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SEC/CORPORATE

PCAOB Adopts New Rules Requiring Disclosure of Participants in an Audit

On December 15, 2015, the Public Company Accounting Oversight Board (PCAOB) adopted new rules and related amendments to auditing standards (Rules) to provide investors with more information about who participates in public company audits, facilitating greater transparency to investors. The Rules will require auditors to disclose on a new PCAOB Form AP, *Auditor Reporting of Certain Audit Participants* (Form AP), the following: (1) the name of the engagement partner; (2) the names, locations and extent of participation of other accounting firms that took part in the audit, and if their work represented 5 percent or more of the total audit hours; and (3) the number and aggregate extent of participation of all other accounting firms participating in the audit whose individual participation constituted less than 5 percent of the total audit hours. Form AP will need to be filed through the PCAOB's existing web-based Registration, Annual, and Special Reporting system within 35 days (or within 10 days, in the case of an initial public offering) after the date the auditor's report is first included in a document filed with the Securities and Exchange Commission. The filings will be available on the PCAOB's website in a single searchable database. In a release by the PCAOB announcing the adoption of the Rules, James Doty, PCAOB chair, noted that "[t]ransparency about the partner and firms involved should further incentivize auditors to organize audit teams conscientiously to give investors comfort that is reliable."

The Rules are subject to SEC approval. If approved, disclosure of the engagement partner would apply to auditor's reports issued on or after the later of January 31, 2017, or three months after final approval of the Rules is granted by the SEC. The requirement of disclosure of other audit firms participating in the audit would be effective for reports issued on or after June 30, 2017.

For the PCAOB's adopting release with respect to the Rules, click here.

SEC Division of Corporation Finance Issues Four Additional C&DIs on FAST Act

Since the adoption of the Fixing America's Surface Transportation Act (FAST Act) on December 4, 2015, the Division of Corporation Finance (Division) of the Securities and Exchange Commission has issued six Compliance and Disclosure Interpretations (C&DIs), the first two of which were previously summarized in the *Corporate and Financial Weekly Digest edition of December 18, 2015*. The four most recently released C&DIs related to the FAST Act were issued on December 21, 2015, and include the following guidance:

- C&DI 3 underscores that Section 85001 of the FAST Act amended Section 12(g) and Section 15(d) of the Securities Exchange Act of 1934, as amended (Exchange Act), to provide that savings and loan holding companies will be treated in a similar manner to bank holding companies for purposes of registration, termination of registration or suspension of their reporting obligations under the Exchange Act. In particular, with respect to savings and loan holding companies:
    - savings and loan holding companies will have a Section 12(g) registration obligation as of any fiscal year-end after December 4, 2015, with respect to a class of its equity securities that is held of record by 2,000 or more persons;

- the holders of record threshold for deregistration under Section 12(g) has increased from 300 to 1,200 persons; and

- the holders of record threshold for suspension of reporting under Section 15(d) has increased from 300 to 1,200 persons.

- C&DI 4 clarifies that the Division interprets the FAST Act amendments to Section 12(g)(1)(B) to eliminate any Section 12(g) registration obligation for savings and loan holding companies with respect to a class of equity securities where the registration obligation would otherwise be triggered as of a fiscal year that ended on or before December 4, 2015. Accordingly, any savings and loan holding company that has filed a registration statement under the Exchange Act that is not yet effective may withdraw the registration statement. If any savings and loan holding company has already registered a class of equity securities under Section 12(g), it must continue such registration unless it is eligible to deregister the securities.

- C&DI 5 provides that a savings and loan holding company may terminate its Section 12(g) registration by filing a Form 15 if the applicable class of equity securities is held of record by less than 1,200 persons. Until rule amendments are made to reflect the changes to Section 12(g)(4) promulgated under the FAST Act, the SEC advises any savings and loan holding company filing a Form 15 in reliance on such changes to include an explanatory note indicating that it is relying on Exchange Act Section 12(g)(4).

