in the August Statement was overstated by £76 million. The total overstatement of actual and expected profit was £284 million.

The FCA's final notice set out Tesco's failings, these included:

- the Relevant Securities were qualifying investments traded on a prescribed market. They were all admitted to trading on the London Stock Exchange or the Irish Stock Exchange;
- the information gave a false or misleading impression as to a qualifying investments; and
- Tesco Stores Limited knew, or could reasonably be expected to have known, that the information it gave to Tesco plc for the August Statement was false or misleading. The provision of the information amounted to its dissemination. Tesco plc knew, or could reasonably be expected to have known, that the information it published in the August Statement was false or misleading.

The FCA considered that the behavior of Tesco Stores Limited and Tesco plc constituted market abuse contrary to section 118(7) of the Financial Services and Markets Act 2000 ("FSMA") (as it was then in force).

The FCA required Tesco plc and Tesco Stores Limited jointly to pay compensation to those persons who, between the date of the publication of the August Statement and the last trading day before the publication of the September Statement, were beneficial owners of the securities and who were determined to have a valid claim for compensation. In the circumstances, the FCA did not consider it appropriate to impose a penalty.

This is the first time that the FCA has used its powers under section 384 FSMA to require a listed company to pay compensation for market abuse.

The final notice is available at:

Final notice, FCA: Tesco plc, press release

Corporate Governance: McGregor-Smith Review on Race in the Workplace

On March 28, 2017, the McGregor-Smith Review on race in the workplace and the government's response to the Review were published. The Review makes various recommendations to improve diversity within organizations, including:

- Recommending that listed companies and businesses with more than 50 employees publish a breakdown of employees by race, ideally by pay bank, on their website and in the annual report.
- Recommending the Government legislate to ensure that workforce data broken down by race and pay band is published.
- Recommending that businesses with more than 50 employees identify a board-level supervisor for all diversity issues who should be held to account for the overall delivery of aspirational targets. Chairs, CEOs and CFOs should reference what steps they are taking to improve diversity in their statements in the annual report.

The government, in its response, stated that it believes a non-legislative solution to be the right initial approach, but that it will monitor progress and be ready to act if sufficient progress is not achieved.

Business Minister Margot Jones has written to the chief executives of all FTSE 350 companies calling on them to take up key recommendations from the Review.

The government's response can be found at:

http://uk.practicallaw.thomsonreuters.com/w-007-2107?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Duty to Report Payment Practices: Final Regulations

On March 20, 2017, the Reporting on Payment Practices and Performance Regulations 2017 and the Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations (together, the "Regulations") were published.

The Regulations oblige large companies and large limited liability partnerships ("LLPs") to report on their payment practices and policies in relation to certain qualifying contracts. The government will provide a web-based service for these companies and LLPs to publish their report. A qualifying contract is one that satisfies the following conditions:

- it is for goods and services or intangible assets (including intellectual property); and
- the parties have entered into it in connection with the carrying on of a business.
- It is not for financial services. (Broadly, contracts for financial services include insurance-related services, banking services and other financial services); and
- it has a significant connection with the UK.

The Regulations came into force on the April 6, 2017, and subject to certain exceptions, the duty to report will apply in relation to financial years beginning on or after April 6, 2017.

The regulation, explanatory memorandums and impact assessments are available at:

http://uk.practicallaw.thomsonreuters.com/w-007-0202?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

http://uk.practicallaw.thomsonreuters.com/w-007-0207?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

http://uk.practicallaw.thomsonreuters.com/w-007-0245?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Fourth Money Laundering Directive: Further Treasury Consultation (Corporate Aspects)

On March 15, 2017, HM Treasury published a further consultation on the transposition of the Fourth Money Laundering Directive, together with draft Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017.

Draft regulation 42 imposes an obligation on every "UK body corporate" to respond to requests for certain information from "relevant persons" within two working days. Additionally, if there is any change to the information previously provided, the UK body corporate must notify the relevant persons within two working days.

A UK body corporate is a body corporate formed under the law of the United Kingdom, or part of the United Kingdom. Relevant persons include banks, auditors, insolvency practitioners, external accountants and tax advisers and lawyers.

