

SEC/CORPORATE

SEC Staff Releases Sample Comment Letter on Securities Offerings During Periods of Market and Price Volatility

On February 8, the staff of the SEC's Division of Corporation Finance (the Staff) published a sample comment letter that the Staff might send to companies that conduct securities offerings during periods of extreme stock price volatility. In its statements accompanying the sample comment letter, the Staff acknowledged the necessity of capital formation, even when the financial markets and stock prices are volatile, while also cautioning that unpredictability in the market can prove hazardous to investors and companies alike. The Staff noted the risks are "particularly acute" when companies attempt to raise capital during times of "recent stock run-ups or recent divergences in valuation ratios relative to those seen during traditional markets," "high short interest or reported short squeezes," and "reports of strong and atypical retail investor interest (whether on social media or otherwise)." The Staff indicated that those risks may be exacerbated "when companies are in distress, face 'going concern,' or liquidity challenges or have smaller public floats."

In light of those heightened risks, the Staff encouraged companies seeking to raise capital during heightened market volatility to disclose relevant information about the market generally and the company's circumstances specifically, including any possible effects that market volatility might have on existing and potential investors. The Staff's illustrative comment letter includes sample comments that the Staff may issue to such companies and is intended to help companies as they prepare their disclosure documents, particularly those that may not typically be subject to review by the SEC (e.g., automatically effective registration statements and prospectus supplements for takedowns from existing shelf registration statements). The sample comments are not intended to be an exhaustive list of issues, and any comments issued by the SEC would be based on the specific offering, as well as the company involved.

The Comment Letter

The Staff's sample comment letter is presented in three categories: (1) the Prospectus Cover Page, (2) Risk Factors and (3) Use of Proceeds.

Prospectus Cover Page

The Staff's comments request that the company that is the subject of the comment letter:

- disclose on its prospectus cover page the recent price volatility of its stock, as well as a brief description of any known risks of investing in its stock during periods of market and price volatility;
- indicate, for comparison purposes, the market price of its common stock before the recent price volatility; and
- describe recent changes to the company's financial condition or results of operations consistent with the recent change in the company's stock price and, if no such changes have occurred, a statement to that effect.

Risk Factors

The Staff's comments focus on the company's risk factor disclosure and request that the subject company include risk factors that:

- address the recent extreme volatility of its stock price, including to disclose its intra-day stock price range, how such price volatility affects investors and the possibility for sudden increases or decreases in stock price (including decreases unrelated to the company's operating performance and prospects). To the extent such price fluctuation is significantly inconsistent with the company's actual or expected operating performance and other metrics, the company should discuss such inconsistencies and, where relevant, quantify them. Such information should be presented for a time period that can sufficiently describe the recent price volatility, and, to the extent the company lacks the information to make such disclosure, it should explain the reason for such deficiency.
- describe the impact on the company and its investors of a possible "short squeeze" as a result of a rapid increase in demand for the company's stock;
- disclose, if relevant, that the number of shares being offered by the company is significant relative to the number of shares currently outstanding, along with a description of the effect that the offering could have on investors and the company's stock price; and
- address the possible impact of any additional offerings the company plans to conduct to fund its operations or provide liquidity, including the dilutive effect of any such future offerings on investors acquiring stock in the current offering at a significantly higher price.

Use of Proceeds

In the sample comment letter, the Staff notes that, in the circumstance where the subject company is seeking to raise a specified dollar amount in its proposed offering, but the number of shares to be sold is limited, the company would not be able to raise the maximum offering amount stated in the prospectus unless the sales price exceeds the historical average price per share. The sample comment letter requests that the subject company disclose that information and, to the extent applicable, discuss its priorities for the intended use of proceeds in the event the company raises less than the maximum offering amount.

The Staff also encouraged companies experiencing extreme stock price volatility to contact the industry office within the SEC that is responsible for the company's filings to discuss any questions regarding the company's proposed disclosure.

