Katten

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SEC/CORPORATE

SEC Amends the Definitions of "Accelerated Filer" and "Large Accelerated Filer"

The Securities and Exchange Commission recently adopted amendments to the definitions of "Accelerated Filer" and "Large Accelerated Filer" in Rule 12b-2 of the Securities Exchange Act of 1934, as amended. The SEC originally proposed these amendments in May 2019, as summarized in a prior *Corporate & Financial Weekly Digest* article. As a result of these amendments, a greater number of smaller companies will be excluded from accelerated and large accelerated filer status, which will ease reporting burdens and reduce compliance costs for those companies.

Reporting companies are classified into three categories: large accelerated filers, accelerated filers and non-accelerated filers. Under Section 404(b) of the Sarbanes-Oxley Act, the independent auditors of large accelerated and accelerated filers, but not of non-accelerated filers, must attest to, and report on, management's assessment of the effectiveness of their internal control over financial reporting (ICFR). Furthermore, non-accelerated filers have additional time to file quarterly and annual reports (until 45 days after quarter end and 90 days after year end, respectively). Accordingly, a non-accelerated filer benefits from reduced compliance costs and this additional time to file periodic reports. Some companies are not classified as non-accelerated filers even though they are smaller reporting companies (SRCs), eligible for scaled disclosure accommodations.

The amendments described below will become effective 30 days after publication in the *Federal Register* and apply to an annual report filing due on or after the effective date, even if the issuer's fiscal year ends prior to the effective date.

Exclusion of low-revenue SRCs from the accelerated filer definition

The amendments exclude from the accelerated filer definition any companies that are eligible to be a SRC that had annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available (the "SRC Revenue Test"). The amendments also exclude business development companies from the accelerated filer definition if they have annual investment income of less than $100 million. As a result, some (but not all) SRCs and business development companies that are currently accelerated filers will become non-accelerated filers, exempt from the ICFR auditor attestation requirement and have additional time to file annual and quarterly reports. In the adopting release, the SEC provided the following table to summarize the relationships between SRCs and the categories of filers following the amendments:

Relationships between SRCs and Non-Accelerated, Accelerated and Large Accelerated Filers under the Amendments		
Status	**Public Float**	**Annual Revenues**
SRC and Non-Accelerated Filer	Less than $75 million	N/A
	$75 million to less than $700 million	Less than $100 million
SRC and Accelerated Filer	$75 million to less than $700 million	$100 million or more
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more
Large Accelerated Filer (not SRC)	$700 million or more	N/A

Increased transition thresholds for exiting accelerated and large accelerated filer status

Pursuant to the amendments, the thresholds for exiting accelerated and large accelerated filer status were increased. In particular, the public float transition threshold for a large accelerated and accelerated filer to become a non-accelerated filer was raised from $50 million to $60 million, and the public float transition threshold for exiting large accelerated filer status was increased from $500 million to $560 million. In the adopting release, the SEC provided the following table to summarize the impact of these amendments on a company's filing status:

Amendments to the Public Float Thresholds			
Initial Public Float Determination	**Resulting Filer Status**	**Subsequent Public Float Determination**	**Resulting Filer Status**
$700 million or more	Large Accelerated Filer	$560 million or more	Large Accelerated Filer
		Less than $560 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer
Less than $700 million but $75 million or more	Accelerated Filer	Less than $700 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer

The amendments also add the SRC Revenue Test to these transition thresholds. Under the amendments, an accelerated filer with a public float that falls below $60 million, or with annual revenues that fall below the SRC Revenue Test, would become a non-accelerated filer.

New check box on the cover pages of annual reports on Forms 10-K, 20-F and 40-F

The amendments also add a check box to the cover pages of annual reports on Forms 10-K, 20-F and 40-F to indicate whether an ICFR auditor attestation is included in the filing, making it easier for investors to identify issuers that undergo an ICFR auditor attestation. This cover page check box must be tagged using Inline eXtensible Business Reporting Language (Inline XBRL).

The adopting release is available here.

