Katten

Corporate & Financial Weekly Digest

April 10, 2020 | Volume XV, Issue 14

SEC/CORPORATE

Katten Launches New Financial Markets Regulation COVID-19 Resource Center

To help market participants keep tabs on the deluge of actions taken by financial market regulators to address the ongoing COVID-19 crisis, Katten's Financial Markets Regulation team has launched the Financial Markets Regulation COVID-19 Resource Center. The new site lists and provides links to the COVID-19-related regulatory actions taken by the SEC, CFTC, FINRA, NFA, FCA, and ESMA, as well as certain relevant actions taken by other regulators worldwide, including exchanges, national regulators and other governmental organizations. The Financial Markets Regulation COVID-19 Resource Center is updated regularly. You may view the various regulatory actions organized by regulator or may sort the information to view only the regulatory developments that are relevant to your business type.

If you would like to be updated when new information is available on the Financial Markets Regulation COVID-19 Resource Center, you can subscribe here.

View our COVID-19 Public Company Update Webinar

On April 6, Corporate Securities partner Mark Wood and Corporate partners Farzad Damania and Brian Hecht, together with panelists from Clermont Partners, Marcum LLP and Broadridge Financial Solutions, participated in a webinar discussing key reporting, disclosure, annual meeting and other legal issues faced by public companies during the COVID-19 pandemic.

To view webinar materials, please click here.

To view webinar recording, please click here.

For more information on the latest news and firm event information regarding COVID-19, please click here.

SEC Division of Corporation Finance Issues C&DI about Conditional Relief Order and Incorporation by Reference Into Form 10-K

On April 6, the Securities and Exchange Commission's (SEC) Division of Corporation Finance issued a new Compliance and Disclosure Interpretation (C&DI) concerning the application of the SEC's conditional relief order (the Order) that was issued in the wake of the Coronavirus Disease 2019 (COVID-19) for companies filing their annual reports on Form 10-K. As detailed in the March 27, 2020 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.

General Instruction G(3) to Form 10-K (the Instruction) allows information required by Part III of Form 10-K (including information about the company's directors and executive officers, executive compensation, beneficial ownership information and related party transactions) to be incorporated by reference from a registrant's definitive proxy statement or information statement, provided that the proxy or information statement is filed with the SEC no

later than 120 days after the end of the company's fiscal year (the 120-day deadline). C&DI 104.18 clarifies that a registrant that intends to rely upon the Instruction, but is unable to file the Part III information by the 120-day deadline, may avail itself of the Order, if the 120-day deadline falls within the Order's relief period, in the following ways:

- A registrant that timely filed its annual report on Form 10-K without relying on the Order should furnish a Form 8-K that includes the required disclosures under the Order no later than the 120-day deadline, in which case the required Part III information would need to be provided, either in an amendment to its Form 10-K (i.e., a Form 10-K/A) or in its definitive proxy statement or information statement, within 45 days of the 120-day deadline.

- A registrant that intends to rely upon the Order with respect to both the filing of the Form 10-K and the Part III information can do so by furnishing, no later than the original deadline for the Form 10-K a single Form 8-K that (1) includes the required disclosures under the Order, (2) discloses that the registrant will incorporate the Part III information by reference or by an amendment to the Form 10-K and (3) indicates the estimated date by which such information will be filed. The Part III information would then need to be filed no later than 45 days following the 120-day deadline.

- If a registrant properly relied upon the Order with respect to its Form 10-K, but did not include in the related Form 8-K required by the Order disclosure concerning its ability to timely file the Part III information, the registrant may either (1) include the Part III information in its Form 10-K that must be filed within 45 days of the original deadline for the Form 10-K, or (2) furnish another Form 8-K by no later than the 120-day deadline with the required disclosures under the Order and then file the Part III information by no later than 45 days following the 120-day deadline.

The full text of this C&DI is available here.

SEC Chairman and Division of Corporation Finance Director Issue Statement Further Addressing COVID-19 Related Disclosures

On April 8, Jay Clayton, the Chairman of the Securities and Exchange Commission (SEC), and William Hinman, the Director of the SEC's Division of Corporation Finance, issued a public statement addressing disclosure considerations in light of the COVID-19 pandemic. The statement follows other guidance and regulatory relief that the SEC has issued in recent weeks as the pandemic has developed.