The information that UK bodies corporate must provide on request is:

- information identifying its name, registered number, registered office, principal place of business, board of directors or members of its management board, its senior management, the law to which it is subject, its legal owners and its beneficial owners; and
- its memorandum of association or other governing documents.

The obligation to provide the information on request will arise in situations where relevant persons are required to carry out customer due diligence. After the initial provision of information, the obligation to notify relevant persons of any changes will continue for the duration of the business relationship between the corporate body and the relevant person.

The consultation is available at:

https://www.gov.uk/government/consultations/transposition-of-the-fourth-money-laundering-directive,

Takeover Appeal Board: Decision on Appeal Concerning Whether Shares in Rangers International Football Club Plc Were Acquired by Persons Acting in Concert

The Takeover Appeal Board has published its decision to dismiss an appeal submitted by Mr. David King against the Hearings Committee's ruling that he acted in concert with three other individuals in the acquisition of shares in Rangers International Football Club Plc ("Rangers"), and that he should be put under an obligation to extend the offer to acquire the shares of the other shareholders on the terms stipulated by Rules 9.3 and 9.5 of the Takeover Code.

Mr. King acquired the shares in Rangers through a purchase by New Oasis Asset Limited ("NOAL"), the sole share in which was held on trust for Mr. King and his family. The main grounds for appeal were that the Committee failed to examine evidence of separation between Mr. King and NOAL, and that it did not specify the nature of Mr. King's interest in the Rangers shares or consider whether he had voting rights over the shares. An additional ground of appeal was that the Committee had erred in relying on a separate, earlier business proposition put forward by Mr. King and others in connection with attaining control of Rangers to infer acting in concert in relation to the later acquisition of shares.

The Takeover Appeal Panel listed the following as some of the reasons for dismissing the appeal:

- There are a number of ways in which persons may act in concert, and direct evidence of what passes between those alleged to have acted in concert is rare. However, in this case, contemporaneous documents (mostly emails) evidence an agreement to co-operate and act in concert to obtain control of Rangers becomes overwhelming when placed in the context of the earlier business proposition.
- In negotiating for the Rangers shares and instructing that the shares be put in the name of NOAL, Mr. King communicated with others and acted as if NOAL and its associated companies were under his control in relation to the Rangers shares, and so he was acting in concert with them and they with him.
- Mr. King was the principal member of the group of persons acting in concert within the meaning of Rule 9.2 of the Takeover Code and, for that reason, was put under an obligation to extend the offer under Rule 9.1 of the Takeover Code.

The statement of the Takeover Appeal Board can be found at:

http://www.thetakeoverappealboard.org.uk/downloads/2017-01.pdf

Listing Rules and Prospectus Regulation: FCA Quarterly Consultation No 16 (Corporate Aspects)

On March 3, 2017, the Financial Conduct Authority ("FCA") published its 16th quarterly consultation paper (CP17/6). The FCA proposes various changes to the Prospectus Rules in anticipation of the entry into force of the Prospectus Regulation to replace the Prospectus Directive. These changes include:

- The amendment of the existing exemption from the requirement to publish a prospectus on the admission of shares to trading to a regulated market where the annual increase of shares is less than 10%, to a higher threshold of 20%. The amended exemption will apply to securities, not just shares.
- The amendment of the exemption from the requirement to publish a prospectus for shares resulting from the conversion or exchange of securities. Under the Prospectus Regulation, the conversion exemption is limited to 20% of the number of shares of the same class already admitted to trading on the same regulated market over a period of 12 months, although that 20% limit is disapplied in prescribed circumstances.

The new PR 1.2.3AEU will set out the text of articles 1(4)(a) and (b) of the Prospectus Regulation. If made, these rule changes will apply from the date the Prospectus Regulation comes into force.

The FCA invites views on these definitional changes and the transitional provisions before May 3, 2017.

