Katten

Corporate & Financial Weekly Digest

March 19, 2021 | Volume XVI, Issue 11

SEC/CORPORATE

Acting SEC Chair Lee Provides Public Statement Welcoming Public Comment on Climate Change Disclosures

On March 15, Acting Securities and Exchange Commission Chair Allison Herren Lee made a public statement (Statement) requesting public input from investors, registrants and other market participants regarding climate change disclosures. In light of increased demand for company disclosure regarding climate change risks, impacts and opportunities, Acting Chair Lee has requested SEC staff to evaluate the SEC's disclosure rules with an emphasis on promoting disclosures that are consistent, comparable and reliable.

Acting Chair Lee noted that the SEC has periodically evaluated its regulation of climate change disclosures in the past, and in 2010 the SEC issued an interpretive release that provided guidance to issuers as to how existing disclosure requirements apply to climate change matters. In her statement, she emphasized that since 2010 investor demand for information about climate change risks, impacts and opportunities has grown dramatically. Consequently, questions arise as to whether current climate change disclosures are adequately informing investors and whether greater consistency could be achieved. Acting Chair Lee also noted that in May 2020 the SEC Investor Advisory Committee approved recommendations urging the SEC to begin updating reporting requirements for issuers to include material environmental, social and governance factors. To facilitate the SEC staff's assessment, Acting Chair Lee presented a series of questions for public comment. These questions include, but are not limited to, the following:

- How can the SEC best regulate, monitor, review, and guide climate change disclosures in order to provide more consistent, comparable, and reliable information for investors while also providing greater clarity to registrants as to what is expected of them?
- What are the advantages and disadvantages of establishing different climate change reporting standards for different industries, such as the financial sector, oil and gas, transportation, etc.?
- What is the best approach for requiring climate-related disclosures?
- What are the advantages and disadvantages of developing a single set of global standards applicable to companies around the world, including registrants under the SEC's rules, versus multiple standard setters and standards?

The SEC has requested comments by June 13.

For more information on the SEC's ESG focus, see Katten's advisory, "ESG is in the (SEC) House: SEC Exams, Enforcement and Regulations are Coming."

SEC Public Statement

BROKER-DEALER

FINRA Publishes Updates to Private Placement Filer Form Pursuant to FINRA Rules 5122 and 5123

On March 11, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 21-10 (Notice), which notifies members that FINRA has updated the form (Filer Form) that must be used to file offering documents and information pursuant to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities). FINRA Rule 5122 establishes disclosure and filing requirements for members that sell a private placement of an unregistered security issued by a broker-dealer or a control entity. FINRA Rule 5123 requires members that sell a private placement to file a copy of any offering documents with FINRA within 15 calendar days of the first sale, subject to various exemptions.

The updated Filer Form will be accessible in the FINRA Gateway beginning May 22, and includes new and updated questions that will facilitate review of the filed material. These questions will cover topics including, but not limited to: (1) contingency offerings; (2) the disciplinary history of issuers, principals and affiliates; (3) the intended use of proceeds; and (4) private securities transactions. Beginning on May 22, members will be required to complete the updated Filer Form for all new filings, as well as for new amendments to filings.

Regulatory Notice 21-10

DERIVATIVES

See "CFTC Acting Chairman Announces New Climate Risk Unit" in the CFTC section.

CFTC

CFTC Acting Chairman Announces New Climate Risk Unit

On March 17, Acting Chairman Rostin Benham of the Commodity Futures Trading Commission announced that he has created a new Climate Risk Unit (CRU) to focus on the role of derivatives in mitigating climate-related risks and helping the economy transition to lower carbon usage. The CRU includes staff from across the CFTC's various divisions and officers and represents the next step in years of climate leadership for the CFTC (including last year's publication of the Market Risk Advisory Committee's Climate-Related Market Risk Subcommittee's report on Managing Climate Risk in the US Financial System).

The CRU will undertake ongoing market and stakeholder outreach to help support developments in the derivatives markets that facilitate understanding, pricing, and addressing climate-related risks. The CFTC also aims to utilize the CRU to increase participation in domestic and international fora focused on standards and practices across derivatives markets with respect to climate-related products and data. In addition, the CRU will help evaluate whether regulatory sandboxes or labs might serve to enhance further positive developments in this space.

CFTC Press Release

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

On March 11, the Financial Crimes Enforcement Network (FinCEN) issued an advisory to announce that the Financial Action Task Force (FATF) has updated its list of jurisdictions with strategic anti-money laundering and combatting the financing of terrorism (AML/CFT) deficiencies.