The statement is expressed in the form of observations and requests from the Chairman and Director and stresses their view that as the next earnings season approaches, public companies should provide as much information as is practicable regarding their current financial and operating status along with future operational and financial planning. Noting that the COVID-19 pandemic has caused a deep contraction in many areas of the economy and that the strategy to address the national health situation is continuing to evolve, the statement goes on to provide that public companies should consider reflecting this state of affairs and outlook by addressing in disclosures investor interest in:

(1) where the company stands today, operationally and financially;
(2) how the company's COVID-19 response is progressing, including efforts to protect the health of the company's workforce and customers; and
(3) how the company's operations and financial condition may change as a result of efforts to combat COVID-19.

The statement also recognizes that upcoming earnings statements and earnings calls will "not be routine." According to the Chairman and the Director, historical performance information may be less relevant while investors and analysts may seek information on where companies currently stand, what adjustments they have made in light of COVID-19 and what additional adjustments they expect to make in the future. This could include a detailed discussion of a company's current liquidity position and expected financial resource needs. Further, the statement notes that a company's efforts to address worker health and customer safety may be of material interest to investors and, if so, should, in the view of the Chairman and the Director, be disclosed.

The statement further provides that, to the extent public companies are receiving financial assistance to mitigate the effects of the COVID-19 pandemic pursuant to the CARES Act or other governmental programs, and such

financial assistance has materially affected, or is reasonably likely to have a material future effect upon, the financial condition or results of operations of a company, the company should disclose the nature, amounts and effects of such assistance.

Observing that the request for public companies to produce forward-looking disclosures may create challenges, in particular given that these statements may involve assumptions outside of the control of public companies, including the length of time for which social distancing will continue, the statement urges public companies to make all reasonable efforts to convey meaningful information and resist the use of generic or boilerplate disclosures. The statement encourages public companies making forward-looking statements about the impact of COVID-19 to avail themselves of existing safe harbors for the use of forward-looking statements, and the Chairman and the Director note their expectation that good faith attempts to provide appropriately framed forward-looking information would not be second guessed by the SEC.

It is important to note that, as expressly indicated in the statement, the statement is not a rule or regulation of the SEC, it does not amend applicable law, it has no legal force or effect, and it does not create any new obligations.

The full text of the statement is available here.

SEC Provides Guidance on Delays in Printing and Mailing of Full Sets of Proxy Materials

On April 7, the Securities and Exchange Commission (SEC) provided guidance to issuers that may be experiencing unexpected delays with the printing and physical mailing of a “full set” of their proxy materials for their upcoming shareholder meetings. A “full set” of proxy materials contains (1) a proxy statement or information statement, (2) an annual report if one is required by Exchange Act Rule 14a-3(b) or 14c-3(a), and (3) a proxy card or, in the case of a beneficial owner holding in “street name” a request for voting instructions, if proxies are solicited.

The SEC recognized that some issuers would like to provide the full set of their proxy materials through the “notice-only” delivery option permitted by Exchange Act Rule 14a-16 but are concerned they may not be able to comply with its requirements. Specifically, as a result of the COVID-19 pandemic’s impact on facilities and staffing of proxy service providers and transfer agents, issuers are concerned they may not be able to (1) send the notice of the electronic availability of the proxy materials at least 40 calendar days before the shareholder meeting, (2) provide intermediaries (such as a broker, dealer or bank) with the information needed to send the notice to beneficial owners within the 40 calendar days timeframe required by Exchange Act Rule 14b-1 or 14b-2, or (3) respond to a shareholder’s request for paper copies of proxy materials in a timely manner.

As a result of the foregoing, the SEC has determined that, in instances where delays are unavoidable due to circumstances related to the COVID-19 pandemic, it would not object to an issuer using the “notice-only” delivery option, even if such issuer does not meet all timing requirements of Exchange Act Rule 14a-16, as long as the issuer will provide shareholders with the proxy materials sufficiently in advance of the shareholder meeting. Additionally, the SEC encouraged issuers and intermediaries to continue using their best efforts to send requesting shareholders their paper copies of proxy materials and annual reports, even if such deliveries would be delayed.