The quarterly consultation paper is available at:

https://www.fca.org.uk/publication/consultation/cp17-6.pdf

Private Equity: Updated Private Equity Reporting Group ("PERG") Guidelines on Good Practice Reporting by Portfolio Companies

On March 2, 2017, PERG published an updated version of its guidance on good practice reporting by private equity portfolio companies under the Walker Guidelines. The guidelines are substantively in the same form as the 2016 version, however, some of the examples from practice have been updated.

The areas highlighted for particular focus and attention are:

- The importance of narrative describing the company's past year performance focusing on performance against the strategic objectives.
- The trends and factors affecting future development and performance considering the wider market environment impacting the business and how this is shaping the strategy and decisions made today.
- Commentary on human rights issues, particularly in light of increasing regulatory emphasis (such as the Modern Slavery Act 2015).
- Gender diversity. This needs to be a greater feature of the annual report with stronger narrative on policies.

These reflect the trends identified from the most recent annual review.

More information can be found at:

http://uk.practicallaw.thomsonreuters.com/w-006-7347?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Market Abuse Regulation: Financial Conduct Authority ("FCA") Policy Statement on Changes to Disclosure and Transparency Rules ("DTR") 2.5 (Delaying Disclosure of Inside Information)

On February 24, 2017, the FCA published a policy paper summarizing feedback received on its consultation paper CP16/38 and setting out the Handbook changes to DTR 2.5.

The policy paper confirms that the FCA will proceed with its proposals to amend DTR 2.5 on the basis outlined in the consultation paper, save for the following:

- The inclusion of the word "indicative" in DTR 2.5.1BG to clarify that the ESMA guidelines on delay in disclosure of inside information contain a non-exhaustive and indicative list of the legitimate interests of issuers to delay disclosure of inside information and situations in which delayed disclosure is likely to mislead the public.
- Limiting the scope of DTR 2.5.4(1)G (which considers the scope of the provisions as to the delay of disclosure) to paragraph 5(1)(8)(a) (issuer in the process of conducting negotiations) of the ESMA guidelines only.
- Making minor amendments to the final sentence of DTR 2.5.4(2)G (which considers the application of the provisions as to the delay of disclosure) to clarify that the paragraph, not the whole provision, will only be relevant to a limited number of issuers in the UK that have a unitary board structure.

The FCA has also published the Disclosure Guidance and Transparency Rules Sourcebook (Delayed Disclosure) Instrument 2017 which implements the changes outlined in the policy statement. The changes came into force on February 24, 2017.

The policy statement can be found at:

http://uk.practicallaw.thomsonreuters.com/w-006-6017?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Corporate Governance: BEIS Committee Report

The Business, Energy and Industrial Strategy Committee (the "Committee") undertook to assess the corporate governance regime and whether any systemic problems could be identified following the reports on BHS and Sports Direct in summer 2016. On April 5, 2017, the Committee published a report which highlights whether the UK corporate governance framework remains fit for purpose, whether it provides a platform for good decision making, taking fully into account the wider interests of society, and how good behavior can be embedded in business through cultural change and persuasion.

The report does not indicate that a radical overhaul of the current framework is necessary but does make a number of recommendations which could lead to significant improvements. These include recommendations that:

- The Corporate Governance Code be amended to require informative narrative reporting on the fulfillment of duties under section 172 (duty to promote the success of the company) of the Companies Act 2006 by directors. This includes a requirement for boards to explain precisely how they have considered each of the different stakeholder interests and how this has been reflected in financial decisions. If the board fails to have due regard to any one of these interests, these should be addressed directly and explained, additionally, companies need to be more imaginative and agile in communicating digitally with stakeholders throughout the year. Boiler-plate statements are discouraged in annual reports.
- The FRC be granted the power to engage and hold to account company directors in respect of the full range of their duties. Possible sanctions in respect of company directors who do not engage would be to report publicly to shareholders and where companies do not respond satisfactorily to engagement with the FRC, the FRC could be given the authority to initiate legal action for breach of section 172 duties. It is likely that the FRC will be renamed accordingly, in light of its potentially wider role.
- A metric be put into place to publicize examples of good and bad corporate governance practice by companies. Companies will need to reference their performance in their annual report.
- In the first instance, a voluntary code of corporate governance should be drawn up for large private companies. If the voluntary regime fails to raise standards after three years, or there are high rates of unacceptable non-compliance, a mandatory regime should be introduced. There should be a new body established to oversee compliance with the voluntary code and implement a mandatory code should the former fail.
- Long-term incentive plans ("LTIPs") should be phased out, and the FRC should consult with stakeholders with a view to amending the UK Corporate Governance Code to establish deferred stock rather than LTIPs as best practice in incentivizing long-term decision making.
- From May 2020, at least half of all new appointments to senior and executive management level positions in the FTSE 350 and all listed companies should be women. An explanation for any failure to meet this target should be included in the annual report.

