Katten

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SEC/CORPORATE

SEC Approves Temporary NYSE Waiver of Stockholder Approval Rules to Facilitate Capital Raising in the Wake of COVID-19

On April 6, the Securities and Exchange Commission issued a release (the Release) announcing that the New York Stock Exchange (NYSE) had issued temporary and partial waivers from the requirement that NYSE-listed companies obtain stockholder approval in connection with certain related party and 20 percent equity issuances (the Waiver). In the Release, the NYSE acknowledged the "unprecedented disruption" caused by the COVID-19 pandemic and the great likelihood that many listed companies will "have urgent liquidity needs in the coming months due to lost revenues and maturing debt obligations," which may mean that listed companies will "need to access additional capital that may not be available in the public equity or credit markets." The Waiver provides NYSE-listed issuers with greater flexibility to engage in capital raising transactions, such as private investment in public equity (PIPE) transactions and registered direct offerings, that may otherwise be constrained by the NYSE's existing stockholder approval rules. The Waiver remains in effect through June 30, 2020.

The chart below provides a summary of the NYSE's shareholder approval requirements applicable to certain related parties and 20 percent equity issuances by NYSE-listed companies, as well as the related changes temporarily effectuated by the Waiver.

Related Party Transactions

Existing NYSE Rule	Modification Effectuated by the Waiver through June 30, 2020
Shareholder approval is required for any issuance by an NYSE-listed company to company insiders, including directors, officers and holders of 5 percent or more of the company's common stock (Significant Holders) and certain of their affiliates (collectively, Related Parties), if the shares of common stock to be issued, including upon the conversion or exercise of the securities, exceeds 1 percent of either the common stock or the voting power, in either case, that was outstanding immediately prior to the issuance (the 1 percent Test). However, no shareholder approval is required for an issuance to one or more Significant Holders (but not to directors or officers) involving no more than 5 percent of the issuer's common stock or voting power prior to the issuance so long as the securities are sold for cash at a price that satisfies the Minimum Price Condition (the 5 percent Test).	Pursuant to the Waiver, an issuance of common stock (or securities convertible into or exercisable for common stock) that would otherwise require shareholder approval under the 1 percent Test and would not satisfy the 5 percent Test will be exempt from such shareholder approval requirement if (1) the sale is for cash; (2) the Minimum Price Condition is satisfied; (3) the issuance is reviewed and approved by the issuer's audit committee or a comparable committee of the issuer's board that is comprised solely of independent directors; (4) proceeds from the sale of securities to the Related Party will not be used to fund an acquisition of stock or assets of another company in which the Related Party has a direct or indirect interest; and (5) the issuance does not implicate a change of control.

The "**Minimum Price Condition**" means that the per share sale price (or the conversion price, as applicable) must be at least equal to the lesser of (1) the official closing price of the issuer's stock on the trading day immediately preceding the signing of the binding agreement; and (2) the average closing price of the issuer's stock for the five trading days immediately preceding the signing of the binding agreement.	

20 Percent Rule

Shareholder approval is required for any issuance by an NYSE-listed company of 20 percent or more of its common stock or voting power, in either case, that was outstanding immediately prior to the issuance, unless the securities are issued for cash in either (1) a public offering; or (2) a "bona fide private financing" that complies with the Minimum Price Condition. For purposes of the 20 percent rule, a securities offering will not be considered a "public offering" merely because it is effected pursuant to a registration statement (e.g., in the case of a "registered direct" transaction). Rather, the status of a particular transaction as a public offering will depend on several factors, including the manner in which the offering is marketed. A "**bona fide private financing**" is an issuance in which either (1) a registered broker-dealer purchases securities from the issuer for the purpose of effectuating a private sale of those securities to one or more purchasers (e.g., in a Rule 144A offering); or (2) the issuer sells the securities to multiple purchasers, and no one purchaser or group of related purchasers acquires or has the right to acquire (upon the exercise or conversion of the securities) more than 5 percent of the issuer's common stock or voting power outstanding immediately prior to the issuance.	Pursuant to the Waiver, the 5 percent limit for sales to any one purchaser or group of related purchasers to constitute a bona fide private financing will not apply. Additionally, if a private placement is effected other than through a broker-dealer acting as the initial purchaser, the offering may constitute a bona fide private financing even if there is only a single investor rather than multiple investors.

The Waiver is consistent with other recent efforts by the NYSE to reduce uncertainty for companies in the current economic environment, including its recent proposal to temporarily suspend its continued listing requirement that issuers maintain a share price of greater than $1 and an average global market capitalization above $50 million for 30 consecutive trading days.

The Release is available here.

