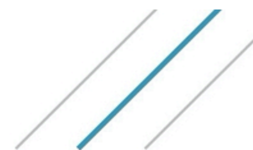
SECURITIES OPERATIONS

REGULATORY UPDATE



May 1, 2021

For more information please contact info@mediantonline.com

IN THIS ISSUE

Take Action Now.....2

Gary Gensler Sworn in as SEC Chair, Selects Initial Senior Staff.....3

SEC Amends, Seeks Comment on Holding Foreign Companies Accountable Act.....3

SEC Names Oh as Director of Enforcement.....4

SEC Chicago Office Director and Whistleblower Chief to Depart.....4

SEC Seeks Comment on U.K. and French Proposals for Substituted Compliance for SBS Entities.....5

SEC's Coates Speaks on SPACs.....5

FINRA Reminds Members About Options Account Approval, Supervision and Margin.....6

SEC Designates Longer Period for Action on FINRA Proposal to Cease Operation of the OTCBB.....6

FINRA to Continue Remote Hearings through August 2021.....7

FINRA Delays Roll Out of Corporate Bond New Issue Reference Data Service.....7

SEC Approves Nasdaq Proposal to Modify Procedures for Certain On-Open Orders.....8

Nasdaq Delays Implementation Date of End of Day Summary Message on NLS Plus.....8

Nasdaq Extends Pilot Program for Clearly Erroneous Transactions.....9

Nasdaq Amends Transaction Credits at Equity 7, Section 118.....9

Nasdaq Amends Options Pricing Schedule, Fees and Rebates.....9

NYSE Amends Proposal Relieving Issuers from Reimbursing Members for Forwarding Certain Proxy Materials.....10

NYSE Amends Price List.....10

NYSE American Modifies Option Fee Schedule.....11

SEC Grants No Objection to OCC Minimum Skin-In-The-Game Proposal.....11

Notable Enforcement Actions.....12

Take Action Now

SEC Reopens Comment Period for Universal Proxy

On April 16, 2021, the U.S. Securities and Exchange Commission ("SEC" or "Commission") announced that it had voted to reopen the comment period on the proposed rules for the use of universal proxy cards in all non-exempt solicitations for contested director elections. The rules and amendments were first proposed in October 2016 and would:

a. require the use of universal proxy cards in all non-exempt director election contests
b. revise the consent required of a bona fide director nominee
c. eliminate the short slate rule
d. prescribe certain filing, notice, and solicitation requirements of registrants and dissidents when using universal proxy cards
e. prescribe formatting and other requirements for universal proxy cards

The reopened comment period permits interested parties to submit further comments and data on the rule amendments proposed in 2016. In addition, the SEC is seeking comment specifically as to whether the proposed rule changes should be extended to registered investment companies and business development companies and whether dissidents should be required to solicit more than a majority of the voting power of shares entitled to vote, as was proposed in 2016. The reopened comment period further allows interested parties to comment on developments since 2016 when the proposing release was issued, including the potential economic and other effects of the proposal in light of any such developments.

- **2016 Proposed Rules and Amendments:** https://www.sec.gov/rules/proposed/2016/34-79164.pdf
- **Commission Notice:** https://www.sec.gov/rules/proposed/2021/34-91603.pdf
- **Press Release:** https://www.sec.gov/news/press-release/2021-64
- **Comments Due:** 30 days after publication in the Federal Register

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GARY GENSLER SWORN IN AS SEC CHAIR, SELECTS INITIAL SENIOR STAFF

On April 17, 2021, the SEC announced that Gary Gensler had been sworn into office as SEC Chair after having been previously nominated for the post on February 3, 2021 by President Joseph R. Biden and confirmed by the United States Senate on April 14, 2021. Gensler's appointment as SEC Chair follows a long career in public service. Gensler served as Chair of the U.S. Commodities Futures Trading Commission ("CFTC") and led the Obama Administration's reform of the $400 trillion swaps market. He also served as a senior advisor to United States Senator Paul Sarbanes in writing the Sarbanes-Oxley Act of 2002 and was Under Secretary of the Treasury for Domestic Finance and Assistant Secretary of the Treasury from 1997 until 2001. Prior to that, Gensler was a partner at Goldman Sachs in the Mergers & Acquisitions department, headed the firm's Media Group, led fixed income & currency trading in Asia, and was Co-Head of Finance, leading the firm's worldwide treasury efforts. Most recently, Gensler was Professor of the Practice of Global Economics and Management at the MIT Sloan School of Management and served as Chair of the Maryland Financial Consumer Protection Commission. On April 19, 2021, the SEC announced the appointments of Prashant Yerramalli, Heather Slavkin Corzo, Kevin Burris and Scott Schneider to Gensler's senior staff. Yerramalli will serve as Gensler's Chief of Staff, advising Gensler on all aspects of the agency's mission, including enforcement, rulemaking, examination and agency operations. Corzo will serve as Gensler's Policy Director and will lead a team of policy experts who will advise Gensler on SEC rulemakings. Burris will serve as the primary liaison between the SEC and Members of Congress and Schneider will serve as Gensler's principal advisor on communications and media relations.

