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BROKER-DEALER

Change to the No-Action Relief Regarding Definition of "Ready Market" With Regard to Foreign Equity Securities Pursuant to SEC Rule 15c3-1(c)(11)(i)

On February 9, the Securities and Exchange Commission withdrew a no-action letter that was issued on November 28, 2012 (Old Letter), and issued a new one in its place (New Letter). The New Letter is identical to the Old Letter except that it: (1) expands the equity securities of a foreign issuer that may be treated as having a "ready market" from ones that are listed on the FTSE World Index to securities listed for trading on a foreign securities exchange located within a country that is recognized on the FTSE World Index if they have been trading for at least 90 days; and (2) it alters footnote 5. Per the New Letter, the SEC is continuing to grant no-action relief, stating that it will not recommend enforcement action if a broker-dealer treats an equity security of a foreign issuer as having a ready market under paragraph (c)(11) of the Net Capital Rule (and subject to the haircuts under paragraph (c)(2)(vi)(J)), if the following conditions are met:

- the security is listed for trading on a foreign securities exchange located within a country that is recognized on the FTSE World Index and the security has been trading on that exchange for at least the previous 90 days;
- daily quotations for both bid and ask or last sale prices for the security provided by the foreign securities exchange on which the security is traded are continuously available to broker-dealers in the United States through an electronic quotation system;
- the median daily trading volume (calculated over the preceding 20-business-day period) of the foreign equity security on the foreign securities exchange on which the security is traded is either at least 100,000 shares or $500,000; and
- the aggregate unrestricted market capitalization in shares of such security exceeds $500 million over each of the preceding 10 business days.

The Old Letter, however, required that the median daily trading volume (calculated over the preceding 20-business-day period) of the foreign equity security on the foreign securities exchange on which the security is traded be at least 100,000 shares or $500,000. In addition, footnote 5 stated that "shares purchased by the computing broker-dealer during the preceding 20-business-day period are to be excluded when determining the median trading volume." The SEC has become aware that footnote 5 creates an operational burden on the computing broker-dealers and revised it in the New Letter to say the "trading volume calculations must be based upon bona fide transactions."

To read the New Letter, click here.

FINRA Regulatory Notice Regarding Private Placements and Public Offerings Subject to a Contingency

The Financial Industry Regulatory Authority's review of various securities offering documents revealed instances in which broker-dealers have not complied with Securities Exchange Act Rules 10b-9 and 15c2-4 requirements (Requirements). FINRA released Regulatory Notice 16-08 to remind broker-dealers of their responsibility to have procedures reasonably designed to achieve compliance with the Requirements and to provide guidance regarding the Requirements.

The Requirements mandate that broker-dealers that participate in best efforts public and private securities offerings that have a contingency must: (1) safeguard investor funds until the contingency is satisfied, including by depositing the funds into "a separate bank account" for which the broker-dealer is the account holder and is designated as agent or trustee "for the persons who have the beneficial interests therein;" (2) as part of its reasonable investigation, review the terms of the contingency, including any agreement and disclosure by the issuer regarding the contingency; and (3) if the contingency is not met, ensure that investors' funds are promptly refunded.

To view the full notice, click here.

DERIVATIVES

See "European Commission and CFTC Announce Harmonized Approach to CCPs" and "CFTC's Energy and Environmental Markets Advisory Committee To Hold Public Meeting" in the CFTC section.

CFTC

European Commission and CFTC Announce Harmonized Approach to CCPs

On February 10, the Commodity Futures Trading Commission and the European Commission (EC) announced that they had reached an agreement on a harmonized approach to central clearing counterparties (CCPs). The agreement ensures that EU market participants will be able to continue to use CFTC-registered CCPs without incurring substantial capital changes.

Under the agreement, the EC will adopt an equivalence decision, which will allow CFTC-registered CCPs to provide services in the European Union by complying with US requirements. In order to be recognized as equivalent, a CFTC-registered CCP will be required to confirm its internal policies and procedures ensure: (1) initial margin collected with respect to clearing member proprietary positions is sufficient to account for a two day liquidation period; (2) initial margin models take into account and mitigate the risk of procyclicality; and (3) the maintenance of "cover 2" default resources. These conditions will not apply to US agricultural commodity derivatives traded and cleared domestically within the United States.

The EC will shortly propose to adopt a decision determining that US trading venues are equivalent to regulated markets in the European Union. Member states must vote on an equivalence decision before the decision is adopted by the EC. The EC will seek to ensure US CCPs are recognized as equivalent prior to June 21, the date on which the first central clearing requirements under the European Market Infrastructure Regulation (EMIR) become effective. To that end, the European Securities and Markets Authority (ESMA) also announced last week that it "will rapidly resume the recognition process of specific CFTC-supervised US CCPs that had applied to ESMA" to be recognized in the European Union. Under the European regime, recommendations to the EC on CCP equivalency determinations are first made by ESMA.

Concurrently, CFTC staff will propose a determination of comparability with regard to EU requirements, which will allow EU CCPs to provide services in the United States by complying with requirements under EMIR. The CFTC also will streamline its registration process for EU CCPs.

The joint announcement can be found here.

ESMA's statement can be found here.

CFTC's Energy and Environmental Markets Advisory Committee To Hold Public Meeting

The Commodity Futures Trading Commission's Energy and Environmental Markets Advisory Committee (EEMAC) will hold a public meeting on February 25. Topics to be addressed are: (1) the EEMAC's report detailing its 2015 proceedings; (2) the CFTC's proposed order to exempt Southwest Power Pool from certain aspects of the Commodity Exchange Act; and (3) the CFTC staff preliminary report regarding the swap dealer *de minimis*

exception. The public can attend the meeting in person at the CFTC's Washington, DC headquarters or can utilize conference call or live webcast options.