The full report is available at:

http://uk.practicallaw.thomsonreuters.com/w-007-4275?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Beneficial Ownership: BEIS Call for Evidence on Register of Beneficial Owners of Overseas Entities

On March 4, 2016, BEIS published a discussion paper on enhancing the transparency of beneficial ownership information in respect of foreign companies that acquire land or property in England and Wales or that enter into public procurement contracts in England.

The discussion paper considers whether overseas companies should keep a register similar to the PSC register under Part 21A of the Companies Act 2006 (CA 2006). The discussion paper closed to comments on April 4, 2016 and, in May 2016, the government announced its intention to introduce a register of the beneficial owners of overseas companies owning UK property or engaging in UK government procurement. EU member states must transpose the requirements of the Fourth Money Laundering Directive ((EU) 2015/849) into national law by June 26, 2017. Article 30 of the directive will require the government to amend the PSC regime and BEIS issued a discussion paper on implementing the MLD4 provisions on increasing corporate transparency on November 3, 2016. Key elements of the proposal include that:

- Scope: all overseas legal entities that can hold property or that can bid on central government procurement contracts are caught.
- Similar to the PSC regime: identifying beneficial owners, what reasonable steps an entity should take to do so and the required particulars that must appear on the publicly available register. Criminal sanctions will apply to some failures to comply with the new regime.
- Registration with Companies House: overseas entities must apply for a registration number with Companies House if they wish to own any property and must furnish beneficial ownership information to Companies House.
- Land Registry: registration of title to property will not be possible without a registration number from Companies House. Overseas entities that already own UK property will have 12 months to comply and obtain a registration number. A restriction prohibiting the sale, long lease or legal charge of property where the overseas owner is not fully compliant with the overseas register requirement will appear on the title register.
- Information on the overseas register should be updated at least every two years and it will be an offence to fail to do so.
- A more extensive protection regime than that applicable under the PSC regime may be required, given the likely association between beneficial owners and individual properties.
- Security Interests: it should still be possible for legitimate lenders to enforce security over property, even where an overseas entity is in breach of the regime's requirements.
- The last date for comments is May 15, 2017. The call for evidence also notes that the government intends to introduce amendments to the PSC legislation shortly.

More information is available at:

> http://uk.practicallaw.thomsonreuters.com/w-007-4389?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Modern Slavery Act 2015: Report of Joint Committee on Human Rights (Corporate Aspects)

On April 5, 2017, the House of Commons and House of Lords' Joint Committee on Human Rights (the "Committee") published a report on human rights and business. This addresses section 54 of the Modern Slavery Act 2015 ("MSA"), which requires relevant commercial organizations to prepare a slavery and human trafficking statement. The report identifies the shortcomings of the MSA. One main fault is that there is no method of monitoring compliance as there is no central list of companies that are required to comply.

The report calls on the government to facilitate the passage of the Modern Slavery (Transparency in Supply Chains) Bill, a private members bill that has been passed by the House of Lords but has not yet received a second reading in the House of Commons. The Bill would require a central list of companies to be maintained and would: (i) extend the transparency in supply chains requirements under the MSA to public bodies; and (ii) prevent public bodies from procuring services from companies that have not conducted the required due diligence.