- C&DI 6 clarifies that a savings and loan holding company may suspend its obligation to file reports under Section 15(d) of the Exchange Act with respect to a class of securities sold pursuant to an Exchange Act registration statement and that was held of record by less than 1,200 persons as of the first day of the current fiscal year. The suspension would be deemed to have occurred as of the beginning of the fiscal year in accordance with Section 15(d) (as amended by the FAST Act). However, if a savings and loan holding company has a registration statement that becomes effective or is updated during the current fiscal year, it will then have a Section 15(d) reporting obligation for the current fiscal year, unless the updating was pursuant to Section 10(a)(3) of the Exchange Act and no sales have been made under the registration statement during the current fiscal year.

The complete text of all six FAST Act C&DIs can be found here.

BROKER-DEALER

Notice of Filing of a Proposed Rule Change To Adopt the Capital Acquisition Broker Rules

The Securities and Exchange Commission is seeking comments on a Financial Industry Regulatory Authority proposal to create a set of rules for FINRA member firms that meet the definition of "capital acquisition broker" (CAB) and elect to be governed by the rules. Under the proposed rules, qualifying firms would be eligible to receive transaction-based compensation and would be subject to reduced regulatory burdens. The reduced regulatory burdens under the proposed rule change include that CABs would not be subject to the provisions of FINRA's supervision rule that require (1) annual compliance meetings, (2) review and investigation of transactions, and (3) supervisory procedures for supervisory personnel. In addition, the chief executive officer of a member firm that qualifies and elects to be treated as a CAB would not be required to certify the firm's compliance program annually, and the proposed rules eliminate the requirement to maintain a business continuity plan. However, CABs still would need to comply with some FINRA rules that may be burdensome, including net capital requirements and obtaining audited financial statements.

Under the proposed rule, the term CAB means any broker that solely engages in any one or more of the following activities:

- advising an issuer, including a private fund, concerning its securities offerings or other capital raising activities;
- advising a company regarding its purchase or sale of a business or assets or regarding its corporate restructuring, including a going-private transaction, divestiture or merger;
- advising an issuer regarding its selection of an investment banker;
- assisting in the preparation of offering materials on behalf of an issuer;

- providing fairness opinions, valuation services, expert testimony, litigation support, and negotiation and structuring services;
- qualifying, identifying, soliciting or acting as a placement agent or finder with respect to institutional investors in connection with purchases or sales of unregistered securities; and
- effecting securities transactions solely in connection with the transfer of ownership and control of a privately held company through the purchase, sale, exchange, issuance, repurchase or redemption of, or a business combination involving, securities or assets of the company, to a buyer that will actively operate the company or the business conducted with the assets of the company, in accordance with the terms and conditions of an SEC rule, release, interpretation or "no-action" letter that permits a person to engage in such activities without having to register as a broker or dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934.

Comments are due on January 16.

To see the notice of filing of the proposed rule change, click here.

Revised Pay-to-Play Rules

The Securities and Exchange Commission is seeking comments on a revised proposal recently filed by the Financial Industry Regulatory Authority to establish "pay-to-play" and related rules regulating the activities of FINRA member firms that engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers. The revised proposal responds to comments made relative to a December, 2014 FINRA proposal. The primary differences between the revised proposal and the prior proposal are that the revised proposal does not require a member firm to (1) provide disclosure to government entities regarding its distribution and solicitation activities, or (2) disgorge fees or other compensation received in violation of the rules.

FINRA is proposing a pay-to-play rule, Rule 2030 (Engaging in Distribution and Solicitation Activities with Government Entities), that would impose substantially the same restrictions on member firms engaging in distribution or solicitation activities as the SEC pay-to-play rule imposes on investment advisers. FINRA also is proposing Rule 4580 (Books and Records Requirements for Government Distribution and Solicitation Activities), which would impose recordkeeping requirements on member firms in connection with political contributions.

Comments on the proposed Rules are due on or before January 20, 2016.

To see the proposal click here.