Additional details about the meeting can be found here.

UK DEVELOPMENTS

FCA Publishes Policy Statement on the Implementation of UCITS V

On February 2, the Financial Conduct Authority (FCA) published a policy statement on the implementation of the Undertakings for the Collective Investment of Transferable Securities V Directive (UCITS V). Policy Statement 16/2 sets out FCA Handbook changes required to implement UCITS V and also the FCA's feedback on responses received to Part I of the FCA's Consultation Paper 15/27, released in September 2015.

As discussed in the *Corporate & Financial Weekly Digest* edition of September 11, 2015, the Consultation Paper contained three sections with proposed rule changes. Part I of the Consultation Paper set out draft rules to transpose UCITS V into UK regulation. Part II set out draft rules to align the FCA Handbook with the regulation on European long-term investment funds (ELTIF Regulation). Part III contained draft incidental changes to the FCA Handbook.

In its latest Policy Statement, the FCA clarified:

- guidance on payments in non-cash instruments;
- whether consequential changes to prospectus and scheme documents will require approval from the FCA (following the implementation of UCITS V);
- UCITS V disclosure requirements for managers of non-UCITS retail schemes (NURS), including that NURS will not be required to disclose the list of the depositary's delegates and sub delegates in prospectuses;
- the level of infrastructures that non-bank depositaries must have in place when delegating the safekeeping function to a third party;
- that UCITS depositaries will be able to delegate the performance of administrative and technical tasks to a third party; and
- which of the Client Assets Sourcebook rules relating to records, accounts and reconciliations will continue to be applicable to depositories of UCITS until the Level 2 Regulation goes into effect.

UCITS V goes into effect on March 18. However, the associated Level 2 Regulation has not yet been published and it is unclear when it will become applicable. The FCA acknowledges that there is a "mismatch" between the UCITS V implementation date, and when the relevant Level 2 Regulation will take effect and notes that firms may face uncertainty in relation to:

- minimum terms to be included in the contract between the management company and the depositary;
- oversight, cash monitoring and safekeeping duties of depositories;
- types of financial instruments that the depositary must hold in custody and associated segregation requirements;
- terms and conditions of the depositary's liability for losses of financial instruments;
- terms of the depositary's delegation of the safekeeping function to third-party custodians; and
- requirements for independence between the management company and the depositary.

The FCA confirmed that despite potential uncertainties, firms are expected to make efforts to comply with the requirements of UCITS V. However, the FCA also confirmed in its Policy Statement that where existing handbook rules cover the topics above, firms should continue to comply with those until the Level 2 Regulation is applicable.

The FCA will outline its final position in relation to Part II and III of the Consultation Paper at a later date.

A copy of the Policy Statement can be found here.

A copy of the Consultation Paper can be found here.

EU DEVELOPMENTS

European Commission Announces Action Plan Against Terrorism Financing and Changes to the Fourth AML Directive

On February 2, the European Commission (EC) announced and presented an action plan (Action Plan) against terrorism financing, which includes amendments to the fourth Anti-Money Laundering (AML) Directive that went into effect in June 2015.

The EC's Action Plan aims to: (1) trace terrorists through financial movements and prevent them from moving funds or other assets; and (2) disrupt the sources of revenue used by terrorist organizations, by targeting their capacity to raise funds.

The EC aims to complete all actions under the Action Plan by the end of 2017.

Proposed amendments to the fourth AML Directive include:

- inserting a list of compulsory checks (due diligence measures) for financial institutions to carry out, to target countries identified as having strategic deficiencies in their national anti-money laundering and terrorist financing regimes;
- widening the scope of information accessible by the financial intelligence units (FIUs);
- centralizing national bank and payment registers or retrieval systems in all member states to give the FIU's easier and faster access to information on the holders of bank and payment accounts;
- bringing virtual currency exchange platforms within scope; and
- lowering thresholds for identification and widening customer verification requirements in relation to "anonymous pre-paid instruments," such as pre-paid cards, in addition to criminalizing money laundering and creating a common definition of money laundering offenses and sanctions across the European Union (among other changes).

The EC also has called on EU member states to commit to implementing the fourth AML Directive by the end of 2016 (rather than by June 2017).

A copy of the EC's announcement can be found here.

A copy of the fourth AML Directive can be found here.

European Commission Proposes One-Year Extension for MiFID II

On February 10, the European Commission (EC) announced its legislative proposal (Proposal) that would provide for a one-year extension to the application of the amended Markets in Financial Instruments Directive and the Markets in Financial Instruments Regulation (together, MiFID II). If the Proposal is approved by the European Parliament and the Council, the application date will be pushed back from January 3, 2017 to January 3, 2018.

In the Proposal, the EC justified the extension on the grounds of the "exceptional technical implementation challenges" of MiFID II. The EC noted that the European Securities and Markets Authority had confirmed that regulators and firms would not have the essential systems and data collection infrastructure in place by January 2017 to implement several key areas of MiFID II, including in relation to the frameworks for transparency, transaction reporting, and position limits and position management.

The one-year extension will not affect the adoption of delegated acts, technical standards and other implementing measures under MiFID II, and the EC is expected to announce those measures shortly.

A copy of the Proposal can be found here.

A copy of the EC's press release accompanying the Proposal can be found here.

See "European Commission and CFTC Announce Harmonized Approach to CCPs" in the CFTC section.

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

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UK/EU DEVELOPMENTS

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