If the Bill is not enacted in the present parliamentary session, the Committee recommends that the government bring forward its own legislation in the next session to achieve a similar objective. Other recommendations include:

- Legislative proposals to make reporting on due diligence compulsory for large businesses for all relevant human rights, not just the prohibition of modern slavery, with a monitoring mechanism and an enforcement procedure.
- Exclusion from public sector contract for companies that have been found to have been responsible for abuses or where a settlement indicates that there have been human rights abuses.
- Legislation to impose a duty on all companies to prevent human rights abuses, as well as a criminal offence of "failure to prevent" human rights abuses for all companies, including parent companies, similar to the Bribery Act 2010. The legislation should provide for civil remedies as well as criminal penalties. It should include a defense for companies that have conducted effective human rights due diligence with the burden of proof falling on companies to demonstrate that this has been done.

The report is available at:

> http://uk.practicallaw.thomsonreuters.com/w-007-4350?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Financial Reporting: FRC Conduct Committee's Revised Reporting Review Procedures Published With Feedback Statement

On April 3, 2017, the FRC Conduct Committee (the "Committee") published a revised version of its operating procedures for reviewing company reporting to reflect the changes to the Conduct Committee's procedures. The revised version comes after a consultation in October 2016, and mirrors that consultation, as most respondents to the consultation agreed that the proposed changes were clear and understandable.

The revised version, by permitting publication of the names of those companies whose reports and accounts it has reviewed, should increase the transparency of the Committee's processes once the cases are closed.

Key features of the Committee's revised procedures include:

- The FRC encourages any interaction with its corporate reporting review ("CRR") function to be disclosed in the Audit Committee Report.
- There will be continued monitoring of the operation of the revised operating procedures.
- Companies should explain the outcome of FRC regulatory interventions to shareholders. Disclosures will be monitored and if found to be inadequate, the decision to give companies the first opportunity to comment will be reconsidered.
- The revised operating procedures took effect on April 1, 2017.

The revised version available at:

> http://uk.practicallaw.thomsonreuters.com/w-007-3608?originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)

Government Publishes White Paper on Legislating for the United Kingdom's Withdrawal from the European Union

On March 30, 2017, the Secretary of State for Exiting the European Union presented the government's White Paper: Legislating for the United Kingdom's withdrawal from the EU to Parliament. This supplements the government's previous announcement of a Great Repeal Bill ("GRB") specifically: (i) repealing the European Communities Act 1972 (ECA 1972); and (ii) converting EU law into UK law as it stands at the moment of the UK's withdrawal, wherever practical.

In addition to GRB's initial two objectives, the White Paper also sets out that it will delegate powers to the government to make secondary legislation that will make necessary "corrections" and other amendments to domestic primary and secondary legislation.

More notable provisions proposed by the White Paper include the judicial precedence of pre-Brexit judgments of the Court of Justice of the European Union, rights conferred by the EU treaties and pre-Brexit EU and EU-derived legislation where these conflict with other pre-Brexit legislation.

The White Paper also notes in relation to the UK's existing devolution arrangements that there "will be a significant increase in the decision making power of each devolved administration." The government intends that the GRB will give ministers of the devolved administrations the power to amend devolved legislation to correct law that will no longer operate appropriately after Brexit (in parallel with the power it proposes should be held by UK ministers).

Since the Crown dependencies, Gibraltar and other Overseas Territories are not part of the UK for the purposes of EU law, nor are they separate members of the EU; the government will consult with them on the implications of the GRB.

The White Paper is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

Corporate Governance: Revised ICSA Guidance on Terms of Reference for Audit Committees

The ICSA has published a revised guidance note on the terms of reference for audit committees. The new note reflects the updated editions of the UK Corporate Governance Code and the FRC Guidance on Audit Committees both published in April 2016. Changes to the model terms of reference for audit committees include:

- **Committee appointments**: deletion of the provision limiting the extension of appointments to the committee to two further periods of three years (following an initial period of appointment of up to three years), provided that the members continue to be independent.
- **Audit Committee**: where possible, one member of the remuneration committee should sit on the audit committee.
- **Electronic communication**: notices, agendas and supporting papers can be sent in electronic form where agreed by the recipient.
- Committee duties now include:
  - financial reporting, to review any other statements requiring board approval which contain financial information first, where to carry out a review prior to board approval would be practicable and consistent with any prompt reporting requirements under any law or regulation including the Listing Rules or Disclosure Guidance and Transparency Rules sourcebook;
  - narrative reporting when assessing whether the content of the annual report and accounts is fair, balanced and understandable and provides the information necessary for shareholders to assess the company's performance, business model and strategy, the Committee should also advise whether the annual report and accounts informs the board's statement in the annual report on these matters;
  - annual approval of audit charter: to ensure it is appropriate for the company's current needs. The Committee must ensure that the internal audit has unrestricted scope and there must be open communication between different functions.
  - third party review: whether an independent, third party should assess the internal audit process;
  - policy on non-audit services: the policy should consider the nature of the non-audit services, whether the external audit firm is the most suitable supplier, the fees for non-audit services and the criteria governing compensation.

- **Risk management**: when the audit committee works with other board committees, it should assess the impact and risks of such delegation.

The revised guidance note can be found here:

https://www.icsa.org.uk/download-resources/downloadt?fileId=3319

UKLA Guidance Notes: Primary Market Bulletin No 17

On March 30, 2017, the FCA published its 17th Primary Market Bulletin which sets out feedback received to its call for views on sponsor conflicts in CP14/21, issued in September 2014. The FCA noted that discussions with stakeholders revealed industry interest and diversity of opinion on the current rules and guidance on sponsor conflicts and therefore it invited comments on whether the current sponsor regime remained fit for purpose. It also identified and sought views a number of issues raised in discussions, including whether:

- The discrepancy between the fees and commissions charged by banks for non-sponsor services and the much lower charges for sponsor services create a conflict and calls into question a sponsor's ability to carry out its duties to the FCA.
- Long-standing relationships between banks and issuers affect the bank's ability to act independently.
- The FCA should enhance its rules and guidance on the analysis expected of sponsors when assessing their ability to act as sponsor.
- The FCA should provide additional guidance on the "perception test" (LR 8.3.8G).
- In addition to the other changes to the UKLA Knowledge Base of technical and procedural guidance notes which are currently under consultation (consultation ending on May 10, 2017):
- on the mechanics of replacing a debt issuer on the Official List through a substitution (UKLA/PN/911.1); and
- on the shareholder obligations under DTR 5 (UKLA/TN/543.3), as well as consideration of sponsor conflicts of interest (UKLA/TN/701.3).

The FCA also confirms the following changes to the UKLA Knowledge Base which were proposed in Primary Market Bulletin Numbers 13, 14 and 16 amendment of six existing procedural notes, 12 existing technical notes, the addition of seven new technical notes and the deletion of three existing technical notes.

In addition, the following technical notes remain under consideration by the FCA:

- Prospectus Directive Advertisement regime (UKLA/TN/604.2);
- scope and application of vote holder and issuer notification rules (UKLA/TN/541.2);
- share buybacks with mix and match facilities (UKLA/TN/202.2); and
- periodic financial information and inside information (UKLA/TN/506.2).

The Bulletin is available at:

https://www.fca.org.uk/publication/newsletters/primary-market-bulletin-17.pdf

Asia Developments

SAFE Policy Update

On January 26, 2017, the State Administration of Foreign Exchange (the "SAFE") issued the Notice on Further Promotion of Foreign Exchange Administration Reform and Improvement of the Authenticity and Compliance Review (the "Notice"). The Notice is aimed at relaxing certain foreign exchange inflow controls and strengthening the authenticity and compliance reviews for capital outflows carried out by China's designated foreign exchange banks. The key measures in the Notice include, but are not limited to, (1) permitting funds under Nei Bao Wai Dai (an arrangement under which a borrower can obtain loans outside China using the domestic assets of its Chinese affiliate(s) as security) to be transferred back to China and used domestically, (2) permitting foreign institutions in the free trade zones to use offshore funds domestically after settlement of exchange and (3) requiring domestic entities that plan to make direct investments overseas to submit various supporting documents to verify the authenticity of such investments.

