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Capital Markets Compass

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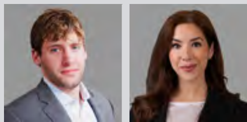
Editorial Note



In the May edition of *Capital Markets Compass*, we examine how innovative offering structures are providing access to capital despite significant market challenges. We analyze recent SEC comment letters focusing on climate and provide best practices going forward in light of enhanced SEC scrutiny on ESG matters. Continuing on the ESG front, we also review how the SEC's Division of Corporation Finance proxy decisions have signaled an agency-wide emphasis on "values-based" capitalism. Next, we look at the recent SEC amendments requiring increased disclosure on stock buybacks. Finally, we discuss the new T+1 settlement cycle and relevant considerations. Thank you for reading, and don't hesitate to reach out with questions about any of these topics.

Timothy J. Kirby and Michelle Mount

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Alternative Equity Offering Structures Provide Access to Capital as Markets Remain Challenged

By Elizabeth C. McNichol and Jonathan D. Weiner

Global equity markets continue to navigate the dueling impacts of inflation, rising interest rates and a slowing economy. While the market for initial public offerings initially showed signs of a recovery in early 2023, the IPO market remains relatively sluggish and has faced set-backs such as uncertainties in the banking sector.[1] Meanwhile, the follow-on equity markets have remained robust as compared to the IPO market, as existing public companies relied on an array of offering structures to raise equity capital in the public markets in 2022 and 2023. Below, we discuss some of the more prominent equity-raising structures being utilized today by public companies, including by special purpose acquisition companies (SPACs) and former SPACs, which face particular challenges when it comes to raising capital.

In 2022, an estimated 1,900 alternative equity financing transactions, inclusive of private investment in public equity transactions (PIPEs), registered direct offerings, confidentiality marketed public offerings (CMPOs), at-the-market offering programs (ATMs) and equity lines of credit (ELOCs), raised over $135 billion in capital, according to Private Raise, a provider of comprehensive analysis of PIPE, Shelf Registration and SPAC transaction activity. The ATM and equity line markets were particularly robust in 2022, with an aggregate of 700 closed deals representing $61 billion raised, which helped offset the decrease in conventional PIPE deals. Excluding ATMs and ELOCs, an estimated 1,200 PIPEs, registered directs and CMPOs that raised approximately $74 billion closed in 2022. Deal activity was robust in the first quarter of 2023, with $33.95 billion raised across 497 deals, with ATM and ELOC deals accounting for $23 billion of the dollars raised in the first quarter of 2023.

This article discusses overall trends in the markets for alternative equity financing transactions in 2022 and early 2023, how such markets were influenced by trends in SPACs and de-SPAC transactions, and business and legal issues that both issuers and investors consider when deciding on a structure for a follow on equity offering.

Private Investments in Public Equity (PIPEs)

General Characteristics. A PIPE transaction involves a private placement of securities by a public company to one or more accredited investors. The securities sold in a PIPE may consist of common stock, convertible preferred stock, convertible debt, warrants or other equity or equity-linked securities of a public company, or a combination of any of the above.

Securities sold in a PIPE (including the common stock issuable upon conversion or exercise of warrants, preferred stock, convertible debt or other securities sold in a PIPE) are "restricted securities" and may only be resold by the investor pursuant to a resale registration statement or pursuant to an exemption from the registration requirements of the Securities Act of 1933 (the "Securities Act"). PIPE documentation will typically obligate the issuer to file a resale registration statement covering the securities purchased in the PIPE (or common stock underlying such securities) either prior to, or within a short period of time (e.g., within 30 days) following, the closing date. Regardless of whether such a resale registration statement is filed or becomes effective, securities held by investors that are not affiliates of the issuer will generally be eligible for resale under the exemptions provided by Rule 144 under the Securities Act six months after the closing date of the PIPE. Given the initial illiquidity of PIPE securities, they are typically sold at a greater discount to the market price than comparable securities could be sold in a registered offering.

The pace of PIPE activity was influenced by trends in the market for de-SPAC transactions in 2022. Traditionally, SPAC sponsors relied on PIPE deals to backstop de-SPAC transactions and mitigate redemption risk. The significant increase in redemption rates in connection with de-SPAC transactions in 2022, as well as other market factors, forced SPAC sponsors and their advisors to consider highly structured PIPE deals in order to complete de-SPAC transactions, including offerings of convertible debt, convertible preferred stock and other securities that offer provide downside protection to investors.

Advantages of a PIPE. The principal advantage of a PIPE is speed of execution as the securities are sold privately, which removes some of the filing and other documentation requirements associated

with a public offering, such as the need to have an effective registration statement filed with the Securities and Exchange Commission (SEC) at the time the securities are sold. PIPEs are also highly customizable, providing both the issuer and the lead investor(s) in the PIPE the ability to structure an investment that achieves both parties' economic and other objectives.