A copy of the SEC’s announcement providing updated guidance is available here.

BROKER-DEALER

SEC Publishes Risk Alerts Regarding Reg BI and Form CRS

On April 7, the Securities and Exchange Commission’s (SEC) Office of Compliance Inspections and Examinations (OCIE) released a risk alert regarding Regulation Best Interest (Reg BI) and a risk alert regarding Form CRS and its related rules.

The risk alerts set forth OCIE’s expectations for compliance with Reg BI by broker-dealers and compliance with Form CRS by broker-dealers and investment advisers. The risk alerts also provide firms with information about the scope and content of OCIE’s initial examinations following the compliance date of June 30.

Initial examinations for Reg BI will focus on assessing whether broker-dealers have made a good faith effort to implement policies and procedures reasonably designed to comply with Reg BI, including the operational effectiveness of broker-dealers' policies and procedures. Initial examinations for Form CRS will focus on assessing whether firms have made a good faith effort to implement Form CRS, including reviewing the filing and posting of a firm's relationship summary, as well as its process for delivering the relationship summary to existing and new retail investors.

The OCIE risk alert regarding Reg BI is available here, and the OCIE risk alert regarding Form CRS is available here. More information is also available here.

FINRA Issues Statement on SEC Risk Alerts Regarding Reg BI and Form CRS

On April 7, the Securities and Exchange Commission's (SEC) Office of Compliance Inspections and Examinations (OCIE) released risk alerts for Regulation Best Interest (Reg BI) and Form CRS and its related rules. The SEC Risk Alerts set forth OCIE's expectations for firms' compliance with Reg BI and Form CRS and provide broker-dealers with information about the scope and content of OCIE's initial examinations following the compliance date of June 30.

On April 8, the Financial Industry Regulatory Authority (FINRA) indicated that it will take the same approach as set forth in the SEC Risk Alerts when FINRA examines broker-dealers and their associated persons for compliance with Reg BI and Form CRS, while focusing primarily on assessing whether firms have made a good faith effort to establish and implement policies and procedures reasonably designed to comply with Reg BI and Form CRS.

The FINRA statement is available here.

The SEC Risk Alert regarding Reg BI is available here, and the SEC Risk Alert regarding Form CRS is available here.

SEC Announces CBOE Amendments to Business Continuity and Disaster Recovery Testing Rules

On April 7, the Securities and Exchange Commission (SEC) announced that Cboe Exchange, Inc. (CBOE) proposed to amend Interpretation and Policy .01 to Rule 5.24 regarding business continuity and disaster recovery testing in order to harmonize with its affiliated options exchanges. The proposed rule change became effective and operative immediately upon filing.

Specifically, among other things, CBOE has amended the application of the threshold of a meaningful percentage of CBOE's overall volume and executed combined customer volume in SPX and VIX to a specified quarter's volume. CBOE has also adjusted the timing for which it notifies trading permit holders required to participate in annual testing.

Interested persons are solicited to provide comments to the SEC at http://www.sec.gov/rules/sro.shtml, by email to rule-comments@sec.gov or by paper in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-CBOE-2020-025 (in the subject line if by email).

SEC Release No. 34-88575 is available here.

DERIVATIVES

BCBS and IOSCO Announce another Postponement of Swap Initial Margin

On Friday, April 3, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) announced another delay in the implementation of the global implementation of mandatory initial margin for uncleared swaps. The initial margin compliance date for Phase 5 will now be September 1, 2021. The compliance date for Phase 6 will be September 1, 2022. (Phase 6 was created by a BCBS-IOSCO announcement last year.)

The announcement includes the following statement: "With this extension, the final implementation phase will take place on 1 September 2022, at which point covered entities with an aggregate average notional amount (AANA) of non-centrally cleared derivatives greater than €8 billion will be subject to the requirements. As an intermediate step, from 1 September 2021 covered entities with an AANA of non-centrally cleared derivatives greater than €50 billion will be subject to the requirements."