On February 27, 2017, the SAFE issued the Circular on the Relevant Issues of Foreign Exchange Risk Management of Foreign Institutional Investors of China's Interbank Bond Market ("CIBM") (Hui Fa [2017] 5 Hao) (the "Circular") and the associated media Q&A, under which foreign institutional investors of CIBM are permitted to apply for the business of RMB-to-foreign-currency derivatives at qualified onshore financial institutions to hedge their foreign exchange risks. Such foreign institutional investors, as clients, may conclude a foreign exchange derivatives transaction with their settlement agents. The types of the foreign exchange derivative transactions include forwards, swaps, cross-currency swaps and options. Foreign institutional investors and their settlement agents may, at their discretion, choose the type of master agreement to be concluded.

Fund Placement Agent, Administrator and Advisor Are Now Required to Register with AMAC

On March 1, 2017, the Asset Management Association of China ("AMAC") circulated the Administrative Measures on the Private Investment Fund Service Business (the "Measures"), effective immediately.

The Measures apply to five types of services that could be provided by a servicing institution entrusted by a private fund manager for a private fund or a private asset management plan issued by a securities or futures operation institution, i.e. fundraising, investment advisory, interest registration, valuation calculation and information technology system services. These services in essence cover business of fund placement agents, administrators and investment advisors. These service providers are now required to register with AMAC and become members of the AMAC. The servicing institutions are required to manage fund and investor assets separately. The Measures, along with the other major self-discipline regulatory rules for private funds issued by AMAC, become part of the framework of self-discipline regulatory rules for the private fund industry in mainland China.

CSRC Investigates and Penalizes the First Cross-Border Manipulation Case Under Stock Connect

On March 10, 2017, the China Securities Regulatory Commission (the "CSRC") issued its administrative sanction decision in relation to the case of Hanbo Tang's cross-border manipulation of the Commodities City (Stock Code: 600415) (the "Case"). The CSRC imposed the most serious administrative sanction permitted by law, confiscating the full amount of illegal gains and imposing a fine of RMB 208,821,180.

The CSRC found that Hanbo Tang, together with his trader Tao Wang, have manipulated the stocks of "Commodities City", a stock available for trading on Stock Connect, by using three accounts opened in Hong Kong and one account opened in the mainland China, taking advantage of capital and utilizing various ways of manipulation such as spoofing, pushing stock prices up during trading hours and wash trades, and obtained illegal gains of RMB 41,884,236.

Disclaimer:

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International Financial Markets Regulation Developments

Financial Stability Board Consults on Unique Transaction Identifier Governance Arrangements

On March 13, 2017, the Financial Stability Board ("FSB") began a consultation on draft governance arrangements for the Unique Transaction Identifier ("UTI"). The UTI is a critical element for the production and sharing of global aggregated derivatives reporting data. The purpose of the global UTI would be to uniquely identify each OTC derivative transaction required by authorities to be reported to trade repositories, thus minimizing the potential for the same transaction to be counted more than once. Numerous countries have implemented legislative and regulatory requirements for the reporting of OTC derivatives aimed at improving transparency, mitigating systemic risk and preventing market abuse. To date, 26 trade repositories have been established in 16 countries.

The Committee on Payments and Market Infrastructures ("CPMI") and the International Organization of Securities Commissions ("IOSCO") published Technical Guidance on the harmonization of the Unique Transaction Identifier on February 28, 2017. That Guidance has implications for the governance of the UTI because it envisages that the UTI will be generated by a wide range of entities in a decentralized way and that there is not likely to be a requirement for a central registry for those entities.

The FSB consultation paper proposes key criteria for assessing UTI governance arrangements, outlines potential governance functions and proposes governance options for UTI governance. The consultation closes on May 5, 2017. The FSB intends to adopt recommendations on UTI governance arrangements later in 2017. Additionally, the FSB will publish proposed governance arrangements for Unique Product Identifiers ("UPI") once the UPI Technical Guidance is published by the CPMI and IOSCO, currently expected to be published in Q2 2017.