DERIVATIVES

See "CFTC Issues Temporary Relief from Certain Regulatory Requirements" and "CFTC Extends Relief for Initial Margin Requirements for Uncleared Swaps" in the CFTC section

CFTC

CFTC Issues Temporary Relief from Certain Regulatory Requirements

On March 17, the staff of the Commodity Futures Trading Commission (CFTC) issued a series of no-action letters to provide certain CFTC-regulated entities and registrants with temporary regulatory relief from a targeted set of regulatory requirements.

The CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) issued a set of Staff Letters aimed at a broad range of market participants — including futures commission merchants (FCMs), introducing brokers (IBs),

swap dealers (SDs), retail foreign exchange (forex) dealers, floor brokers, and members of designated contract markets (DCMs) and swap execution facilities (SEFs). These letters provide for temporary no-action relief from a number of CFTC regulatory requirements, as described below.

1. Until June 30, 2020, DSIO will not recommend enforcement action against FCMs, IBs, SDs, retail forex dealers, floor brokers and members of DCMs and SEFs for failure to record the time and date on certain order records and trade information by time stamp or other timing device as required by CFTC rules if the personnel who are responsible for preparing such records are mandated by the firm's BCP to be absent from their normal offices, ***provided*** that the required records are created, are maintained, and include any required date and time to the nearest minute. This date and time entry could be manually entered.
2. Until June 30, 2020, DSIO will not recommend enforcement action against FCMs, IBs, SDs, retail forex dealers and floor brokers for failure to record the oral communications of personnel who would otherwise be required to use a recorded line pursuant to CFTC rules if such personnel are mandated by the firm's BCP to be absent from their normal offices, ***provided*** that a written record of the communication is maintained that identifies date, time, participants and subject matter, and that the firm takes "affirmative steps" to collect and maintain any written materials prepared by affected personnel in connection with such communications.
3. Until June 30, 2020, DSIO will not recommend enforcement action against floor brokers who are not physically located in a pit or other place determined by a contract market, nor will floor brokers be subject to a requirement to register as an IB because of failure to so locate, if the floor broker is required by the DCM's BCP to be absent from such place.
4. DSIO will not recommend enforcement action against FCMs and SDs who would otherwise be required to provide the CFTC with a copy of their Chief Compliance Officer (CCO) annual reports prior to September 1, 2020, ***provided*** that they submit such reports within 30-calendar days of their original due dates.

The CFTC's Division of Market Oversight (DMO) issued a set of Staff Letters covering SEFs and DCMs. These letters provide for temporary no-action relief from certain audit trail-related requirements for SEFs and DCMs, as well as an extension of the deadline for submission of CCO annual compliance and certain financial reports for SEFs.

1. Until June 30, 2020, DMO will not recommend enforcement action against any SEFs that cannot meet requirements around recording of voice communications, to the extent that voice trading personnel are outside their normal offices, ***provided*** that the SEF makes reasonable efforts to record in writing the time, date, parties and subject matter of unrecorded conversations, all transaction terms are captured in SEF systems, and orders (even if placed on unrecorded lines) are retained in the SEF's normal audit trail.
2. Until June 30, 2020, DMO will not recommend enforcement action against DCMs that fail to comply with audit trail requirements, to the extent that those failings are a result of interactions with market participants who are relying on the DSIO Staff Letters described above, ***provided*** that the DCM requires such participants to comply with the applicable conditions of those DSIO Staff Letters and that orders entered by such participants are retained in the DCM's normal audit trail.

DMO will not recommend enforcement action against any SEF or SEF CCO for failure to timely submit to the CFTC either an annual compliance report or a fourth quarter financial report (where either report would have been due prior to September 1, 2020), ***provided*** that such reports are submitted no later than 120 days after the end of the fiscal year for that SEF.

The DSIO Staff Letters are available here. The DMO Staff Letters are available here.

NOTE: On March 17, the National Futures Association provided relief from parallel NFA requirements for Members that are in compliance with the terms of the CFTC staff no-action relief.

The NFA statement is available here.