Gensler Press Release: https://www.sec.gov/news/press-release/2021-65
Senior Staff Press Release: https://www.sec.gov/news/press-release/2021-68

SEC AMENDS, SEEKS COMMENT ON HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT

On March 24, 2021, the SEC announced that it had adopted interim final amendments to implement congressionally mandated submission and disclosure requirements of the Holding Foreign Companies Accountable Act ("HFCA Act"). The HFCA Act became law on December 18, 2020 and, among other things, amended Section 104 of the Sarbanes-Oxley Act of 2002 to require the Commission to identify each "covered issuer" that has retained a registered public accounting firm to issue an audit report where that firm has a branch or office located in a foreign jurisdiction, and the Public Company Accounting Oversight Board (PCAOB) has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. These registrants will be required to submit documentation to the Commission on or before the annual report due date that establishes that they are not owned or controlled by a governmental entity in that foreign jurisdiction. The interim final amendments implement a process for this documentation requirement. Before any registrant will have to comply with the interim final amendments, the Commission must implement a process for identifying such a registrant. Thus, the Commission is seeking public comment on this identification process.

Interim Final Rule: https://www.sec.gov/rules/interim/2021/34-91364.pdf
Effective Date/Comments Due: May 5, 2021
Press Release: https://www.sec.gov/news/press-release/2021-53

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SEC NAMES OH AS DIRECTOR OF ENFORCEMENT, OH ABRUPTLY RESIGNS

On April 22, 2021, the SEC announced that Alex Oh had been appointed as Director of the SEC's Division of Enforcement. Oh was most recently a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and Co-Chair of the law firm's Anti-Corruption & Foreign Corrupt Practices Act ("FCPA") practice group. She was previously an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, where she was a member of the Securities & Commodities Fraud Task Force and the Major Crimes Unit. Prior to private practice, Oh was the lead trial lawyer in numerous jury trials during her tenure as an Assistant U.S. Attorney. On April 29, 2021, the new enforcement chief abruptly resigned, citing a complication in a case from her prior legal career. "A development arose this week in one of the cases on which I worked while still in private law practice," Oh, the first Asian American woman to head the Enforcement Division, said in an emailed resignation to Chairman Gensler. "I have reached the conclusion that I cannot address this development without it becoming an unwelcome distraction." Melissa Hodgman will return to the role of Acting Director of the Division of Enforcement.

Press Release: https://www.sec.gov/news/press-release/2021-69
Press Release: https://www.sec.gov/news/press-release/2021-75

SEC CHICAGO OFFICE DIRECTOR AND WHISTLEBLOWER CHIEF TO DEPART

On April 8, 2021, the SEC announced that Jane Norberg, Chief of the SEC's Office of the Whistleblower, would step down in the coming weeks. Norberg had served in the Office of the Whistleblower nearly since its inception in 2012 and served as its first Deputy Chief. Norberg streamlined the awards review and adjudication process, managed an expansion of the Office's staff, and oversaw a dramatic growth in the number of awards issued to whistleblowers under the program, in part by leveraging the work of staff across the Commission to complement the office's dedicated staff. Norberg also played an active role in efforts related to diversity and inclusion. During Norberg's tenure, the SEC's whistleblower program issued awards totaling nearly $650 million to more than 110 individual whistleblowers. These include nine of the 10 largest awards in the program's history. The information and assistance provided by these whistleblowers resulted in successful SEC enforcement actions totaling more than $3.1 billion in sanctions, including more than $1.8 billion in disgorgement of ill-gotten gains and interest, of which over $760 million has been, or is scheduled to be, returned to harmed investors. The Whistleblower Office's Deputy Chief, Emily Pasquinelli, will serve as Acting Chief following Norberg's departure. In addition, on April 16, 2021, the SEC announced that Joel Levin, Director of the SEC's Chicago Regional Office, would leave the SEC at the end of May 2021. Levin oversaw numerous investigations and enforcement actions since becoming Director in 2018, including the securities fraud case involving Volkswagen AG's "clean diesel" scandal.