BROKER-DEALER

SEC Enhances Standards for Critical Market Infrastructure

On April 9, the Securities and Exchange Commission adopted amendments to its rules for securities clearing agencies to apply enhanced standards to all SEC-registered central counterparties (CCPs) and central securities depositories (CSDs).

The amendments are meant to build on rules adopted by the SEC in 2016 pursuant to the Dodd–Frank Wall Street Reform and Consumer Protection Act, establishing enhanced standards for the operation and governance of securities clearing agencies deemed systemically important and those that are CCPs for security-based swaps.

The adopted rules will amend the following:

- 17 CFR 240.17Ad22(a)(5) will be amended to define "covered clearing agency" to mean a registered clearing agency that provides the services of a CCP or CSD;
- 17 CFR 240.17Ad-22(a)(3) will be amended to define "central securities depository" to mean a clearing agency that is a securities depository as described in Section 3(a)(23)(A) of the Securities Exchange Act of 1934; and
- the definition of "sensitivity analysis" included in 17 CFR 240.17Ad-22(a)(16) will be amended so that the policies and procedures of all covered clearing agencies that are CCPs provide for a sensitivity analysis that considers the most volatile relevant periods, where practical, that have been experienced by the markets served by the covered clearing agency.

The adopted rules will become effective 60 days after publication in the *Federal Register*. The final rule is available here.

FINRA Amends Arbitration Code to Expand Options Available to Customers if a Firm or Associated Person Is or Becomes Inactive

On April 9, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-11 to amend FINRA's Code of Arbitration Procedure for Customer Disputes (Customer Code) to expand a customer's options to withdraw an arbitration claim if a member firm or an associated person becomes inactive.

Under FINRA Rule 12202, a customer's claim against an inactive firm is ineligible for arbitration unless the customer agrees in writing to arbitrate after the claim arises (i.e., when the customer claimant first files the arbitration claim). However, the Customer Code does not address situations where a member firm becomes inactive during a pending arbitration. In addition, the Customer Code does not provide specific procedures for a customer to withdraw, and file in court, a claim against an associated person who becomes inactive before the customer files a claim or during a pending arbitration.

Under the amendments, if a member firm or an associated person is inactive at the time a claim is filed, the claim is ineligible for arbitration unless the customer claimant agrees in writing to arbitrate after the claim arises. If a member firm or an associated person becomes inactive during a pending arbitration, FINRA will notify the customer claimant of the status change, and the customer claimant may withdraw the claim or claims, amend the pleading to add a claim or new party without prior approval by a panel, or postpone a scheduled hearing that is within 60 days of the date the customer claimant receives the notice from FINRA. The amendments retain the customer's option to request a default proceeding against an inactive member or associated person.

The amendments are effective for cases filed on or after June 29, 2020. The Notice is available here.

DERIVATIVES

See "SEC Enhances Standards for Critical Market Infrastructure" in the Broker-Dealer section and "CFTC Extends Certain Comment Periods in Response to COVID-19," "CFTC Approves Proposed Amendments to its Bankruptcy Rules," "CFTC Approves Proposed Rules on Filing Requirements for CPOs and Clearing Requirements for Certain Institutions" and "CFTC Approves Final Rules Regarding Margin Requirements for ESM and Consumer Privacy" in the CFTC section.

CFTC

CFTC Extends Certain Comment Periods in Response to COVID-19

On April 9, the Commodity Futures Trading Commission (CFTC) extended five currently open comment periods in light of COVID-19. The comment periods for the following rulemakings have been extended until May 22, 2020, unless otherwise noted:

- Swap Execution Facility Requirements and Real-Time Reporting Requirements;
- Certain Swap Data Repository and Data Reporting Requirements;
- Amendments to the Real-Time Public Reporting Requirements;
- Amendments to the Swap Data Recordkeeping and Reporting Requirements; and
- Position Limits for Derivatives (extended until May 15, 2020).

The CFTC approved the extension by a 3-2 vote over the dissents of Commissioner Rostin Behnam and Commissioner Dan M. Berkowitz, both of whom believe that the extensions provided are too short.

The CFTC press release is available here.

