

SEC/CORPORATE

Register for our COVID-19 Public Company Update

Please join Katten on Monday, April 6 at 1:00 p.m. (ET) for a webinar panel discussion of key reporting, disclosure, annual meeting and other legal issues impacting public companies during the COVID-19 pandemic. Further details are available [here](#); click [here](#) to register.

SEC Division of Corporation Finance Issues New C&DIs about the SEC's Conditional Relief Order and Compliance with Rule 12b-25

On March 31, the Securities and Exchange Commission's (SEC) Division of Corporation Finance (the Division) issued two new Compliance and Disclosure Interpretations (C&DIs) related to compliance with Rule 12b-25 in connection with the SEC's conditional relief order (the Order) that was issued in the wake of the Coronavirus Disease 2019 (COVID-19). As detailed in the March 27 edition of *Corporate & Financial Weekly Digest*, the Order gives publicly traded companies an additional 45 days to file certain reports, including most periodic or current reports, that would have been due during the period of March 1-July 1, if the company is unable to meet a filing deadline due to circumstances related to COVID-19. In order to take advantage of the relief, an issuer must, among other things, issue a current report on Form 8-K or Form 6-K, as applicable, with a summary of why the relief is necessary in the particular circumstances.

The new C&DIs address the following issues:

C&DI 135.12 clarifies that, if a company is unable to timely file a report due to COVID-19 without unreasonable effort or expense and is uncertain that it will be able to file the required report within the applicable period under Rule 12b-25, the company should file a current report on Form 8-K or Form 6-K, as applicable, including the required statements under the Order. If the company only files a Form 12b-25 (but does not file a Form 8-K or a Form 6-K pursuant to the Order) by the original due date of the report, the company will not have satisfied the conditions required to rely upon the Order, in which case the 45 day relief provided under the Order will not be available, and the company will only be entitled to the relief provided under Rule 12b-25. Under Rule 12b-25, and assuming compliance with all of the requirements thereunder, if the subject filing is an annual report, semi-annual report or transition report on Form 10-K, 20-F, 11-K, N-CEN, or N-CSR, the report will be considered timely only if it is filed no later than the fifteenth calendar day following the original deadline; or, if the subject filing is a quarterly report or transition report on Form 10-Q, if it is filed no later than the fifth calendar day following the original deadline. The full text of this C&DI is available [here](#).

In C&DI 135.13, the Division explains that the filing of a Form 12b-25 does not change the due date of a periodic report and that a company may only rely upon the Order to extend the filing deadline of the underlying report if the company files a Form 8-K or a Form 6-K, in accordance with the Order, by the original due date of the report. The Division further clarified that, if the company takes the required actions to be able to rely on the Order with respect to a report, the due date of the report will be extended for 45 days after the report's original filing deadline, and the company would subsequently be able to rely on Rule 12b-25 if it is ultimately unable to file the report on or before the extended filing deadline. The full text of this C&DI is available [here](#).

Both C&DIs encourage registrants, who are unable to rely on the Order, to contact the Staff to discuss the collateral consequences of late filings.

CFTC

Agencies to Consider Comments on Volcker Rule Modifications

On April 2, the five regulators responsible for Section 13 of the Bank Holding Company Act of 1956 (the Volcker Rule) issued a joint release (Joint Release) announcing that they will consider comments submitted before May 1 in connection with their proposal to modify the Volcker Rule's general prohibition on banking entities investing in or sponsoring hedge funds or private equity funds. The original comment period was set to expire on April 1. (For a discussion of this proposal, please refer to the January 31, 2020 edition of *Corporate and Financial Weekly Digest*.)

This extension is intended to provide interested persons more time to analyze the issues related to the proposal and prepare their comments in light of potential disruptions resulting from the COVID-19 pandemic.

The text of the Joint Release is available [here](#).