Levin Press Release: https://www.sec.gov/news/press-release/2021-63
Norberg Press Release: https://www.sec.gov/news/press-release/2021-59

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SEC SEEKS COMMENT ON U.K. AND FRENCH PROPOSALS FOR SUBSTITUTED COMPLIANCE FOR SBS ENTITIES

On April 5, 2021, the SEC voted to take two actions to continue to advance implementation of security-based swap regulation under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd Frank Act"). The SEC published a notice of application and proposed substituted compliance order in response to an application from the United Kingdom's Financial Conduct Authority ("FCA") and reopened the comment period on the notice of application and proposed a substituted compliance order in relation to the application by France's Autorité des Marchés Financiers ("AMF") and Autorité de Contrôle Prudentiel et de Résolution ("ACPR"). Specifically, the FCA is seeking substituted compliance for certain UK-regulated firms that are also registered with the SEC as security-based swap ("SBS") dealers and major SBS participants. Under the FCA's petition, those firms would satisfy certain requirements under the Exchange Act of 1934 ("Exchange Act") by complying with comparable requirements in the United Kingdom, subject to certain conditions. The French substituted compliance application addressed the same Exchange Act requirements that are the subject of the United Kingdom proposal for substituted compliance. The application included analyses that compare French and European Union requirements with relevant requirements under the Exchange Act, as well as information regarding the financial supervisory and enforcement frameworks in France.

UK Proposal: https://www.sec.gov/files/uk-financial-conduct-authority-complete-application-substituted-compliance-031921.pdf
French Proposal: https://www.sec.gov/files/full-french-application.pdf
Press Release: https://www.sec.gov/news/press-release/2021-57

SEC'S COATES SPEAKS ON SPACS

On April 8, 2021, the Acting Director of the SEC's Division of Corporate Finance John Coats issued a public statement with respect to the rising popularity of special purpose acquisition companies ("SPACs"). Specifically, Coates touched on one legal liability attached to disclosures in a "de-SPAC" transaction, a colloquial reference to when a SPAC and a target company complete a business combination transaction. Coates noted that some practitioners in the space have claimed that an advantage of SPACs over traditional IPOs is lesser securities law liability exposure for targets and the public company itself. They sometimes specifically point to existing safe harbors for forward-looking statements and suggest or assert that the safe harbor applies in the context of de-SPAC transactions but not in conventional IPOs. This, such observers assert, is the reason that sponsors, targets and others involved in a de-SPAC feel comfortable presenting projections and other valuation material of a kind that is not commonly found in conventional IPO prospectuses. Coates clarified, however, that "[a]ny simple claim about reduced liability exposure for SPAC participants is overstated at best, and potentially seriously misleading at worst…any material misstatement in or omission from an effective Securities Act of 1933 ("Securities Act") registration statement as part of a de-SPAC business combination is subject to Securities Act Section 11 [and] any material misstatement or omission in connection with a proxy solicitation is subject to liability under Exchange Act Section 14(a) and Rule 14a-9, under which courts and the Commission have generally applied a "negligence" standard.

Coates' Statement: https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws

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FINRA REMINDS MEMBERS ABOUT OPTIONS ACCOUNT APPROVAL, SUPERVISION AND MARGIN

On April 9, 2021, the Financial Industry Regulatory Authority, Inc. (“FINRA”) published Regulatory Notice 21-15 to remind members of their obligations for determining whether to approve a customer to trade in options. FINRA rules require that each customer must be specifically approved, or disapproved, for options trading prior to the time the member accepts an options order from the customer, regardless of whether the brokerage account is self-directed or options are recommended by a registered representative. The rule sets forth the steps that must be taken as part of that approval. FINRA Rule 2360(b)(16) requires a member to exercise due diligence to ascertain the essential facts relative to the customer. Specifically, the member must seek to obtain and consider detailed customer information, including, among others, the customer’s knowledge, investment experience, age, financial situation and investment objectives. Based upon this information the member must determine whether it is appropriate to approve the customer to trade options. This approval process must consider the appropriateness of the full range of options trading being approved for the customer. As part of the approval process, members also should consider whether to approve a customer only for certain types of options transactions and not for others. FINRA also reminds members of their obligations under Regulation BI when they make recommendations of options transactions or investment strategies involving options (including account recommendations) to retail customers. With respect to compliance obligations pertaining to margin, FINRA Rule 4210 sets forth the maintenance margin requirements for options transactions, which are often required to be affected in a margin account, and requires firms to have procedures in place to review the limits and types of credit extended to all customers.