Additional considerations related to a PIPE. In a PIPE offering, securities are typically sold at a greater discount to the market price than the discount associated with the sale of comparable securities in other offering structures, raising the cost of capital and potentially the dilutive effect on existing shareholders. Note that the sale of convertible securities, warrants and similar instruments via a PIPE may also continue to put downward pressure on a company's stock price as the market anticipates later sales on the part of the PIPE investors, particularly if the exercise or conversion price of the securities sold varies (or "floats") with the market price of the underlying security. PIPEs are subject to the so-called "20 percent rule" of the stock exchange in which the issuer's securities are listed. Both Nasdaq and the NYSE require listed companies to obtain shareholder approval for certain issuances of common stock or securities convertible into common stock, including the issuance of securities representing 20 percent or more of the issuer's outstanding common stock or voting power at a price below the minimum market price.

At-the-Market Offerings (ATMs)

The increased popularity of both ATMs and ELOCs was a major driver in offsetting an overall decrease in follow-on equity offering activity in 2022, representing almost half of dollars raised in the follow-on equity markets in 2022.

General Characteristics. An ATM offering (sometimes also referred to as a "continuous offering program" or an "equity distribution program") is a public offering of securities in which the issuer sells equity securities (typically common stock) through a sales agent into the public market over time and at then prevailing market prices (rather than at a fixed price). As is the case with registered direct offerings, prior to making sales through an ATM program, the issuer must have an effective registration statement on file with the SEC. To facilitate an ATM, the issuer will typically enter into a distribution or sales agreement with one or more sales agents, which provides the issuer the ability to make ongoing sales when the issuer decides it would like to raise equity capital.

Advantages of ATMs. ATMs are appealing to issuers that want the flexibility to raise capital on an as-needed basis but are not designed to raise substantial amounts of capital at one time. ATM programs are often viewed favorably in volatile equity markets, because they allow public company issuers to put an ATM program in place and then wait and raise capital quickly with limited additional advance disclosure (minimizing arbitrage opportunities) when market conditions are appropriate. Moreover, once an ATM program is in place, a company can raise capital under the program without requiring management to devote substantial time and resources to marketing efforts, and transaction costs are fairly predictable. To the extent there is sufficient volume to sustain sales into the market, the prices of the shares sold pursuant to the ATM will be at market prices, and not subject to a discount like in other offerings discussed in this article. In addition, the sales agent fees are typically less than underwriting discounts payable in the other capital-raising structures.

Additional considerations related to ATMs. An issuer must have a shelf registration statement for a primary offering on file with the SEC that is already effective in order to conduct sales through an ATM program. Accordingly, an issuer seeking to maximize flexibility would be well served to ensure it has an effective shelf registration statement with sufficient registered securities to facilitate either an ATM program or a Registered Direct or CMPO, which are discussed below. An issuer with a smaller market capitalization may find that the SEC rules restricting the amount of securities that may be offered (the "baby-shelf" rule) and sold in a primary offering undermines, at least in part, the value of an ATM program compared to an ELOC.

Additionally, as with any public offering, both the issuer and the distribution agent will need to be comfortable that the issuer's public disclosure is adequate and current, and free of material misstatements or omissions at any time when the securities are being sold. Accordingly, distribution agreements provide for customary underwriter protections, including accountant comfort letters, opinions of counsel, representations and warranties of the issuer and certificates to the agent from officers of the issuer. The distribution agent will require that certificates and other documents be updated periodically and require ongoing "bring-down" due diligence exercises to be performed, including, for example, delivery of quarterly auditor "comfort letters." As a result of these diligence requirements, ATMs result in up-front costs for the issuer, even if little or no capital is eventually raised. On the other hand, investing in the diligence and documentation up-front also avoids having to begin the process from scratch at the time the issuer is looking to raise capital, as would be the case in a customary public offering. Finally, the ability to use the ATM is subject to there being sufficient trading volume to sustain sales into the market.

Equity Lines

Small to mid-cap companies often turn to "equity lines" or "ELOCs" for much-needed liquidity in turbulent markets. SPACs and companies that went public via de-SPAC also increasingly turned ELOCs in 2022 and the first part of 2023. Prior to 2022, a SPAC looking to consummate a merger with an acquisition target typically relied on raising funds in the PIPE market (typically selling common stock at $10 per share) in order to mitigate the risk of a high redemption rate from its public stockholders in connection with a de-SPAC transaction. 2022 saw the simultaneous trends of high redemption rates in de-SPAC transactions together with a softening of the PIPE market for de-SPACs. As a result, SPACs increasingly turned to alternative financing structures, including ELOCs (as well as structured PIPEs, commonly involving convertible securities).

General Characteristics. Equity lines are financing agreements whereby an issuer enters into an agreement with an investor, pursuant to which the investor agrees to purchase securities (typically pursuant to an agreed-upon pricing formula) from the issuer in the future if certain conditions are met. After the issuer and the investor execute the definitive agreements to establish the equity line, the issuer files a resale registration statement covering the resale by the investor of the securities subject to the equity line. Once the registration statement is declared effective, the issuer can then "draw" upon the equity line by selling the subject securities to the investor per the terms of their agreement. Alternatively, issuers that are eligible to make primary offerings on Form S-3 and already have a universal shelf registration statement on file with the SEC, can immediately file a prospectus supplement registering the securities subject to the equity line and do not need to wait for the SEC to declare a registration statement effective. These arrangements allow an issuer to draw against its equity on an as-needed basis, typically for a period of months or years.