[SEC's Division of Corporation Finance's sample comment letter and related statement published on February 8.](#)

BROKER-DEALER

FINRA Releases Regulatory Notice on Policies and Procedures Relating to Fraud Involving Low-Priced Securities

On February 10, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 21-03 (the Notice) urging member firms to review their policies and procedures with respect to red flags of potential securities fraud involving low-priced securities. Given that low-priced securities tend to be volatile and trade in low volumes, it may be difficult to find accurate information regarding such securities. As a result, low-priced securities are vulnerable to fraud and market manipulation, especially with respect to COVID-19-related products or services.

The Notice provides information that may help FINRA member firms that engage in low-priced securities business assess and, as appropriate, strengthen their controls to identify and mitigate their risk, and the risk to their customers, of becoming involved in activities related to fraud involving low-priced securities.

[The Notice.](#)

CFTC

CFTC Announces Market Risk Advisory Committee Meeting

On February 8, the Market Risk Advisory Committee (MRAC) of the Commodity Futures Trading Commission (CFTC) announced that it will hold a public meeting on February 23. At this meeting, the MRAC will hear reports from the Climate-Related Market Risk, CCP Risk and Governance, Market Structure and Interest Rate Benchmark Reform subcommittees, and will discuss diversity, equity and inclusion in the derivatives industry and financial markets more generally.

The meeting will be held via conference call in accordance with CFTC's implementation of social distancing due to COVID-19.

[Market Risk Advisory Committee meeting on February 23.](#)

NFA Publishes Series of Member Notices Related to Common Deficiencies and Other Regulatory Matters

On February 8, the National Futures Association (NFA) released three Notices to Member that cover educational resources, common regulatory and compliance deficiencies, and recent amendments to NFA Rules and Interpretative notices, each aimed at a different audience, as indicated below. These Notices are intended to assist members in efficiently and effectively meeting their regulatory obligations.

[Notice I-21-06](#) is for swap dealers; [Notice I-21-07](#) is for futures commission merchants, forex dealer members, and introducing brokers; and [Notice I-21-08](#) is for commodity pool operators and commodity trading advisors.

UK DEVELOPMENTS

FCA Updates Webpage on Changes to Regulatory Reporting During COVID-19

On February 5, the UK's Financial Conduct Authority (FCA) updated its webpage on the temporary measures introduced to regulatory reporting in response to the COVID-19 pandemic (the Webpage).

In the Webpage, the FCA permits firms and their auditors flexibility in the submission deadline for annual report and accounts (FIN-A filings) in light of the challenges caused by the pandemic. Firms that wish to delay their 2021 submission can apply a two-month extension on submissions due up to and including July 31.

The FCA advises firms to submit FIN-A filings on time if it is possible to do so. The FCA also advises firms that all submissions should be made no later than September 30.

For further information on the impact of COVID-19, please refer to our [Coronavirus \(COVID-19\) Resource Center](#).

[The Webpage.](#)

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

For more information, contact:

SEC/CORPORATE

James J. Calder	+1.212.940.6460	james.calder@katten.com
Bonnie Lynn Chmil	+1.212.940.6415	bonnie.chmil@katten.com
Brian J. Hecht	+1.212.940.8516	brian.hecht@katten.com
David S. Kravitz	+1.212.940.6354	david.kravitz@katten.com
Laura Keidan Martin	+1.312.902.5487	laura.martin@katten.com
Mark J. Reyes	+1.312.902.5612	mark.reyes@katten.com
Jonathan D. Weiner	+1.212.940.6349	jonathan.weiner@katten.com
Mark D. Wood	+1.312.902.5493	mark.wood@katten.com

FINANCIAL MARKETS AND FUNDS

Henry Bregstein	+1.212.940.6615	henry.bregstein@katten.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@katten.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@katten.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@katten.com
Mark D. Goldstein	+1.212.940.8507	mark.goldstein@katten.com
Jack P. Governale	+1.212.940.8525	jack.governale@katten.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@katten.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Susan Light	+1.212.940.8599	susan.light@katten.com
Richard D. Marshall	+1.212.940.8765	richard.marshall@katten.com
Paul McCurdy	+1.212.940.6676	paul.mccurdy@katten.com
Fred M. Santo	+1.212.940.8720	fred.santo@katten.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@katten.com
Robert Weiss	+1.212.940.8584	robert.weiss@katten.com
Allison C. Yacker	+1.212.940.6328	allison.yacker@katten.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com

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Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@katten.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@katten.co.uk

* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

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