CFTC Extends Relief for Initial Margin Requirements for Uncleared Swaps

On March 17, the Commodity Futures Trading Commission (CFTC) adopted a final rule extending the compliance schedule for uncleared margin requirements to September 1, 2021 for market participants with the smallest uncleared swaps portfolios, i.e., Phase 5.

Currently, the CFTC's initial margin requirements apply to the largest 40 swap dealers, which represents 97 percent of the US portion of the global market. The compliance of the remaining 3 percent of the US market represents the final phase of initial margin compliance for swap dealers.

The final rule is not yet available.

CFTC Issues Customer Advisory Regarding COVID-19 Related Fraud

On March 18, the Commodity Futures Trading Commission (CFTC) issued a Customer Advisory warning the public to watch for fraudulent schemes attempting to profit from recent market volatility stemming from the COVID-19 (coronavirus) pandemic. The CFTC identified common fraud tactics often used during major news events (such as the spread of the COVID-19 pandemic), including the following:

1. the promise of oversized returns;
2. urgency to act before market conditions change;
3. credibility building using unverifiable credentials (e.g., "hedge fund genius," "trading legend," or "advisor to the biggest firms on Wall Street");
4. testimonials from "real" people; and
5. reciprocity by offering a gift in exchange for contact information.

Fraudsters also can act by taking advantage of individuals' biases and emotions that influence investment decision making.

Although it is not a guarantee against fraud, the Customer Advisory urges individuals to rely on www.cftc.gov/check for information on advisers, brokers, commodity pool operators and retail foreign exchange dealers; checking out virtual currency trading platforms; and links to the websites of other regulators offering similar assistance.

The full Customer Advisory is available here.

NFA Provides Relief From Branch Office Requirements for Associated Persons

On March 13, NFA provided relief from the requirement that all associated persons (APs) who are not located in a member's main office work from a branch office that has been listed on the member's Form 7-R, which office must be supervised by a branch office manager. NFA stated that it will not pursue disciplinary action against a member that permits APs to work temporarily from locations not listed as branch offices and without branch managers, provided that the member implements alternative supervisory methods to adequately supervise the APs' activities and meet its recordkeeping requirements. Member firms should also ensure that these procedures are documented.

More information is available here.

ANTITRUST

COVID-19 Update – Hart-Scott-Rodino Filings

In response to the COVID-19 pandemic, the staffs at the Federal Trade Commission (FTC) and Department of Justice (DOJ) responsible for Hart-Scott-Rodino (HSR) merger reviews are working remotely. Accordingly, HSR filings cannot be made in hard copy — which is the only way those filings have been made in the past. In order address this situation, the FTC Premerger Notification Office has set up a temporary electronic platform to enable parties to make their HSR filings electronically. The new platform went live on Tuesday, March 17. Given the dislocations caused by these changes, the FTC has advised that it will ***not*** be granting Early Termination of the HSR Waiting Period on electronic filings at this time. Accordingly, parties who need HSR clearance on their transactions should factor in a full 30 days for HSR clearance in setting their timetables for closing.

In addition, for strategic deals that may raise substantive antitrust issues, there is some concern that the FTC or DOJ may not be able to complete their reviews and clear those deals within the 30-day Waiting Period. In those cases, there may be an increased risk that the reviewing agency will issue Second Requests for Information in order to stop the HSR clock so that the review can be completed. Parties to strategic deals may wish to take this into account in calculating time to closing.

UK DEVELOPMENTS

BOE Publishes Discussion Paper on Central Bank Digital Currency

On March 12, the Bank of England (BoE) published a discussion paper on central bank digital currency (CBDC), focussing on its opportunities, challenges and design (the Paper). In conjunction with publishing this Paper, the BoE updated its CBDC webpage.

In this Paper, the BoE sets out its initial thoughts on a CBDC in light of its understanding of the future of finance. The BoE notes that physical cash, such as banknotes, are being used less frequently as a form of payment, while FinTech firms are introducing new mechanisms of payment and forms of money. The Paper considers whether the BoE should innovate to provide a CBDC to the public as a complementary form of payment to banknotes.