CFTC Provides Relief to Certain Foreign Affiliates of FCMs in Response to COVID-19

On March 31, the Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission (CFTC) issued Staff Letter No. 20-12 (Letter), announcing temporary no-action relief (Relief) that allows certain non-US entities, that are exempt from registration with the CFTC as introducing brokers pursuant to CFTC Regulation 30.5 (Foreign Brokers), and which are affiliates of futures commission merchants (FCMs) registered with the CFTC, to handle US order flow under certain conditions. The Relief is in response to the COVID-19 pandemic, causing compliance with certain CFTC requirements to be difficult or impossible due to the displacement of personnel from normal business sites as a result of preventative measures implemented in response to the pandemic.

The Relief allows Foreign Brokers of covered FCMs to accept orders from US persons for execution on US contract markets in the event the affiliated FCM's US personnel are unable to handle the order flow of US customers due to their absence from normal business sites. Such Relief is subject to certain conditions, including, but not limited to, the Foreign Broker being (1) an affiliate of a CFTC-registered FCM, and (2) appropriately licensed or registered in a jurisdiction in which the CFTC has issued an exemptive order under CFTC Regulation 30.10. In addition, each FCM with which the Foreign Broker is affiliated must file with the National Futures Association an acknowledgment that it will be jointly and severally liable for any violations of the Commodity Exchange Act, or the CFTC's rules, by the Foreign Broker in connection with the activities in which it engages in reliance on the Letter.

The Relief expires on September 30.

The press release announcing the Relief and Staff Letter No. 20-12 are available [here](#).

ANTITRUST

Covid-19 — Antitrust — Hart-Scott-Rodino

The FTC's Premerger Notification Office (PNO) has announced that it has successfully launched the temporary e-filing platform for Hart-Scott-Rodino filings. Accordingly, the PNO has advised that the moratorium on grants of Early Termination of the HSR Waiting Period has been lifted. The PNO has advised, however, that Early Termination grants will be limited and will be issued more slowly than they were pre-COVID-19 shutdown. In addition, the FTC and DOJ standards for substantive merger reviews will not be relaxed. For execution timeline purposes, it would be prudent to factor in a full 30 day HSR Waiting Period in your calculations.

UK DEVELOPMENTS

FCA Updates Statement on Short Selling Bans and Reporting During the Covid-19 Pandemic

On March 31, the UK's Financial Conduct Authority (FCA) published an updated version of its statement on short selling bans and reporting (the Statement).

In the Statement, the FCA notes the European Securities Markets Authority's (ESMA) decision issued on March 16, to temporarily amend the threshold for notifying net short positions to EU financial regulators under the Short Selling Regulation (SSR) from 0.2 percent of issued share capital to 0.1 percent. For further information on the original statement, the earlier advisory prepared by Katten is available [here](#).

The FCA also confirms that the system changes required by ESMA's decision have been made in the UK. From April 6 (the Notification Date), the FCA can receive notifications at the lower threshold. The Statement also notes that firms are not required to amend and resubmit notifications submitted to the FCA between March 16 and April 3.

The FCA requests that firms make best effort to report at the lower threshold from the Notification Date. However, the FCA acknowledges that it may not be possible for certain firms to amend their systems by the Notification Date. If this is the case, these firms should contact the FCA at PMU@fca.org.uk.

The Statement notes that the new reporting obligation will apply to shares for which the FCA is the relevant financial regulator and not to exempted shares where the principal venue for the trading of the shares is located outside the EU.

The Statement is available [here](#).

FCA Updates Webpage on the Directory of Certified and Assessed Persons

On March 25, the UK's Financial Conduct Authority (FCA) updated its webpage on its directory of certified and assessed persons in light of the Covid-19 pandemic (the Webpage).

Under the senior managers and certification regime, the FCA will publish and maintain a directory of certified and assessed persons on the Financial Services Register (FS register) for consumers and professionals to check the details of key individuals working in financial services. The publication of such directory was originally due by the end of March. As a result of the impact of the Covid-19 pandemic, the FCA has introduced a delay to the publication of the directory of certified and assessed persons for at least a month. The timing of the directory's launch is now under review, and the FCA will provide further updates on the Webpage.

