Katten

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SEC/CORPORATE

NYSE Provides Temporary Relief From Shareholder Approval Requirements Due to COVID-19

On May 14, the Securities and Exchange Commission announced the adoption and immediate effectiveness of Section 312.03T of the NYSE Listed Company Manual. Recognizing that existing exceptions to the shareholder approval requirements in the NYSE Listed Company Manual are "not helpful in most situations arising from the COVID-19 pandemic," Section 312.03T provides a temporary exception to shareholder approval requirements applicable to certain issuances of equity securities (or convertible or other securities that may result in the issuance of equity securities) representing 20 percent or more of a New York Stock Exchange (NYSE)-listed company's common stock or voting power, as well as narrow exceptions from shareholder approval requirements in connection with issuances to a related party or equity compensation. Section 312.03T is scheduled to expire on June 30, 2020.

To rely on the temporary relief provided by Section 312.03T, among other things, an NYSE-listed company must demonstrate that the delay that would result from the need to obtain shareholder approval for a 20 percent equity issuance would (1) have a material adverse impact on its ability to maintain its operations under its pre-COVID-19 business plan; (2) result in workforce reductions; (3) adversely impact its ability to undertake new initiatives in response to COVID-19; or (4) seriously jeopardize the enterprise's financial viability. The company also must show that "the need for the transaction is due to circumstances related to COVID-19, that the proceeds would not be used to fund any acquisition transaction, and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company."

Section 312.03T also imposes certain procedural requirements. Among other things, an issuer relying on the temporary exception must publicly announce (by filing a Form 8-K where required by SEC rules or by issuing a press release), no later than two business days prior to the issuance of securities, the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received); that shareholder approval would ordinarily be required under NYSE shareholder approval rules; and that the audit committee or a comparable committee comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

The adoption of Section 312.03T follows the NYSE's partial waivers, effective through June 30, 2020, from the requirement that NYSE-listed companies obtain stockholder approval in connection with certain related party and 20 percent equity issuances (the "April Waivers"). Like the April Waivers, Section 312.03T 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 April Waivers were summarized in the April 17, 2020 edition of *Corporate & Financial Weekly Digest*. Prior to the adoption of Section 312.03T, on May 4, The Nasdaq Stock Market LLC adopted similar relief from certain shareholder approval requirements for Nasdaq-listed companies.

The SEC release regarding the adoption of Section 312.03T is available here.

SEC Amends Disclosure Rules for Acquisitions and Dispositions of Businesses

On May 21, the Securities and Exchange Commission adopted final rules related to the financial disclosure requirements for acquisitions and dispositions of businesses (i.e., M&A transactions). The SEC's release adopting the final rules is available here. These rules will be discussed in an upcoming edition of the *Corporate & Financial Weekly Digest*.

DERIVATIVES

CFTC GMAC Recommendations Concerning Initial Margin for Swaps

On May 19, the Commodity Futures Trading Commission's Global Markets Advisory Committee approved a report that contains several recommendations for action by the CFTC with respect to the implementation of its initial margin (IM) rules for uncleared swaps. The recommendations are focused on the unique challenges faced by small end users of swaps and entities that engage in swap activity through separate managed accounts (SMAs).

The report recommends that the CFTC take all of the following actions:

1. issue Interpretive Guidance to confirm that a swap dealer can continue to trade with an SMA client in the case of an inadvertent breach of the $50M IM threshold;
2. eliminate undue restrictions on collateral eligibility of Money Market Funds;
3. provide exemption from consolidation of seeded funds with sponsors for purposes of aggregate average notional amount (AANA) calculation;
4. remove barriers for small dealers to rely on the ISDA Standard Initial Margin Model (SIMM) Calculations of a larger counterparty dealer;
5. provide a six-month forbearance period for each dealer-small end user relationship commencing from the day the regulatory IM amount for the relationship exceeds the $50M IM Threshold;
6. permit application of a separate IM threshold for each SMA of an SMA client;
7. expand forbearance for SMAs;
8. align the Margin Rules' timing and calculation methodology for Material Swaps Exposure and Phase-In Compliance Periods with International Standards;
9. as an alternative to globally aligned Phase-in Compliance Dates, confirm that the Initial Post Phase-in Compliance Date is January 1, 2023, consistent with the EU and Switzerland;
10. codify relief provided in CFTC Letters No. 17-12 and 19-25, which address practical challenges of applying Minimum Transfer Amounts to Collateral Settlement; and
11. remove deliverable foreign exchange (FX) from AANA calculation.

The CFTC commissioners participated in the call approving the report.

The GMAC report on Initial margin is available here.

CFTC

CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

On May 20, the Commodity Futures Trading Commission's Division of Enforcement (Division) issued new guidance (Guidance) outlining factors the Division will consider in recommending civil monetary penalties (CMPs) imposed by the CFTC in enforcement actions. This is the first publicly issued Division CMP guidance since the CFTC published its penalty guidelines in 1994. The Guidance is designed to provide market participants with greater transparency as to Division staff's decision-making criteria regarding CMPs.