FINRA Regulatory Notice 21-15: https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-15.pdf

SEC DESIGNATES LONGER PERIOD FOR ACTION ON FINRA PROPOSAL TO CEASE OPERATION OF THE OTCBB

As previously reported, on October 1, 2020, the SEC published for comment a FINRA proposal aimed at expanding and enhancing the obligations of member firms that operate certain systems that regularly disseminate the quotations of identified broker-dealers in over-the-counter (“OTC”) equity securities (“inter-dealer quotation systems”). The proposed rule change would also delete the rules related to, and cease the operation of, the OTC Bulletin Board (“OTCBB”), FINRA’s inter-dealer quotation system for use by broker-dealers to publish quotations in eligible OTC equity securities. On November 4, 2020, the SEC designated a longer period within which to approve, disapprove, or institute proceeding with respect to the proposal. Thereafter, FINRA filed an amendment to the proposal to address three comment letters that it had received, which the SEC published for comment on December 30, 2020. The SEC then announced on April 5, 2021, the statutory deadline for Commission action on the proposal, as amended, that it would exercise the available 60-day extension for action to June 4, 2021. In its filing, the SEC stated that it found the delay to be appropriate so that it has sufficient time to consider the issues raised in the comment letters submitted and respond to them.

Notice Release: https://www.sec.gov/rules/sro/finra/2021/34-91474.pdf

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FINRA TO CONTINUE REMOTE HEARINGS THROUGH AUGUST 2021

On April 7, 2021, the SEC published for comment a FINRA proposal, effective on filing, to extend the expiration of the temporary amendments set forth in SR-FINRA-2020-015 and SR-FINRA-2020-027 from April 30, 2021 to August 31, 2021. The temporary amendments were enacted last year during the outbreak of the COVID-19 pandemic to provide temporary relief from some timing, method of service and other procedural requirements in FINRA rules and allow FINRA's Office of Hearing Officers ("OHO") and the National Adjudicatory Council ("NAC") to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. In addition, the need for FINRA staff, with limited exceptions, to work remotely and restrict in-person activities, consistent with the recommendations of public health officials, have made it challenging to meet some procedural requirements and perform some functions required under FINRA rules. For example, working remotely makes it difficult to send and receive hard copy documents and conduct in-person oral arguments. FINRA stated in its filing that, while it has seen improvement, the COVID-19 conditions that necessitated the enactment of the amendments persist, and an extension of the amendments through August 2021 is, therefore, also necessary. Similarly, FINRA proposed to extend from April 30, 2021 to June 30, 2021 the expiration of temporary amendments allowing deferrals of certain FINRA qualification examinations, due to the ongoing challenges faced by test-site administrators. The proposals were designated by FINRA to be statutorily non-controversial and, therefore, the proposals became effective upon filing.

NAC/OHO Notice Release: https://www.sec.gov/rules/sro/finra/2021/34-91495.pdf
Comments Due: May 4, 2021
Qualifications Exam Notice Release: https://www.sec.gov/rules/sro/finra/2021/34-91506.pdf
Comments Due: May 5, 2021

FINRA DELAYS ROLL OUT OF CORPORATE BOND NEW ISSUE REFERENCE DATA SERVICE

On April 15, 2021, the SEC published for comment a FINRA proposal to extend its scheduled timeline to announce the implementation schedule for the planned corporate bond new issue reference data service. In the proposal previously approved by the SEC on January 15, 2021, FINRA stated that it would announce the effective date for the new issue reference data service in a Regulatory Notice within 90 days of receiving SEC approval, and that the effective date would be within 270 days of SEC approval. In its most recent filing, FINRA proposed to extend the timeline to establish and announce the effective date. FINRA stated that, once an effective date has been established, it will issue a Regulatory Notice to announce an implementation schedule that provides market participants with sufficient time to prepare for implementation. The filing also indicated that FINRA requested, and the SEC granted, a waiver from the 30-day operative delay which allowed the proposal to become effective immediately on filing.

Notice Release: https://www.sec.gov/rules/sro/finra/2021/34-91582.pdf
Comments Due: May 12, 2021

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SEC APPROVES NASDAQ PROPOSAL TO MODIFY PROCEDURES FOR CERTAIN ON-OPEN ORDERS

On April 2, 2021, the SEC issued an order approving a proposal by The Nasdaq Stock Market LLC ("Nasdaq") to modify its procedures related to certain on-open orders. As previously reported, on February 10, 2021, the SEC published the proposal for comment. Several comment letters were received and the proposal was amended on April 1, 2021. The SEC order approved the proposal as amended. Under the new rules, as amended, Nasdaq will: 1) disseminate abbreviated order imbalance information prior to the dissemination of the order imbalance indicator; 2) amend certain cutoff times for on-open orders entered for participation in the Nasdaq opening cross; and 3) extend the time period for accepting certain limits on-open orders. The changes to the Nasdaq opening cross mirror similar changes previously undertaken by Nasdaq for its closing cross process. Nasdaq stated in its filing that the changes improved price stability and discovery in the closing cross and believes the opening cross would benefit from similar modifications. In addition, the new rules establish an early order imbalance indicator ("EOII") for the opening cross and provide for dissemination of the EOII data every 10 seconds. Prior to the change, Nasdaq began disseminating what is known as the net order imbalance indicator ("NOII") at 9:28 a.m. and continued to disseminate it every second until market open. Nasdaq then initiated an opening cross in all system securities for which there are orders that will execute against contra-side orders at 9:30 a.m., at which time the opening book and the Nasdaq continuous book were brought together to create single Nasdaq opening prices for system securities. The EOII adopted by Nasdaq will begin disseminating at 9:25 a.m. and will continue disseminating a subset of NOII data until the NOII itself begins to be disseminated.