A key feature of a CBDC is that is electronic money that could be made available to the general public and businesses allowing them to make payments and store value. The Paper discusses the application of CBDCs in this context. The Paper notes that this is not a conclusive CBDC approach, but rather a basis for further exploration of the opportunities and challenges it could pose for payments, the BoE's objectives and the wider economy.

The BoE has not yet decided on whether to introduce a CBDC, and that was not the aim of the Paper. The BoE intended that the Paper would begin discussions on the design of a CBDC and provide a considered cost benefit analysis of their adoption. If a CBDC is adopted by the BoE in the future, the decision to do so would involve the government, Parliament and regulatory authorities, and engagement with society more generally.

The BoE is open to responses until June 12, 2020, and will be hosting a webinar on this Paper on April 7, 2020.

The Paper is available here and the BoE's updated CBDC webpage is here.

FCA Publishes New Webpages on SFTR

On March 11, the UK Financial Conduct Authority (FCA) published the following new webpages on the Securities Financing Transactions (SFTR):

1. an overview of SFTR (available here);
2. an overview of the EU SFTR reporting obligations (available here); and
3. a non-exhaustive library for EU and UK SFTR links and information (available here).

The FCA note that this is not intended to substitute a firm's own research.

In their overview of the EU SFTR reporting obligations, the FCA notes that counterparties are required to report aspects of the securities financing transactions (SFTs) that they have concluded, modified or terminated to a registered or recognized trade repository (TR). The webpage also provides guidance on the following topics:

1. an approach to help choosing a TR;
2. the firms that are required to report to a TR;
3. the information to be included when reporting to a TR; and
4. how firms can fulfil their reporting obligations.

FCA Publishes Information for Firms on COVID-19

On March 17, the UK Financial Conduct Authority (FCA) published a new webpage with information on its COVID-19 response.

The FCA notes that it is monitoring COVID-19 and is prepared to take any necessary steps to ensure customers are protected and markets continue to function well. The FCA is in regular contact with firms to assess their current position and expects them to take reasonable steps to ensure they are prepared to meet the challenges COVID-19 poses to customers and staff.

The new webpage sets out responses to a variety of concerns. Key features include:

1. Regulatory changes:
    a. the FCA may delay or postpone activities that are not critical to protecting consumers and market integrity. For example, the FCA is extending its closing date for responses to open consultation papers and calls for input until October 1, 2020 and rescheduling most other planned work;
    b. the FCA has also reduced its routine business interactions so that it only contacts firms on business-critical requests and responses to the current COVID-19 situation; and
    c. it will continue with a small number of regulatory changes that support consumers, particularly the most vulnerable, or where major long-term programs would be disrupted.
2. Impact on consumers: the FCA welcomes firms taking initiatives to go "beyond usual business practices" to support their customers, such as waiving fees to individual savings accounts. Firms should notify the FCA of any business practices which go beyond the usual to support their customers, so the FCA can "consider the impacts and offer support as appropriate."
3. Market trading and reporting: the FCA expects firms to continue to record calls and asks them to notify the FCA if they cannot do this. The FCA also expects firms that have trouble submitting regulatory data to maintain appropriate records and submit the data as soon as possible.

The FCA plans to update the webpage and adapt its guidance for firms as the situation develops.

The FCA webpage is available here.

FCA Statement on Short Selling Bans and Reporting

On March 17, the UK Financial Conduct Authority (FCA) published a statement on short selling bans and reporting (the Statement).

The Statement explains that, under the Short Selling Regulation (SSR), EU regulators and the FCA have the power to apply short- or long-term bans on short sales in shares and certain other financial instruments.

The Statement considers the impact of an EU regulator or the FCA imposing a ban on short selling. It notes that the FCA has rarely before imposed a ban on short selling of UK shares and has never initiated a ban under the SSR. In order to impose a ban, the FCA states that the situation would need to meet a "high bar," but which will depend on the particular circumstance.