Research Note: Equity Market Volatility on August 24, 2015

On December 29, 2015, the staff of the Securities and Exchange Commission's Office of Analytics and Research Division of Trading and Markets published a research note (Research Note) on the unusual price volatility that the US equity markets and equity-related futures markets experienced on August 24, 2015. The Research Note assesses US equity markets under stressed conditions, including the lack of a uniform approach among exchanges and how exchange-traded products, such as exchange-traded funds, are affected by volatility, and provides a useful opportunity to evaluate the practical operation of several regulatory initiatives implemented in recent years by the SEC and self-regulatory organizations to address transitory price volatility.

To see the Research Note, click here.

FINRA's 2016 Regulatory and Examination Priorities

On January 5, the Financial Industry Regulatory Authority released its Regulatory Examination Priorities Letter, which identified its three main areas of focus for the year: (1) Culture, Conflicts of Interest and Ethics; (2) Supervisions, Risk Management and Controls; and (3) Liquidity.

In determining how a firm's culture affects its compliance and risk management, FINRA will assess five indicators of a firm's culture: (1) whether control functions are valued within the organization; (2) whether policy or control breaches are tolerated; (3) whether the organization proactively seeks to identify risk and compliance events; (4) whether supervisors are effective role models of firm culture; and (5) whether sub-cultures (e.g., a branch office,

trading desk or investment banking department) that may not conform to overall corporate culture are identified and addressed.

In 2016, FINRA will focus on four areas that affect firms' business conduct and the integrity of the markets: (1) management of conflicts of interest, including what firms are doing to mitigate conflicts of interest that arise through the sale of proprietary or affiliated products, information leaks and the valuation of level 3 assets, (2) technology, including firms' cybersecurity preparedness and ability to protect the confidentiality of customer information, (3) outsourcing, and (4) anti-money laundering. FINRA notes that firms should routinely test systems and verify the accuracy of data sources to ensure that all types of customer accounts and customer activity are properly identified and reviewed in order to detect and report possible suspicious activity.

In terms of liquidity, FINRA will examine the appropriateness of firms' emergency funding plans in light of their business models. In addition, in 2016 FINRA also will focus on sales practices and vulnerable investors, the development of Regulation A+, and internal audit processes for identifying and prioritizing risk. Additionally, FINRA is planning to deliver monthly compliance report cards to firms that will provide information regarding instances where potentially manipulative activity (including layering and spoofing) is occurring throughout the firm and instances where some of the activity is occurring throughout the firm and the remainder is effected outside the firm. FINRA will then test how firms use the information provided by the compliance report cards to identify and stop potential misconduct.

To see the Regulatory Examination Priorities Letter, click here.

DERIVATIVES

Congress Provides Swap Clearing and Margin Exemption for Central Treasury Units

Section 705 of the Consolidated Appropriations Act, 2016, that was signed by President Obama on December 18, 2015, amends Section 2(h)(7)(D) of the Commodity Exchange Act and the equivalent provision in the Securities Exchange Act of 1934 that provide exemptions from swap clearing for certain affiliates of a non-financial corporation. The amendment deletes the "acting as agent" condition from those provisions that prevented them from being useful for non-financial corporations that use an affiliated central treasury unit (CTU) that is a financial entity to hedge the risks of the corporation. The amendment does add some additional conditions to the exemptions, but assuming that they can be met, Section 705 will expand the availability of exemptions from clearing for swaps executed by a CTU to hedge risks of its non-financial affiliate.

Since the final margin rules for non-cleared swaps adopted in December by the Commodity Futures Trading Commission and in October by the prudential swap regulators each contain an exemption for any swap that satisfies the criteria in Section 2(h)(7)(D) of the Commodity Exchange Act (and, in the case of the prudential regulator margin rules, for any swap that qualifies for an exception under equivalent provision in the Securities Exchange Act of 1934), the amendment in Section 705 also expands the availability of exemptions from the margin rules for affiliates of non-financial corporations.

The text of Section 705 can be found here.

See "CFTC Amends Recordkeeping Rules," "CFTC Requests Comment on Draft Technical Specifications for Swap Data," "CFTC Proposes Alternative to Fingerprinting Requirement for Foreign Individuals," "CFTC Reminds SDs and MSPs of Swap Reporting Obligations," "CFTC Provides Relief to SEFs From Audit Trail Requirements Related to Post-Trade Allocation Information" and "NFA Revises SD and MSP 4s Review Process" in the CFTC section.