Approval Order: https://www.sec.gov/rules/sro/nasdaq/2021/34-91461.pdf

NASDAQ DELAYS IMPLEMENTATION DATE OF END OF DAY SUMMARY MESSAGE ON NLS PLUS

On April 9, 2021, the SEC published for comment a Nasdaq proposal, effective on filing, to extend the implementation date of its enhancements to the End of Day ("EOD") summary message on Nasdaq Last Sale ("NLS") Plus to May 17, 2021. As previously reported, on March 2, 2021, the SEC published for comment Nasdaq's proposal to enhance the EOD summary message on NLS Plus by replacing the current high, low and closing price of a security based on its trading on the Nasdaq, Nasdaq BX and Nasdaq PSX exchanges with the consolidated high, low and closing price as published by the securities information processors ("SIPs") and adding the opening price of a security published by the SIPs to that message. As stated in the original filing, Nasdaq's proposal for the EOD enhancements is in response to requests by firms using NLS Plus for a broader benchmark against which to compare trades on the Nasdaq exchanges. According to Nasdaq, the delay in implementation is in response to a customer request to allow more time for weekend testing in advance of the launch.

Notice Release: https://www.sec.gov/rules/sro/nasdaq/2021/34-91526.pdf
Comments Due: May 6, 2020

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NASDAQ EXTENDS PILOT PROGRAM FOR CLEARLY ERRONEOUS TRANSACTIONS

On April 15, 2021, the SEC published for comment a Nasdaq proposal, effective on filing, to extend from April 20, 2021 through October 20, 2021 the current pilot program related to Nasdaq Equity 11, Rule 11890 (Clearly Erroneous Transactions). On September 10, 2010, the SEC approved, on a pilot basis, changes to Equity 11, Rule 11890 that, among other things: 1) provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving 20 or more securities; and 2) reduced the ability of Nasdaq to deviate from the objective standards set forth in the rule. Nasdaq adopted additional provisions in 2013 and 2014 regarding the operation of the plan and the powers of Nasdaq officials to nullify certain trades after a trading halt had been issued, and when there was a disruption or malfunction in the electronic trading facilities. The pilot related to Equity 11, Rule 11890 was scheduled to coincide with the pilot period for Nasdaq's Limit Up-Limit Down Plan ("LULD Plan"), but the SEC approved the LULD Plan on a permanent basis in April 2019. In its filing, Nasdaq stated that the additional time to operate the pilot related to Clearly Erroneous Transactions is necessary to allow it, as well as other national exchanges and self-regulatory organizations with coincident pilot programs, to consider whether further amendments to the relevant rules are appropriate.

Notice Release: https://www.sec.gov/rules/sro/nasdaq/2021/34-91577.pdf
Comments Due: May 12, 2021

NASDAQ AMENDS TRANSACTION CREDITS AT EQUITY 7, SECTION 118

On April 21, 2021, the SEC published for comment a Nasdaq proposal, effective on filing, to amend its schedule of credits at Equity 7, Section 118(a). As proposed, Nasdaq would (1) eliminate an existing credit of $0.0030 per share for members that meet specified volume requirements on both Nasdaq and the Nasdaq Options Market ("NOM") when adding liquidity; and (2) amend an existing credit of $0.0030 per share for members that meet specified volume requirements on Nasdaq when adding liquidity and that qualify for Tier 4 of the MARS program on NOM.

Notice Release: https://www.sec.gov/rules/sro/nasdaq/2021/34-91619.pdf
Comments Due: 21 days after publication in the Federal Register

NASDAQ AMENDS OPTIONS PRICING SCHEDULE, FEES AND REBATES

On April 26, 2021, the SEC published for comment a Nasdaq proposal, effective on filing, to amend NOM's pricing schedule at Options 7, Section 1. Nasdaq also proposed to relocate certain rule text concerning equity tier calculations from current Options 7, Section 2(4) to Options 7, Section 1 and add a new defined term to Options 7, Section 1. In addition, Nasdaq proposed to amend Options 7, Section 2(1) to add rule text to make clear the applicable pricing and also amend the Tier 3 NOM market maker rebate to add liquidity in penny symbols. Finally, Nasdaq proposed to amend Options 7, Section 2(3) regarding Nasdaq BX's routing fees.