The Webpage sets out the deadlines for submitting certified and assessed persons information. Solo-regulated firms must submit their data by December 9 and banks, building societies, credit unions and insurance companies should have submitted their data on March 9. Dual regulated firms can either regularly update their certified and assessed persons data as changes occur, or they can wait and provide a bulk update once the new launch date is confirmed.

The Webpage also sets out information to assist firms with submitting their directory of certified and assessed persons to the FCA.

The Webpage is available [here](#).

FCA Outlines Financial Resilience Expectations for FCA Solo-Regulated Firms During Covid-19 Pandemic

On March 26, the UK's Financial Conduct Authority (FCA) published a statement on its expectations of FCA solo-regulated firms in light of the Covid-19 pandemic (the Statement).

At the beginning of the Statement, the FCA clarifies that it will provide flexibility to these regulated firms so that they can continue to operate. For instance, the FCA notes that those firms who have been set capital and liquidity buffers may use them now.

The FCA also notes that firms should ensure the sound management of their financial resources and may consider accepting government schemes to help them meet their debts through this period. If a firm needs to exit the market, it should consider how this may be done in an orderly way while taking steps to reduce any potential harm to consumers and markets. If a firm encounters challenges in meeting its capital requirements or its debts, it should contact its FCA supervisor with a plan for the immediate future.

In the Statement, the FCA notes that prudentially regulated firms should consider the Prudential Regulation Authority requirements and discuss their concerns with them. Those firms should also notify the FCA of any significant developments.

The Statement is available [here](#).

FCA Publishes Statement on Delays to Audited Annual Financial Reports

On March 26, the UK's Financial Conduct Authority (FCA) published a statement of policy announcing temporary relief to listed companies that are required to publish audited annual financial reports pursuant to DTR 4.1 (the Statement).

The Statement confirms that listed companies will have six months from their year-end to publish their audited financial statements instead of the usual four. In the Statement, the FCA strongly recommends that listed companies review all elements of their timetables for publication of financial information in order to make appropriate use of the time available within regulatory deadlines to ensure accurate and carefully prepared disclosures. The FCA then urges market participants not to draw undue adverse inferences when companies make use of the extra time provided under this temporary delay.

In connection with the Statement, on March 21 the FCA published a statement requesting companies observe a moratorium of at least two weeks on the publication of their preliminary statements of account. The FCA confirmed that they were in talks with the Financial Reporting Council and Prudential Regulation Authority on a package of relief measures. On March 26, the FCA confirmed that the moratorium period ends on April 5.

The Statement is available [here](#).

The FCA has also published a Q&A on the duration scope and applicability of this temporary relief, available [here](#).

EU DEVELOPMENTS

ECB Publishes Recommendation on Dividend Distributions During Covid-19 Pandemic

On March 27, the European Central Bank published a recommendation on dividend distributions and share buy-backs during the Covid-19 pandemic (the Recommendation).

In the Recommendation, the ECB advises that credit institutions should conserve capital to support the economy during the Covid-19 pandemic. The ECB notes that capital resources to support the real economy and absorb losses should take priority at present over discretionary dividend distributions and share buy-backs. As a result, the ECB recommends that:

- (1) credit institutions should refrain from paying dividends until October 1;
- (2) no irrevocable commitment to pay out dividends should be undertaken by credit institutions for the financial year 2019 and 2020;
- (3) credit institutions should refrain from share buy-backs aimed at remunerating shareholders until October 1; and
- (4) credit institutions that are unable to comply with this Recommendation because they consider themselves legally required to pay-out dividends should immediately explain the underlying reasons to their joint supervisory team.

The Recommendation is also addressed to EU financial regulators with regard to less significant supervisory entities and less significant supervisory groups, which are expected to apply the Recommendation to such entities as they deem appropriate.

The Recommendation is available [here](#).