CFTC

CFTC Amends Recordkeeping Rules

The Commodity Futures Trading Commission has amended Regulation 1.35(a) to ease recordkeeping obligations for certain entities with respect to commodity interest transactions and related cash or forward transactions. Specifically, members of a designated contract market (DCM) or a swap execution facility (SEF) that are not

registered with the CFTC in any capacity are no longer required to keep written pre-trade communications or text messages that lead to the execution of commodity interest transactions and related cash or forward transactions. Similarly, such unregistered entities are not required to keep their written records in any particular form and manner. Further, registered commodity trading advisors that are members of a DCM or a SEF are not required to record and keep oral pre-trade communications.

The CFTC also revised its rule to confirm that all required records must be kept in a form and manner that (1) permits prompt, accurate and reliable location, access, and retrieval; and (2) allows for identification of a particular transaction. In doing so, the CFTC clarified that the rule does not require market participants to convert records to searchable electronic databases.

The amendments to Rule 1.35(a) will be effective upon publication in the *Federal Register*.

The CFTC's final rules are available here.

CFTC Requests Comment on Draft Technical Specifications for Swap Data

The staff of the Commodity Futures Trading Commission has published for comment draft technical specifications for certain swap data elements, including data that are currently reportable under Part 45 of CFTC Regulations as well as data that are not currently reportable under CFTC Regulations. The draft technical specifications raise several questions with respect to certain data, including counterparty, product, price, notional amount, additional fixed payments, options, orders, package transactions, clearing, periodic reporting, events, interest rate swaps, foreign exchange swaps and other data elements.

The draft technical specifications are available here.

CFTC Proposes Alternative to Fingerprinting Requirement for Foreign Individuals

The Commodity Futures Trading Commission has proposed to amend Regulation 3.21 to provide an exemption for the fingerprinting requirements for an individual who is a principal or associated person of a registrant, if such individual has not resided in the United States since reaching the age of 18 years. Under the proposal, the fingerprint card obligation would be deemed satisfied if the individual's certifying firm conducts a criminal history background check and submits a certification to National Futures Association. The proposed rule would codify and expand relief that the Division of Swap Dealer and Intermediary Oversight previously provided in Letter No. 12-49 and Letter No. 13-29.

Comments on the proposed amendments must be submitted within 30 days following publication in the *Federal Register*.

The CFTC's proposal is available here.

CFTC Reminds SDs and MSPs of Swap Reporting Obligations

The Division of Swap Dealer and Intermediary Oversight of the Commodity Futures Trading Commission has issued an advisory to remind swap dealers (SDs) and major swap participants (MSPs) of their swap data reporting obligations. The advisory lists examples of reporting issues that appear with some frequency, including readily apparent errors, incomplete reporting, duplicative swap reporting, calculation errors and reporting delays. The advisory also provides examples of reporting practices that SDs and MSPs may want to consider, including the implementation of data gatekeepers, automated review of reported data, erroneous record checks, improved change management practices, prompt data correction and proper supervision of third-party service providers.

The advisory is available here.

CFTC Provides Relief to SEFs From Audit Trail Requirements Related to Post-Trade Allocation Information

The Division of Market Oversight of the Commodity Futures Trading Commission has issued temporary no-action relief to swap execution facilities (SEFs) from certain audit trail requirements related to post-trade allocations. Under CFTC Regulation 37.205, SEFs are required to maintain audit trail data sufficient to track an order from the

time of receipt through fill, allocation or other disposition. SEFs also are required to maintain a transaction history database that can identify each account to which fills are allocated.

The no-action relief provides that SEFs are not required to capture post-trade allocations in their audit trail data or conduct audit trail reviews of post-trade allocations, subject to the following conditions:

- a SEF seeking relief must adopt a rule that requires market participants to provide post-trade allocation information to the SEF upon request; and
- the SEF must obtain and review post-trade allocation information as part of an investigation into any trading activity involving post-trade allocations.