Notice Release: https://www.sec.gov/rules/sro/nasdaq/2021/34-91677.pdf
Comments Due: 21 days after publication in the Federal Register

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NYSE AMENDS PROPOSAL RELIEVING ISSUERS FROM REIMBURSING MEMBERS FOR FORWARDING CERTAIN PROXY MATERIALS

On January 29, 2021, the SEC published a notice that it had designated a longer period of time to either approve, disapprove or institute proceedings with respect to a proposal by the New York Stock Exchange LLC ("NYSE") prohibiting members from seeking reimbursement, in certain circumstances, from issuers for forwarding proxy and other materials to beneficial owners. As previously reported, on March 17, 2021, the Commission instituted proceedings in order to make a determination on the proposal. The NYSE filed Amendment No. 1 to the proposal, which it subsequently withdrew, and is now seeking comment on Amendment No. 2, which supersedes the proposed rule change as originally filed. The NYSE proposal, as amended, would prohibit a member organization from seeking reimbursement for expenses incurred in connection with the distribution of proxies or other materials on behalf of issuers to the beneficial owners of shares or units of an issuer's securities in a nominee account if those shares or units were transferred to the account holder by the member organization at no cost (e.g., stock awards given in connection with a promotional campaign by the broker). The NYSE noted in its filing that the stock awards in broker promotional campaigns of this kind are generally exceedingly small in size and usually represent a very small percentage of the voting power. As such, the costs the issuer incurs in reimbursing the broker for distributing proxies to these accounts is very disproportionate to the maximum potential vote such shares represent. By contrast, the broker using such a scheme chooses to engage in it because it believes that it will result in a commercial benefit to the broker. Consequently, the NYSE believes that it is more appropriate for the broker to bear these proxy distribution costs.

Notice Release: https://www.sec.gov/rules/sro/nyse/2021/34-91663.pdf
Comments Due: 21 days after publication in the Federal Register

NYSE AMENDS PRICE LIST

On April 14, 2021, the SEC published for comment a NYSE proposal, effective on filing, to amend its price list to introduce a new Adding Tier in Tape A securities and a new Tier 5 for supplemental liquidity providers ("SLPs") in Tape A securities. According to the NYSE, the proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing orders by offering further incentives for member organizations to send additional displayed liquidity to the NYSE. Further, the NYSE stated in its filing that its market share of trading in Tapes A, B and C securities combined is less than 12%. Separately, on April 21, 2021, the SEC published for comment a NYSE proposal, also effective on filing, to amend its price list to lower the new firm and the annual trading license fees, and introduce the NYSE membership on-ramp program, which offers discounted membership fees, port fees and market data fees for up to 18 months for new member organizations.

Notice Release: https://www.sec.gov/rules/sro/nyse/2021/34-91561.pdf
Comments Due: May 11, 2021
Notice Release: https://www.sec.gov/rules/sro/nyse/2021/34-91626.pdf
Comments Due: 21 days after publication in the Federal Register

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NYSE AMERICAN MODIFIES OPTIONS FEE SCHEDULE

On April 8, 2021, the SEC published for comment a proposal by the NYSE American LLC ("NYSE American"), effective on filing, to modify its options fee schedule regarding the professional step-up incentive program. Specifically, the NYSE American proposed to increase the qualification for Tier A from 0.12% of Total Customer Average Daily Volume ("TCADV") to 0.20% of TCADV and for Tier B from 0.15% of TCADV to 0.25% of TCADV. The rule, as amended, also excludes an additional category of volume – in all cases volume that removes liquidity from the exchange – from the calculations of base volume amounts and qualifying volume. In its filing, the NYSE American indicated that the proposal is an effort to continue to encourage and incentivize greater electronic professional volume.

Notice Release: https://www.sec.gov/rules/sro/nyseamer/2021/34-91510.pdf
Comments Due: May 5, 2021