The Guidance identifies three factors that will inform the Division's recommendations regarding an appropriate penalty: (1) the "gravity of the violation" (including, but not limited to, facts surrounding the respondent's role in the applicable violation and the nature and scope of any consequences flowing from such violation); (2) "mitigating and aggravating circumstances" (including, but not limited to, the respondent's conduct, such as self-reporting the misconduct, and whether any acts of concealment or obstruction occurred); and (3) "other considerations" (including, but not limited to, whether a timely settlement was reached and other remedies and sanctions to be imposed in parallel actions by other civil or criminal authorities or self-regulatory agencies). In applying these factors, Division staff will be guided by aligning the proposed penalty with the dual goals of specific and general deterrence.

The Guidance is available here.

CFTC Seeks Public Comments on 2020-2024 Strategic Plan

On May 19, the Commodity Futures Trading Commission published in the *Federal Register* a request for public comment on the CFTC's draft 2020-2024 Strategic Plan (Strategic Plan). The current draft of the Strategic Plan includes a discussion of the CFTC's mission, vision, core values, strategic goals and strategic objectives. The proposed strategic goals include:

- strengthening the resilience and integrity of the derivatives markets while fostering their vibrancy;
- regulating the derivatives markets to promote the interests of all Americans;
- encouraging innovation and enhancing the regulatory experience for market participants at home and abroad;
- being tough on those who break the rules; and
- focusing on the CFTC's unique mission and improving its operational effectiveness.

The comment period will be open through June 18, 2020.

The *Federal Register* release is available here.

The draft Strategic Plan is available here.

UK DEVELOPMENTS

London Weekly Fireside Chat

Katten is continuing our weekly, 15-minute fireside chat series featuring London partners Carolyn Jackson, Nathaniel Lalone and Neil Robson. Please join us on Tuesday, May 26 at 1:00 p.m. Eastern / 6:00 p.m. London time.

Add to Calendar

The recording from the May 19 chat is available here.

BREXIT/EU DEVELOPMENTS

ESMA Publishes Statement on the End of Short Selling Bans by Certain EU Financial Regulators

On May 18, the European Securities and Markets Authority (ESMA) published a statement regarding the non-renewal and termination of the short selling bans imposed by certain EU financial regulators (the Statement).

As a result of the impact of the COVID-19 pandemic on EU financial markets, the Austrian Finanzmarktaufsicht (FMA), the Belgian Financial Securities and Markets Authority (FSMA), the French Autorité des Marchés Financiers (AMF), the Greek Hellenic Capital Market Commission (HCMC), the Spanish Comisión Nacional del Mercado de Valores (CNMV) and the Italian Commissione Nazionale per le Società e la Borsa (CONSOB) introduced bans on short selling from the middle of March 2020.

In the Statement, ESMA notes that the Austrian FMA, Belgian FSMA, French AMF, Greek HCMC and Spanish CNMV chose not to renew their emergency restrictions on short selling, and that the Italian CONSOB decided to preemptively terminate its equivalent emergency restrictions (which were otherwise due to expire on June 18, 2020). All such short selling measures therefore expired at midnight on May 18, 2020.

Despite the end of the various short selling bans, holders (anywhere in the world) of net short positions in shares admitted to trading on an EU regulated market must continue to notify the relevant EU financial regulator if their net short position is equal to or greater than 0.1 percent of the issued share capital of the relevant EU company. For further information on this requirement, please see the March 20, 2020 edition of *Corporate & Financial Weekly Digest*.

The Statement is available here.

Brexit: UK Government Publishes Legal Texts on Future UK-EU Relationship Negotiations

On May 19, the UK Government published a suite of draft legal texts (the Legal Texts) to accompany its policy paper, "The Future Relationship with the EU," published on February 27 (the Policy Paper).

The UK Government states that the draft Legal Texts are the legal articulation of its approach in the Policy Paper and that these have formed the basis of discussions with the EU.

The Legal Texts further the UK Government's approach to come to an agreement with the EU on a comprehensive free trade agreement (FTA). In the Legal Texts, the UK Government proposes zero tariffs and zero quotas on goods (currently this is not the case in any of the existing EU FTAs), and includes relatively weak and unenforceable level playing field provisions. The UK Government suggests that this approach is consistent with the political declaration, whereby both the EU and UK aimed to reach an agreement on a zero tariffs, zero quotas FTA.

Contrastingly, the EU's position is to have an overall governance framework that covers all areas of economic and security cooperation. In this governance framework, the Court of Justice of the EU would be the sole arbiter of EU law. Furthermore, the level playing field provisions would be strong and enforceable, unlike those proposed by the UK Government.

The Legal Texts and Policy Paper are available here.

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

For more information, contact:

SEC/CORPORATE		
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 SERVICES		
Henry Bregstein	+1.212.940.6615	henry.bregstein@katten.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@katten.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@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	+1.212.94.8765	richard.marshall@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
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com
UK/BREXIT/EU DEVELOPMENTS		
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

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