BC Announces Delay to Basel III and Actions in Light of Covid-19 Pandemic

On March 27, the EU's Basel Committee (BC) announced a delay to the introduction of Basel III until January 1, 2023 and a delay to the accompanying transitional arrangements for the output floor until January 1, 2028 (the Announcement).

The delay arises from the development of the Covid-19 pandemic and the subsequent need for regulators to provide the relevant regulatory relief. With this delay, banks should have more time to focus on critical services for the real economy. The Announcement will also ensure that the banking system remains financially and operationally resilient.

The Announcement also defers the implementation date of the revised market risk framework and the revised Pillar 3 disclosure requirements by a year to January 1, 2023.

In an earlier statement published on March 20, the BC discussed how the Basel III framework can be used during stressful circumstances, such as the Covid-19 pandemic (the Initial Statement). The measures include the various Basel III buffers, such as capital, liquidity, capital conservation and countercyclical capital buffers and buffers for systemically important banks. They also include using the banks' stock of high-quality liquid assets to meet liquidity demands. In the Initial Statement, the BC notes that capital resources to support the real economy and absorb losses should take priority at present over discretionary distributions. Many supervisors are already encouraging banks to make use of these tools, which provide a flexible approach to responding to the current circumstances.

The Announcement is available [here](#).

The Initial Statement is available [here](#).

ESMA Publishes Consultation Paper on Draft ITS under Regulation on Cross-Border Distribution of Funds

On March 31, the European Securities Markets Authority (ESMA) published a consultation paper on draft implementing technical standards (ITS) under the Regulation on the cross-border distribution of funds (the Consultation Paper).

The Consultation Paper is the first stage in the development of the draft ITS in accordance with the following provisions of the Regulation:

- (1) Article 5(3) provides that ESMA shall draft ITS to determine standard forms, templates and procedures for the publication and notifications that EU financial regulators are required to make in relation to national provisions concerning marketing requirements applicable within their jurisdiction;
- (2) Article 10(3) requires ESMA to draft ITS to determine standard forms, templates and procedures for the publication and notification that EU financial regulators are required to make in relation to national provisions concerning fees and charges levied by them in relation to activities of alternative investment fund managers, European venture capital fund managers, European social entrepreneurship fund managers and undertakings for collective investment in transferable securities (UCITS) management companies; and
- (3) Article 13(3) states that ESMA should draft the ITS to specify the information to be communicated by EU financial regulators, and the standard forms, templates and procedures for communication of the information, that is necessary for the creation and maintenance of the central database on cross-border marketing of alternative investment funds and undertakings for the collective investment in transferable securities, and the technical arrangements necessary for the functioning of the notification portal into which each EU financial regulator must upload all documents necessary for the creation and maintenance of such central database.

The deadline for responses to this Consultation Paper is June 30. ESMA will take into consideration the responses from this Consultation Paper and then aim to finalize the submission to the European Commission by February 2, 2021.

The Consultation Paper is available [here](#).

Response form to the Consultation Paper is available [here](#).

ESMA Publishes a Review Report on Position Limits and Management under MiFID II

On April 1, and following a recent consultation, the European Securities Markets Authority (ESMA) published a review report on position limits under MiFID II (the Review Report) and a report on technical advice on weekly position reporting (the Technical Advice Report).

The Review Report will provide the European Commission with useful guidance for its on-going review of MiFID II in relation to the impact of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets, which it must deliver to the European Parliament and Council.

Under the Review Report, ESMA proposes to refocus the position limit regime on the most important commodity derivative contracts and improve the trading venues' implementation of position management controls through Level 2 measures.

In connection with the Review Report, ESMA published on the same day the Technical Advice Report to the European Commission on the weekly aggregated information to be published by trading venues on open positions per category of stakeholders. The Technical Advice Report aims to ensure that information is made available for a larger number of commodity derivatives traded on EU trading venues to ensure more transparency in EU commodity derivative markets.

The Review Report is available [here](#) and the Technical Advice Report is available [here](#).

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

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