SEC GRANTS NO OBJECTION TO OCC MINIMUM SKIN-IN-THE-GAME PROPOSAL

On April 7, 2021, the SEC published a notice of no objection regarding a proposal by the Options Clearing Corporation to establish a persistent minimum level of skin-in-the-game that OCC would contribute to cover default losses or liquidity shortfalls. "Skin-in-the-game," as a component of financial risk management, entails a covered clearing agency choosing, upon the occurrence of a default or series of defaults and application of all available assets of the defaulting participant(s), to apply its own capital contribution to the relevant clearing or guaranty fund in full to satisfy any remaining losses prior to the application of any: 1) contributions by non-defaulting members to the clearing or guaranty fund; or 2) assessments that the covered clearing agency require non-defaulting participants to contribute following the exhaustion of such participant's funded contributions to the relevant clearing or guaranty fund. OCC's skin-in-the-game component of its financial risk management regime is described in its current rules, which provide for the use of OCC's own capital to mitigate losses arising out of a clearing member default. Prior to the proposed change, however, the OCC's rules did not dedicate OCC's excess capital for use solely as skin-in-the-game, or guaranty that OCC maintain a minimum amount of skin-in-the-game. Such skin-in-the-game would consist of a minimum amount of OCC's own pre-funded resources that OCC would contribute prior to charging a loss to the clearing fund (the "Minimum Corporate Contribution") and the Executive Deferred Compensation Plan unvested balance. As proposed, funds comprising the Minimum Corporate Contribution would be excluded from OCC's liquid net assets funded by equity ("LNAFBE") for purposes of meeting OCC's target capital requirement to ensure that OCC may maintain the Minimum Corporate Contribution exclusively for default management. OCC proposes to define the Minimum Corporate Contribution to mean the minimum level of OCC's own funds maintained exclusively to cover credit losses or liquidity shortfalls, the level of which OCC's Board of Directors shall determine from time to time. As an initial step, OCC's Board approved a Minimum Corporate Contribution amount such that total skin-in-the-game would equal 25% of OCC's target capital requirement.

Notice Release: https://www.sec.gov/rules/sro/occ/2021/34-91491.pdf
Effective Date: April 7, 2021

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Notable Enforcement Actions

This month regulators announced several enforcement actions addressing a wide variety of compliance failures, some with severe penalties.

A firm was censured and fined $650,000 for failing to establish and maintain a supervisory system or written supervisory procedures ("WSPs") reasonably designed to screen non-registered associated persons for statutory disqualification. The findings state that the firm's written procedures only addressed fingerprinting and screening for statutory disqualification of registered individuals or those required to be registered. The procedures did not require that non-registered associated persons be fingerprinted and screened for statutory disqualification. In addition, the firm failed to assign personnel to identify and screen non-registered associated persons. After identifying this issue, the firm was able to fingerprint and screen some of the non-registered associated persons. Through this process the firm did not identify any individuals who were subject to statutory disqualification. However, the firm was unable to fingerprint and screen other individuals because they were no longer associated with the firm and thus could not determine whether those individuals were subject to statutory disqualification.
(**FINRA Case #2018059528401**)
https://www.finra.org/sites/default/files/fda_documents/2018059528401%20HSBC%20Securities%20%28USA%29%20Inc.%20CRD%2019585%20AWC%20jlg%20%282021-1614990001492%29.pdf

A firm was censured, fined $150,000, and ordered to pay restitution of $43,998.48, plus interest, for failing to establish and maintain a reasonable supervisory system to achieve compliance with suitability requirements regarding switching and short-term trading of Class A share mutual funds. The findings state that the firm relied on its automated surveillance system to identify mutual fund switches and on designated principals to obtain and review a signed switch letter from the customer detailing the rationale for the switch. The system, however, allowed designated principals to approve a transaction before the firm received the switch letter. In many cases, the firm did not receive switch letters until months after the transaction occurred, and in some instances, the firm never received a switch letter. The WSPs also required evidence of supervisory review by the designated principal initialing the ticket/application and the purchase or sales blotter. In many instances, the firm's designated principals failed to review the transactions prior to execution. As a result, a registered representative associated with the firm engaged in short-term, unsuitable purchases and sales and switching of mutual funds in customer accounts resulting in customer losses of $43,998.48. The findings also state that the firm failed to establish, maintain and enforce reasonable supervisory systems and WSPs that were reasonably designed to identify possible inappropriate rates of variable annuity exchanges. Specifically, the firm's WSPs failed to set forth any procedures for review of, or calculation of, rates of variable annuity exchanges. Instead, the firm relied on two designated principals to identify problematic rates of exchange without any exception reports or other tools. The only tool the principals had access to, the firm's variable annuity blotter, failed to distinguish between variable annuity exchanges and replacements. Because the firm's blotter did not distinguish between exchanges and replacements from other variable annuity transactions, the firm was unable to monitor and reasonably supervise to determine whether there were any potentially inappropriate rates of exchange. Given the

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large volume of variable annuity transactions, it was unreasonable to expect that the two designated principals could reasonably surveil all the variable annuity applications for trends and rates of exchange among its representatives without access to accurate historical data, systematic surveillance tools, or guidance from the firm. The findings also include that the firm failed to timely file disclosures in connection with customer-related arbitrations that resulted in settlements greater than $25,000, failed to timely report written customer complaints, failed to timely update its representatives' Uniform Application for Securities Industry Registration or Transfer forms ("Form U4s") to disclose reportable events related to arbitration filings and settlements, and failed to timely update former representatives' Uniform Termination Notice for Securities Industry Registration forms ("Form U5s") to disclose reportable events involving arbitration claims and arbitration settlements of more than $15,000.