The Commodity Futures Trading Commission (CFTC), US prudential regulators and national regulators in other countries will have to amend their respective margin rules to make this change official for their respective jurisdictions. (Coincidentally, the CFTC just recently adopted a final rule that reflects the creation of Phase 6 that was announced last year by BCBS-IOSCO.)

The announcement is available here.

CFTC

CFTC to Hold an Open Commission Meeting on April 14

The Commodity Futures Trading Commission (CFTC) will hold an open meeting on April 14 from 10:00 a.m. to 1:00 p.m. (ET) to consider several proposed amendments to its rules, including: (1) proposed amendments to the CFTC's Part 190 bankruptcy regulations; (2) compliance requirements for commodity pool operators on Form CPO-PQR; and (3) proposed amendments to the CFTC's Part 50 rules addressing clearing requirements for central banks, sovereigns, international financial institutions, bank holding companies and community development financial institutions.

The CFTC will also consider adopting final rule amendments relating to: (1) Part 23 of its rules governing margin requirements for the European Stability Mechanism; and (2) Part 160 of its rules governing consumer financial information privacy. Furthermore, the CFTC will address administration of CFTC rulemaking comment periods. This meeting was originally scheduled to take place on March 31.

The meeting is open to the public via a live, audio-only feed. The meeting will take place via conference call because of the COVID-19 pandemic.

More information, including listening instructions, is available here.

CFTC Releases COVID-19-Related Customer Advisory on Fee Scams

On April 6, the Commodity Futures Trading Commission (CFTC) issued a Customer Advisory, alerting the public to a proliferation of fraudulent schemes aiming to profit from the COVID-19 pandemic. Such frauds may involve claims that an individual can earn unrealistically large sums of money from working at home but then later require the payment of "fees" or "taxes" to access those supposed earnings. Often, these claims are issued by unregistered brokers that use social media and messaging applications to target out-of-work individuals and involve sales of binary options, foreign exchange programs and cryptocurrencies. The public should remain cautious and vigilant with respect to these types of claims, and individuals can submit tips or complaints regarding suspicious activities or information to the CFTC via a toll-free hotline (866-366-2382) or online (click here for more details).

The advisory is available here.

NFA Issues Notice Regarding FinCEN COVID-19 and AML/CFT Guidance

On April 8, the National Futures Association (NFA) published Notice I-20-17, notifying Member futures commission merchants (FCMs) and introducing brokers (IBs) of two recent issuances from the Financial Crimes Enforcement Network (FinCEN). The NFA encourages Member FCMs and IBs to carefully review both of the following releases to assess any impact they might have on their anti-money laundering (AML) programs and regulatory obligations.

First, the NFA called attention to FinCEN's April 3 notice regarding compliance with the Bank Secrecy Act (BSA) and AML obligations in the midst of the COVID-19 pandemic. The notice includes direct contact instructions

should a financial institution need to contact FinCEN regarding urgent issues related to COVID-19. Additionally, the notice addresses modifications to Currency Transaction Report filing requirements and emphasizes the potential role of novel approaches in meeting BSA and AML responsibilities. The notice also addresses certain aspects of beneficial ownership requirements and the CARES Act.

The notice is available here.

Second, the NFA highlighted FinCEN's March 26 advisory announcing updates to the Financial Action Task Force's list of jurisdictions with deficiencies regarding AML and combating the financing of terrorism (CFT). The advisory also includes specific updates regarding AML/CFT compliance issues related to the Democratic People's Republic of Korea and Iran.

The advisory is available here.

UK DEVELOPMENTS

FCA Statement on Expectations of Dual-Regulated Firms

On April 6, the UK's Financial Conduct Authority (FCA) updated its joint statement with the UK's Prudential Regulation Authority (PRA) on its expectations of dual-regulated firms applying the Senior Managers and Certification Regime (SM&CR) during the COVID-19 pandemic (the Statement).