The FCA also highlights the European Securities & Markets Authority's (ESMA) decision to alter the thresholds for the notification of short selling positions to EU financial regulators under the SSR and the FCA confirms that it will apply this change in the UK. (For more information, please see the March 20 edition of *Corporate & Financial Weekly Digest*.)

The Statement is available here.

EU DEVELOPMENTS

ESMA Publishes Public Statement on COVID-19 and Reporting Obligations

On March 19, 2020, the European Securities and Markets Authority (ESMA) published a public statement regarding the reporting requirements and registration of EU trade repositories (TR) under the Securities Finance Transactions Regulation (SFTR) in light of the recent adverse developments of the COVID-19 pandemic (the Public Statement).

In the Public Statement, ESMA notes that from April 13, 2020 until July 13, 2020, EU financial regulators should not prioritize their supervisory action towards entities which are subject to the Securities Finance Transactions (SFT) reporting obligations. These entities are counterparties, entities responsible for reporting and investment firms.

ESMA notes that it does not deem it necessary to register any TR ahead of April 13, 2020. Instead they expect TRs to be registered sufficiently ahead of the next phase of the reporting regime, which is scheduled to begin on July 13, 2020 for credit institutions, investment firms, central counterparties, central securities depositories and relevant third-country entities.

ESMA will continue to monitor the implementation and impact of the SFTR measures in light of COVID-19 to ensure alignment of SFT reporting requirements and supervisory practices in the EU.

The Public Statement is available here.

ESMA Publishes a Decision on Short Selling in Light of COVID-19

On March 16, the European Securities and Markets Authority (ESMA) issued a decision to temporarily require the holders of net short positions in shares traded on an EU regulated market to notify the relevant EU financial regulator if the position is equal to or greater than 0.1 percent of the issued share capital (the Decision). This applies to all positions entered into after the entry into force of the Decision.

Due to the exceptional circumstances of the COVID-19 pandemic, ESMA notes that lowering the reporting threshold is a necessary, appropriate and proportionate precautionary action to assist with the monitoring of the developments in financial markets. It also notes that it can enforce more rigid measures if required, in order to ensure the orderly functioning of EU markets, financial stability and investor protection.

ESMA acknowledges that COVID-19 represents a real threat to market confidence in the EU and so this measure applies immediately to any natural or legal person, irrespective of their country of residence. By introducing this preliminary step now, ESMA notes that EU financial regulators can get information about short selling sooner and decide if further responses are necessary.

ESMA notes that the reporting requirements do not apply to:

1. shares admitted to trading on a regulated market where the principal venue for the trading of the shares is located in a third country;
2. market making activities; or
3. stabilization activities as defined in the Market Abuse Regulation (MAR).

The Decision is available here. (For more information on the FCA statement on short selling, please see the March 20 edition of *Corporate & Financial Weekly Digest*.)

ESMA Recommendation to Financial Market Participants in Light of COVID-19

On March 12, the European Securities and Markets Authority (ESMA) issued a public statement to note certain recommendations for EU financial market participants as a result of the impact and developments of COVID-19 (the Statement). ESMA's recommendations include:

1. financial market participants should be prepared to use their business contingency plans (BCP) to ensure that they maintain their operational continuity and regulatory compliance during this COVID-19 pandemic. For further information on this topic, please see the additional advisory prepared by Katten, available here;
2. as soon as possible and in accordance with the Market Abuse Regulation (MAR), issuers of EU-listed shares must disclose any relevant significant information in relation to the impacts of COVID-19 on their fundamentals, prospects or financial situation;
3. issuers should consider providing a qualitative and quantitative assessment of the actual and potential impacts of COVID-19 on their business via disclosure in their 2019 year-end financial report or in their interim reports; and
4. asset managers should be continue to apply the requirements on risk management, and react accordingly.

The Statement notes that ESMA and EU financial regulators continue to monitor the developments of COVID-19's impact on financial markets, and that ESMA is prepared to use its powers to ensure the orderly functioning of markets, financial stability and investor protection.

The Statement 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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