(**FINRA Case #2017052330501**)

https://www.finra.org/sites/default/files/fda_documents/2017052330501%20Triad%20Advisors%2C%20LLC%20CRD%2025803%20AWC%20jlg%20%282021-1615508403618%29.pdf

A firm was censured, fined $90,000, ordered to pay $42,446.06, plus interest, in restitution to customers and required to revise its WSPs for charging unfair and unreasonable mark-ups and mark-downs in transactions involving below investment-grade municipal securities. The findings state that, in some instances, the mark-ups charged by the firm resulted from the use of an average cost methodology ("ACM") to calculate the mark-ups instead of calculating the mark-ups based on the firm's contemporaneous cost. In those instances where it used an ACM, the firm calculated mark-ups based upon the average price paid by the firm to acquire the same bonds in similar inter-dealer transactions instead of its contemporaneous cost. In the remaining transactions, the firm charged mark-ups and mark-downs without reasonably considering the prevailing market price of the bonds based upon the firm's contemporaneous cost or proceeds. The findings also state that the firm failed to establish and maintain a supervisory system, including WSPs, reasonably designed to achieve compliance with its municipal securities fair pricing obligations. The firm's supervisory system was not reasonably designed to determine when an ACM was used or how firm supervisors should determine the prevailing market price for the bonds under such circumstances. In addition, the WSPs did not provide reasonable guidance as to how the firm's supervisors should assess whether a mark-up or mark-down that met the firm's internal guidelines was fair and reasonable, including whether the mark-up or mark-down was based upon the prevailing market price of the subject bonds. (**FINRA Case #2016050321201**)

https://www.finra.org/sites/default/files/fda_documents/2016050321201%20The%20GMS%20Group%2C%20LLC%20CRD%208000%20AWC%20sl%20%282021-1616372396281%29.pdf

A firm was censured and fined $70,000 for failing to implement market access controls to limit its financial exposure. The findings state that the firm did not have any pre-set credit thresholds for its customers or capital thresholds for the firm, and it did not implement any controls to prevent the entry of duplicative orders. In addition, the firm's controls were not reasonably designed to prevent the entry of erroneous orders. The findings also state that the firm failed to implement controls and supervisory procedures to restrict the use of its market access. The firm did not have any controls reasonably designed to prevent the entry of orders for securities that a customer was

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restricted from trading. The findings also included that twice the firm did not perform an annual review of the overall effectiveness of its market access risk management controls and supervisory procedures. In both years, the firm reviewed only a single control. Furthermore, the firm's CEO certifications in those two years did not state that the firm's controls and procedures complied with Rule 15c3-5 of the Exchange Act. (**FINRA Case #2017055591602**)
https://www.finra.org/sites/default/files/fda_documents/2017055591602%20Precision%20Securities%2C%20LLC%20CRD%20103976%20AWC%20sl%20%282021-1616717999735%29.pdf

A firm was censured, fined $25,000, and required to revise its WSPs for failing to provide customers complete annual notifications required under Rule 606(b)(2) of Regulation National Market System ("Reg NMS") under the Exchange Act. The findings state that the firm failed to notify customers that they could request information on whether orders were filled on a held or not held basis and, if the order involved options contracts, the identity of the venue to which the customer's orders were routed for execution in the six months prior to the request, whether the orders were directed or non-directed orders, and the time of the transactions, if any, that resulted from such orders. The findings also state that the firm failed to establish a supervisory system, including WSPs, that was reasonably designed to achieve compliance with Rule 606. The firm's supervisory system, including its WSPs, did not provide for a review to confirm that the annual notification was sent to customers, nor did it include a review for accuracy of the firm's reports. (**FINRA Case #2017053083001**)
https://www.finra.org/sites/default/files/fda_documents/2017053083001%20Network%201%20Financial%20Securities%20Inc.%20CRD%2013577%20AWC%20jlg%20%282021-1616199599262%29.pdf

A firm was censured and fined $25,000 for making publicly available quarterly reports on its routing of non-directed orders in covered securities that were inaccurate and incomplete, in that "not held" orders were included in the "other" classification on the reports. The findings also stated that those quarterly reports failed to describe the material terms of order routing arrangements, such as the amounts per share or per order that the firm received as payment for order flow. The findings also state that the firm submitted reportable order events ("ROEs") to the Order Audit Trail System ("OATS") that contained inaccurate, incomplete, or improperly formatted data. The inaccurate OATS reporting resulted from the firm's failure to enter the correct account type code, and its failures to submit the required cancel/replace event and its reporting of an incorrect price were caused by human error. (**FINRA Case #2018057162301**)
https://www.finra.org/sites/default/files/fda_documents/2018057162301%20J.H.%20Darbie%20%26%20Co.%2C%20Inc.%20CRD%2043520%20AWC%20jlg%20%282021-1615508403482%29.pdf

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