CFTC Approves Proposed Amendments to Its Bankruptcy Rules

At the Commodity Futures Trading Commission (CFTC) open meeting on April 14, the CFTC unanimously approved proposed amendments to Part 190 of its rules governing bankruptcy proceedings of commodity brokers, including futures commission merchants (FCMs) and derivatives clearing organizations (DCOs). The proposed amendments are intended to comprehensively update Part 190 to reflect current market practices. Among other revisions, the proposed amendments to Part 190 would:

- confirm that shortfalls in segregated property should be made up from a FCM's general assets;
- establish a policy preference for transferring (as opposed to liquidating) positions of public customers and those customers' proportionate share of associated collateral;
- establish a new subpart C to Part 190 governing the bankruptcy of DCOs, which would establish the approach to be taken to foster prompt action in the event such a bankruptcy occurs. Among other things, the trustee would be directed to follow, to the extent appropriate, the DCO's pre-existing default management rules and procedures and recovery and wind-down plans that have been submitted to the CFTC. Likewise, with respect to assets that are intended to flow through to members as part of daily settlement (including both daily variation payments and default resources), the trustee would be directed to devote these assets to that purpose, rather than to the general estate. Other provisions of proposed Subpart C would draw on provisions of Part 190 that are applicable to FCMs;
- generally enhance the discretion granted to bankruptcy trustees to adapt to the unique characteristics of a particular commodity broker bankruptcy; and
- clarify text in existing provisions of Part 190.

The comment period on the proposed amendments expires July 13, 2020.

The CFTC press release with a link to the proposed amendments is available here.

CFTC Approves Proposed Rules on Filing Requirements for CPOs and Clearing Requirements for Certain Institutions

On April 14, the Commodity Futures Trading Commission (CFTC) at its open meeting unanimously approved two proposed rules regarding (1) amendments to Form CPO-PQR and related filing requirements for commodity pool operators (CPOs); and (2) amendments to the rules governing the treatment of swaps entered into by certain financial institutions.

The first proposal would largely eliminate the pool-specific reporting requirements in existing Schedules B and C of Form CPO-PQR, amend the information in existing Schedule A of the form to request Legal Entity Identifiers for CPOs and their operated pools, and eliminate questions regarding pool auditors and marketers. Additionally, the CFTC would no longer accept the filing of Form PF in lieu of the revised Form CPO-PQR. For more information, please see Katten's recently issued Advisory on the proposed amendments to Form CPO-PQR, available here.

The second proposal would exempt swaps entered into with certain central banks, sovereign entities and international financial institutions from the clearing requirement set forth in Section 2(h)(1) of the Commodity Exchange Act. The comment period for both proposed rules expires 60 days after publication in the *Federal Register*.

The CFTC press release, with a link to the proposed rules, is available here.

CFTC Approves Final Rules Regarding Margin Requirements for ESM and Consumer Privacy

On April 14, the Commodity Futures Trading Commission (CFTC) unanimously approved two final rules as follows:

- The CFTC approved a final rule codifying CFTC No-Action Letter 19-22 concerning the margin requirements for the European Stability Mechanism (ESM). Generally, the CFTC margin requirements apply to swap transactions between prudential regulators and swap dealers, major swap participants or financial end users. The final rule excludes ESM from the definition of financial end user, effectively exempting uncleared swaps transactions entered into by ESM from the CFTC margin requirements. The rule will become effective 30 days after publication in the *Federal Register*.
- The CFTC approved a final rule to restore a portion of Part 160 that was inadvertently deleted in a 2011 amendment. More specifically, the restored rule requires certain institutions to adopt policies and procedures to address administrative, technical and physical safeguards for the protection of customer records and information. Such policies and procedures must be reasonably designed to (1) insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3 protect against unauthorized access to or use of customer records or information that could result in substantial harm to any customer.

The CFTC press release, with a link to the final rules, is available here.

EU DEVELOPMENTS

ESG: IOSCO Publishes Report on Sustainable Finance and the Role of Securities Regulators and IOSCO

On April 14, the International Organization of Securities Commissions (IOSCO) published a final report on sustainable finance and the role of securities regulators and IOSCO (the Report).

In the Report, IOSCO provides an overview of the current sustainable finance initiatives taken by regulators and the industry. The Report also includes a detailed analysis of the most relevant environmental, social and governance related international initiatives, and third-party frameworks and standards.

IOSCO identified in the Report a number of areas where improvements could be made, including:

1. multiple and diverse sustainability frameworks and standards, in particular, sustainability-related disclosure;
2. a lack of common definitions of sustainable activities, for example, there is not a clear definition of sustainable investments and sustainability risk; and
3. greenwashing and other investor protection challenges.

The Report notes that market regulators and participants expect IOSCO to take an active role in addressing the above listed challenges. Consequently, IOSCO has agreed to establish a board level Sustainability Task Force (STF). The STF aims to:

1. improve sustainability-related disclosures made by issuers and asset managers;
2. work in collaboration with other international organizations and regulators; and
3. conduct case studies and analyses of transparency, investor protection and other relevant issues within sustainable finance.

The 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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EU DEVELOPMENTS

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