The FCA and PRA intend that the measures set out in the Statement would provide flexibility for firms to comply with their obligations under the SM&CR. The measures include:

(1) the FCA and PRA expect firms to resubmit their statement of responsibilities as soon as reasonably practicable taking into account the current circumstances. The FCA and PRA understand that firms may take longer than usual to submit such statements;
(2) the FCA and PRA are currently collating evidence on whether the 12-week rule is likely to give dual-regulated firms enough flexibility to deal with temporary absences of senior management functions (SMFs);
(3) if an SMF becomes temporarily vacant, firms should reallocate those SMFs' prescribed responsibilities (PRs) among their remaining SMFs until a permanent replacement is in place. If a firm cannot reallocate an absent SMF's PRs to a remaining SMF, then such firm is permitted to temporarily allocate them to the individual acting as interim SMF under the 12-week rule, even if they are, at the time, unapproved as an SMF. The Statement notes that firms should record any temporary allocation of PRs to unapproved individuals and notify the FCA and/or PRA of such allocation;
(4) firms are not required to have a single senior manager responsible for their COVID-19 pandemic response (as had previously been reported), but instead the responsibility of identifying 'key workers' should be allocated to the CEO (SMF1). Where firms have an SMF24 (enhanced firms only), this individual would naturally be expected to oversee business continuity, information security and outsourcing during the COVID-19 pandemic;
(5) relevant firms with such functions must ensure that those individuals performing SMF1 (CEO), 2 (CFO), 19 (head of overseas branch), 25 (small insurer senior management function), 26 (head of small run-off firms) and other SMFs required by the FCA are only furloughed as a last resort;
(6) if a senior manager is furloughed, they will retain their FCA approval during their absence, unless they permanently leave their post; and
(7) firms should continue to take reasonable steps to complete any annual certifications of employees that are due to expire during the COVID-19 pandemic.

The Statement is available here.

FCA Publishes Webpage on its Expectation of Funds During COVID-19 Pandemic

On April 6, the UK's Financial Conduct Authority (FCA) published a new webpage setting out its expectations of funds in light of the COVID-19 pandemic (the Webpage).

The FCA notes that firms are facing difficulties during the COVID-19 pandemic, but it still expects them to continue to uphold the best interest of their investors at all times. In order to do so, the Webpage answers a number of queries from firms, including:

(1) firms can delay their annual and half-yearly fund reports;
(2) firms can hold virtual general meetings for fund unitholders, subject to the fund's documentation (including prospectuses and instruments of incorporation) permitting such types of meetings;
(3) the FCA expects firms to have plans in place to deal with issues of compliance with limits on value at risk (VAR) and should take appropriate remediation action, considering the market conditions and what is in the best interests of their customers. If individual firms continue to face issues managing their funds within risk limits and VAR limits, then they should speak to their FCA supervisory contact; and
(4) during the COVID-19 pandemic, the FCA is willing to accept electronic signatures on applications to authorize funds or approve changes to funds. This clarification applies only to information sent by firms to the FCA.

The Webpage is available here.

FCA Statement on Expectations of Solo-Regulated Firms

On April 3 the UK's Financial Conduct Authority (FCA) published a statement setting out its expectations for solo-regulated firms applying the Senior Managers and Certification Regime (SM&CR) during the COVID-19 pandemic (the Statement).

In the Statement, the FCA clarifies that it does not require firms to have a single senior manager responsible for the COVID-19 pandemic response. Firms should allocate these responsibilities in the way which best enables them to manage their own risks. The Statement also explores a number of other requirements under the SM&CR, including:

(1) the FCA does not intend to enforce the requirement on firms to submit updated statements of responsibilities, provided that the change is made to cover multiple sicknesses or other temporary changes in direct response to the COVID-19 pandemic. Such arrangements should be temporary and firms are expected to revert to their previous arrangements. The FCA expects firms to clearly document such changes;
(2) the FCA intends to issue a modification by consent to the 12-week rule to support firms using temporary arrangements. Under the modification, firms are able to allocate prescribed responsibilities of the absent senior manager to an individual standing in for the absent senior manager. Firms are expected to clearly document these responsibilities;
(3) the FCA does not expect firms to submit an updated statement of responsibilities of the absent senior manager or of the individual taking on the absent senior managers responsibilities;
(4) the FCA notes that there may be cases where a senior manager is furloughed if they are unable to fulfil their responsibilities, for example due to illness, caring responsibilities or if they have no current practical responsibilities. Furloughed senior managers will retain their FCA senior manager approval during their absence, unless they permanently leave their post; and
(5) firms should reallocate the prescribed responsibilities of a furloughed senior manager to another senior manager or to the individual acting as the senior manager's replacement. Individuals performing required functions should only be furloughed as a last resort.