This relief will expire on November 15, 2017.

The no-action letter is available here.

NFA Revises SD and MSP 4s Review Process

National Futures Association (NFA) has revised its review process for swap dealer (SD) and major swap participant (MSP) applications under Section 4s of the Commodity Exchange Act. Effective immediately, SDs and MSPs are no longer required to submit additional documentation or revisions in response to NFA's feedback letters. (As background, NFA issues a feedback letter to an SD or MSP after it has conducted a detailed review of the firm's Section 4s submission.)

SDs and MSPs now are required to submit an attestation signed by the firm principal that attests that the firm has revised its policies and procedures to address the issues raised in the feedback letter. For firms with active feedback letters, NFA will reissue feedback letters identifying where an attestation is required to be submitted instead of revised documentation.

More information is available here.

BANKING

Federal Bank Regulatory Agencies Release CRA Asset-Size Thresholds for Small and Intermediate Small Institutions

On December 22, 2015, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency (collectively, Agencies) announced the annual adjustment to the asset-size thresholds used to define small bank, small savings association, intermediate small bank and intermediate small savings association under the Community Reinvestment Act (CRA) regulations. Financial institutions are evaluated under different CRA examination procedures based upon their asset-size classification. Those meeting the small and intermediate small institution asset-size thresholds are not subject to the reporting requirements applicable to large banks and savings associations.

The definitions of small and intermediate small institutions for CRA examinations will change as follows:

- "small bank" or "small savings association" means an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.216 billion; and
- "intermediate small bank" or "intermediate small savings association" means a small institution with assets of at least $304 million as of December 31 of both of the prior two calendar years, and less than $1.216 billion as of December 31 of either of the prior two calendar years.

These asset-size threshold adjustments were effective January 1.

In addition, the Agencies are making technical edits to 12 CFR 25.42, 228.42, and 345.42 to remove obsolete references to the Office of Thrift Supervision and to 12 CFR 563e in the CRA rules. Finally, the Agencies are updating the citations in the CRA regulations to reference Regulation C and Regulation Z, located at 12 CFR 1003 and 12 CFR 1026, respectively.

Read the press release here.

UK DEVELOPMENTS

PSC Register—Draft Guidance on the Meaning of "Significant Influence or Control" for UK Companies and LLPs

As discussed in the *Corporate and Financial Weekly Digest* edition of August 14, 2015, the new obligation for UK companies and limited liability partnerships (LLPs) to keep and maintain a register (Register) of people with significant control (PSC) over the company (PSC Register), as introduced by the Small Business, Enterprise and Employment Act 2015, includes an individual or entity that otherwise exercises (or has the right to exercise) "significant influence or control" over the company.

On December 21, 2015, the Department for Business, Innovation and Skills (BIS) published for consultation draft statutory guidance for UK companies and LLPs as to the meaning of "significant influence or control." Under the draft guidance:

- a person has control of a company or the activities of a trust or firm when they have the power to direct its policies and activities; and
- "significant influence" enables the person to ensure that the company or trust adopts those policies or activities desired by the holder of the significant influence.

Helpfully, the draft guidance also provides a non-exhaustive list of safe harbor roles and relationships that would not normally be considered exercising significant influence or control. These roles include:

- persons who provide advice or direction in a professional capacity (i.e. lawyers, accountants, management consultants or financial advisors);
- persons engaged in third-party commercial or financial agreements (i.e. suppliers, customers or lenders);
- employees acting in the course of their employment; and
- directors of a company (i.e. managing directors, sole directors or non-executive directors who hold casting votes).

However, the draft guidance notes that a person may still be considered a PSC if the role or relationship contains elements that exceed the role or relationship normally understood or exercised, or if the role or relationship forms one of several opportunities in which that person has to exercise significant influence or control.

The BIS intends the guidance in relation to UK companies to apply beginning April 6.It has not specified the effective date of the guidance issued for UK LLPs, although comments from the UK government this past summer suggest that the LLP guidance also will apply on April 6.