As detailed in the advisory, the FATF has added Burkina Faso, the Cayman Islands, Morocco and Senegal to, and removed the Bahamas from, its list of jurisdictions under increased monitoring for strategic AML/CFT deficiencies. The advisory notes that Iran and the Democratic People's Republic of Korea remain subject to FATF's "High-Risk Jurisdictions Subject to a Call for Action" statement, and as such, the FATF urges all jurisdictions to impose countermeasures on those countries to protect against strategic AML/CFT deficiencies that could affect the international financial system.

FinCEN Advisory

EU DEVELOPMENTS

European Parliament Adopts Report Recommending Directive on ESG Due Diligence Obligations

On March 10, the European Parliament adopted a legislative initiative report detailing recommendations for a new directive on corporate due diligence and corporate accountability for holding companies accountable for harm caused to human rights, the environment and good governance (the Report).

The key proposals recommended by the European Parliament in the Report include:

- requiring companies to address and rectify their impact on human rights, the environment and good governance throughout their value chain;
- imposing sanctions for non-compliance and legal support for victims of companies operating in third countries; and
- enforcing a ban on products imported into the EU that are linked to severe human rights violations such as forced or child labor.

The European Parliament further proposes that the directive should have extraterritorial effect and also be applicable to undertakings that are not established in the EU but which otherwise operate in the EU internal market by selling goods or providing services to EU-based customers.

The European Commission previously consulted on a sustainable governance initiative in October 2020 and is expected to adopt a legislative proposal in the second quarter of 2021.

It is currently unknown if the UK will implement similar proposals.

European Parliament Report

European Parliament Press Release

ESMA Allows Decision on Reporting Net Short Positions to Expire

On March 15, the European Securities and Markets Authority (ESMA) announced its decision not to renew the requirement for holders of net short positions in shares traded on an EU regulated market to inform the relevant national competent authority (NCA) if the position reaches, exceeds or falls below 0.1 percent of the issued share capital (the Press Release).

The 0.1 percent net short reporting requirement expires on March 19. Therefore, the last reporting where this measure applies will relate to March 19 and must be reported to NCAs by 15:30 (local time in the relevant EU country) on March 22.

From March 20, positions holders will only need to notify the applicable NCA if they reach or exceed the 0.2 percent net short threshold. Any outstanding net short position between 0.1 percent and 0.2 percent does not require reporting.

ESMA has stated that along with NCAs, it will continue to monitor the impact of the COVID-19 pandemic on financial markets and is prepared to use its powers if necessary to stabilize the markets and protect investors.

ESMA Press Release

ESG: ESAs Consult on Draft RTS on Content and Presentation of Taxonomy-Related Sustainability Disclosures Under SFDR

On March 17, the European Supervisory Authorities (ESAs) published a joint consultation paper on draft regulatory technical standards (RTS) regarding the content and presentation of sustainability disclosures under Articles 8(4), 9(6) and 11(5) of the Sustainable Finance Disclosure Regulation ((EU) 2019/2088) (SFDR).

Article 25 of the Taxonomy Regulation ((EU) 2020/852) amends the SFDR to allow the ESAs to include RTS on additional disclosure obligations for products using environmental taxonomy.

The ESAs have agreed to:

- amend the draft RTS on the content, methodologies and presentation of disclosures and aims to create a single rulebook for RTS on sustainability disclosures; and
- create one set of RTS for all the environmental taxonomy-related disclosures, covering the six objectives of Article 9 of the Taxonomy Regulation, with two different application deadlines depending on the product's environmental objectives.

The ESAs' proposals on how activities funded by the product are taxonomy-aligned consist of:

- a graphical representation of the taxonomy-alignment of investments of the financial product and a key performance indicator (KPI) calculation for that alignment; and
- a statement that the activities funded by the product qualifying as environmentally sustainable are compliant with the criteria of the Taxonomy Regulation.

The ESAs also propose to standardize the disclosures in the draft SFDR RTS by adding a new section including the Taxonomy Regulation disclosures.

The disclosure requirements added in Articles 8(2a), 9(4a), and 11(1)(c)-(d) of the SFDR refer to information required to be published under Articles 5 and 6 of the Taxonomy Regulation. The European Commission consulted on a draft Delegated Regulation in November 2020 and the final text is expected to be adopted later in 2021.

The consultation closes on May 12 and the ESAs intend to publish a final report with final draft RTS for submission to the Commission by late June or early July.

Joint Consultation Paper

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

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