The Statement is available here.

EU DEVELOPMENTS

European Commission Published Consultation on Renewed Sustainable Finance Strategy

On April 8, the European Commission (Commission) published a consultation on its renewed sustainable finance strategy (the Consultation).

The Consultation furthers the Commission's work on its green deal economic growth plan published in March 2018. The aim of the Consultation is to collect views and opinions of interested parties in order to inform the

Commission on its renewed sustainable finance strategy, which it intends to adopt in the second half of 2020. The consultation would ensure that the Commission does not lose sight of its long term sustainability objectives during the COVID-19 pandemic.

The aim of the Consultation is to help the Commission provide a roadmap for its renewed sustainable finance strategy in the following three areas:

(1) strengthening the foundations for sustainable investment. For instance, companies should move their focus away from a short-term mindset to a long-term approach to development and sustainability;
(2) increasing opportunities for citizens, financial institutions and corporations to have a positive impact on society and the environment; and
(3) fully managing and integrating climate and environmental risks into financial institutions and the financial system while being mindful of social risks.

The deadline for responses to the Consultation is July 15.

The Consultation is available here, and the response to the Consultation is available here.

European Commission Published Consultations on Digital Finance and Retail Payments

On April 3, the European Commission (Commission) launched targeted consultations on digital finance (Digital Finance Consultation) and retail payments (Retail Payments Consultation) and together with the Digital Finance Consultation (the Consultations).

The Digital Finance Consultation seeks views on the possible measures required to further enable innovative digital financial services in the European Union (EU), which includes the consideration of open finance, technology neutrality and possible competition issues with BigTech companies. The outcomes and findings of the Digital Finance Consultation will feed into and inform the Commission's new digital finance strategy for the next five years. The Commission is due to propose such strategy in Q3 2020.

The Retail Payments Consultation seeks feedback for the forthcoming Retail Payments Strategy for the EU, which will also be adopted later this year. Its aim is to create an innovative, integrated and competitive retail payments sector for European consumers, which can also be used globally. The Commission believes that safe and efficient payment systems and services can also contribute to improving the EU's ability to deal with emergencies, such as the COVID-19 pandemic.

The Consultations should assist the EU with its strategic vision to ensure that consumers and companies benefit from faster, more secure and convenient pan-European payment services in the future. By innovating in this sector, the EU could become a frontrunner in this field, and so these consultations should help the Commission strike the right balance between promoting innovation and properly managing risks to consumers and investors.

The deadline for responses to the Consultations is June 26.

The Digital Finance Consultation is available here, and the response to the Digital Finance Consultation is available here.

The Retail Payments Consultation is available here, and the response to the Retail Payments Consultation is available here.

BCBS and IOSCO Delay Non-Cleared Margin Rules

On April 3, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commission (IOSCO) published a statement to delay the implementation of the final two phases of margin requirements for non-cleared derivatives by one year due to the COVID-19 pandemic (the Statement).

The Statement notes that the final two phases of the implementation of these margin requirements for non-cleared derivatives will take place on September 1, 2022, at which point many buy-side firms with derivatives of an aggregate average notional amount exceeding €8 billion will have to comply with the rules.

The Statement also confirms that firms with derivatives of an aggregate average notional amount exceeding €50 billion will also see a delay and be subject to the requirements from September 1, 2021, one year later than originally planned.

The delays to the implementation of the rules expect to allow firms to focus resources on managing risks associated with the current market volatility caused by the COVID-19 pandemic.

The BCBS and IOSCO have published a revised version of the margin requirements to reflect these delays (the Revised Margin Document). The Revised Margin Document does not contain any other substantive changes to the margin requirements framework.

The Statement is available here, and the Revised Margin Document 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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