The FSB's consultation paper is available at:

> http://www.fsb.org/wp-content/uploads/Proposed-governance-arrangements-for-the-unique-transaction-identifier-UTI.pdf?_sm_au_=iVVH7SZ6qZ1wDsMj

The CPMI/IOSCO UTI Guidance is available at:

> http://finreg.shearman.com/final-global-guidance-on-unique-transaction-ident

Final Global Guidance on Unique Transaction Identifier Published

On February 28, 2017, the CPMI and IOSCO published Technical Guidance on the harmonization of the UTI. The development of a UTI was identified in September 2014 by the FSB as a critical element for a mechanism to produce and share global aggregated derivatives reporting data, along with the development of a unique product identifier and the harmonization of other key data elements. The purpose of the global UTI would be to uniquely identify each OTC derivative transaction required by authorities to be reported to trade repositories. Numerous countries have implemented legislative and regulatory requirements for the reporting of OTC derivatives aimed at improving transparency, mitigating systemic risk and preventing market abuse. The aggregation of data from those trade repositories is key to giving authorities a comprehensive view of the OTC derivatives market and activity.

The Technical Guidance is intended to guide authorities in preparing rules for a global uniform UTI. The Technical Guidance includes, among other things, the circumstances in which a UTI should be used, the impact of life cycle events on the UTI, which entity should be responsible for generating a UTI, when a UTI should be generated and the structure and format of a UTI. The FSB is expected to launch a consultation on UTI governance in the next few months. The CPMI and IOSCO are continuing their work towards producing technical guidance on UPIs and the harmonization of other critical data elements.

The report is available at:

> https://www.iosco.org/library/pubdocs/pdf/IOSCOPD557.pdf

Regulators Issue Guidance on Approach to Non-Compliance With the Impending Variation of Margin Exchange Requirement

On February 23, 2017, the European Supervisory Authorities (the "ESAs"), the Financial Conduct Authority ("FCA"), the US prudential regulators, including the Federal Reserve Board and the Office of the Comptroller of the Currency, and IOSCO issued guidance as to the March 1, 2017 implementation of variation margin requirements on uncleared swaps. The guidance indicates how the respective supervisory authorities and regulators will approach compliance with the variation margin requirements.

The ESAs expect national regulators to apply their risk-based supervisory powers in day-to-day enforcement of the applicable legislation, including taking into account the size of the exposure to the counterparty and its default risk. The ESAs expect firms to document the steps taken toward full compliance and put in place alternative arrangements to ensure that the risk of non-compliance is contained. The ESAs are not delaying application of the rules but are signaling that compliance will be evaluated on a case-by-case basis and they expect any compliance issues to be overcome in the next few months. This is a not dissimilar to the approach taken to reporting under the EMIR, when practicalities prevented many persons from being able to connect to a trade repository on time, and no prosecutions were made for late compliance. The FCA followed the ESA's guidance with a statement indicating that where a firm cannot comply fully, it must be able to demonstrate that it has made best efforts to achieve full compliance and explain how it will achieve compliance in as short a time as practicable for all in-scope transactions entered into from March 1, 2017. Firms are expected to have detailed and realistic plans.

The US prudential regulators expect priority to be given to compliance efforts by covered entities based on the size of and risk inherent in the credit and market risk exposures presented by each counterparty. In particular, compliance by March 1 was expected to be achieved with respect to those counterparties that present significant exposures. Firms must make good faith efforts to comply as soon as possible for other counterparties but no later than September 1, 2017.

The ESA's statement is available at:

https://www.esma.europa.eu/press-news/esma-news/esas-publish-statement-variation-margin-exchange

The FCA's statement is available at:

https://www.fca.org.uk/news/news-stories/fca-statement-emir-1-march-2017-variation-margin-deadline

The US regulators' statement is available at:

https://www.federalreserve.gov/newsevents/pressreleases/bcreg20170223a.htm?_sm_au_=iVVH7SZ6qZ1wDsMj

IOSCO's statement is available at:

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD556.pdf?_sm_au_=iVVH7SZ6qZ1wDsMj

Contacts

This newsletter is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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