The consultation on draft guidance closes on January 11 and finalized guidance is expected soon after.

The UK company guidance is available here.

The UK LLP guidance is available here.

EU DEVELOPMENTS

European Union Publishes Implementing Directive on Whistleblowing Under Market Abuse Regulation

On December 18, 2015, the *Official Journal of the European Union* published the European Commission's (EC's) new Implementing Directive on whistleblowing under the European Union's Market Abuse Regulation. Article 32 of the Market Abuse Regulation mandated that the EC should publish pan-European procedures whereby persons may bring new information to the attention of EU regulators and assist the latter in detecting and imposing sanctions for market abuse offences.

EU authorities have identified that whistleblowers may be deterred from reporting concerns to regulators in the European Union for fear of retaliation, discrimination or disclosure of personal data, and consequently the new

Implementing Directive outlines arrangements to ensure the overall protection and the respect of the fundamental rights of whistleblowers and accused persons. However, persons who knowingly report wrong or misleading information to EU regulators will not be considered whistleblowers and therefore will not benefit from the protection mechanisms.

The Implementing Directive also outlines the following:

- mechanisms for anonymous reporting to EU regulators and the application of protection mechanisms where an anonymous whistleblower decides to reveal its identity to the EU regulator at a later stage (the Implementing Directive allows that whistleblowers should be free to report either through internal procedures, where such procedures exist, or directly to the relevant EU regulator);
- requirements for EU regulators to establish dedicated whistleblowing channels of communication, requiring that these are: (1) separated from general communication channels of the regulator, including those through which the regulator communicates internally and with third parties in its ordinary course of business, (2) designed, set up and operated in a manner that ensures the completeness, integrity and confidentiality of the information and prevents access to non-authorized staff members of the regulator, and (3) established with appropriate information storage retention facilities;
- measures for the protection of persons working under a contract of employment (such that whistleblowers should have access to comprehensive information and advice on the remedies and procedures available under national law to protect them against unfair treatment, including on the procedures for claiming pecuniary compensation, and that the relevant EU regulator should certify such persons as a whistleblower in the event of any employment disputes); and
- measures for the protection of personal data.

The Implementing Directive went into effect on January 7.

The Implementing Directive is available here.

ESMA Publishes Consultation Guidelines on MiFIR

On December 23, 2015, the European Securities and Markets Authority (ESMA) published consultation guidelines (Guidelines) in relation to Markets in Financial Instruments (MiFIR). The Guidelines are intended to complement ESMA regulatory technical standards on transaction reporting, reference data, order record keeping and clock synchronization under MiFIR (RTS 22, 23, 24 and 25), and provide guidance as to the requirements under the new technical standards following requests by market participants during consultations on the (Markets in Financial Instruments Directive (MiFID II) technical standards.

Specifically, the Guidelines include:

- individual scenarios in relation to transaction reporting activity, and provide precise technical formats and schema to be used to represent the specific reportable values; and
- scenarios applicable to specific order record keeping activities.

The consultation on the Guidelines closes on March 23, with finalized guidelines expected to be published by ESMA in the latter half of 2016.

A copy of the press release can be found here.

A copy of the Guidelines can be found here.

European Union Single Resolution Mechanism is Operational

On January 1, the Single Resolution Mechanism (SRM) became fully operational. The SRM implements the European Union Bank Recovery and Resolution Directive (BRRD). The SRM is designed to strengthen the resilience of the financial system and to assist in mitigating against future crises. The regulation underlying the SRM establishes the framework and procedures that member states of the European Union will be required to follow when a bank in their jurisdiction fails and requires resolution.

The SRM provides that a Single Resolution Fund is to be established under the control of the Single Resolution Board (SRB), with funds to be added throughout eight years with contributions from the banking sector.

The full resolution of powers of the SRB also apply as of January 1.

A copy of the European Commission's press release (which contains further background on the SRM in effect) can be found here.

Links to the text of the underlying regulation to the SRM (Regulation (EU) No 806/2014), including links to further Delegated Regulation in relation to the SRM can be found here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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