Advantages of ELOCs. Similar to an ATM, which is described further below, an equity line can provide an issuer with access

to cash from time to time and allow an issuer to quickly take advantage of periods of favorable market sentiment. While the all-in-cost of capital is often higher for equity lines as compared to ATMs, equity lines do offer "firm commitments" from the investor as compared to a typical ATM program, which is conducted on a commercially reasonable efforts basis. Investors may also favor an equity line over other forms of investment, because the securities are purchased over time in tranches at a pre-determined discount to the market prices (which may be based on forward or backward pricing formulas). Because the equity line shares are registered for issuance under a shelf registration statement or for resale, the finance provider may quickly and freely resell the equity line shares for profit. ELOCs allow companies with relatively small market capitalizations to raise significant amounts of capital, as an issuer can register the securities subject to the ELOC using a Form S-1 if it is not eligible to use a Form S-3 for a primary offering. The ATM, Registered Direct and CMPO structures discussed above and below do not offer the flexibility to use a Form S-1. In addition, issuers can avoid limitations imposed by the 20 percent rule if the average price of all securities issued pursuant to the ELOC is above the minimum price established at the initial signing of the ELOC.

Additional considerations related to ELOCs. Since issuers can draw upon equity lines as needed, they are likely less helpful to an issuer that needs an immediate, one-time cash infusion into its business. Also, because the shares to be sold to the investor pursuant to an equity line must be registered on an effective resale registration statement that is filed with the SEC, an issuer is required to consider additional costs and timing considerations if it does not have, or is not yet eligible for, a Form S-3 Registration Statement. Similar to an ATM program, the equity line finance provider will typically conduct the bulk of its due diligence up front, which allows the company to quickly access financing on an as-needed basis going forward. The SEC requires the finance provider to be named as an "underwriter" in the prospectus covering the resale of the shares sold in the equity line. As such, many equity line finance providers, as with ATM finance providers, require delivery of negative assurance letters and in some cases comfort letters, which are typically not required in a PIPE or registered direct offering.

Registered Direct Offerings

General Characteristics. A registered direct offering is a public offering of securities (often consisting of a combination of common stock and warrants) directly to a select group of investors pursuant to an effective shelf registration statement. Similar to the marketing process in PIPE transactions, registered direct offerings typically are marketed to one or more accredited investors, usually through a placement agent, and usually sold pursuant to a purchase agreement with each investor.

The execution of a registered direct offering is not subject to risk of delay as a result of SEC review, as might be the case in the traditional public offering context, because securities are offered and sold pursuant to a registration statement that is already effective prior to the initial marketing and announcement of the offering.

Advantages of Registered Direct Offerings from an Issuer's Perspective. As with a PIPE, a key advantage of registered direct offerings is that they are marketed to potential institutional investors before the offering is announced, allowing issuers to test the market without the publicity (and opportunities for arbitrage) associated with traditional public offerings. To address selective disclosure concerns, potential investors are typically required to enter into confidentiality agreements before being provided with full information about the offering. Registered direct offerings are typically announced and priced on the same day, and an issuer can therefore avoid the downward pressure on its stock price that frequently occurs between the time a traditional "road show" is first announced and the date the offering is priced.

Although registered direct offerings resemble PIPE transactions to the extent that they typically are marketed to a select group of accredited or institutional investors and not purchased by an underwriter on a principal basis, the shares sold pursuant to a registered direct offering are registered with the SEC and, therefore, are freely tradeable in the public market upon issuance, subject to limitations generally applicable to "control securities" held by affiliates of the issuer. As a result, shares sold in a registered direct offering are generally priced more favorably to the issuer than securities sold in a PIPE offering, which often must be sold at a greater discount to prevailing market prices.

Additional considerations related to Registered Direct Offerings. An issuer must have a shelf registration statement for a primary offering that is already effective in order to conduct registered direct offerings (though WKSIs can file an automatic shelf registration statement, which is immediately effective, for this purpose). As discussed above, issuers with smaller market capitalization may be restricted in their ability to utilize a universal shelf registration statement due to the SEC "baby-shelf" rule.

Registered direct offerings also typically require a placement agency agreement, and placement agents (who are subject to underwriter liability under federal securities laws because registered direct offerings are considered public offerings of securities) typically conduct due diligence on the issuer, which in some instances may include obtaining comfort letters and engaging in other aspects of the diligence process that are customarily performed in connection with a traditional underwritten public offering, although the extent of the diligence efforts may vary depending upon the nature of the investors and the terms of the transaction.

While registered direct offerings engender the liability exposure of a public offering, they are ordinarily not treated as "public" offerings for purposes of the stock exchange "20 percent rule," because they do not typically involve sufficient public marketing efforts and, accordingly, are subject to stock exchange limitations on private placements.

Confidentially Marketed Public Offerings (CMPOs)

Characteristics. A CMPO is an offering of securities registered on a shelf registration statement, but confidentiality marketed in advance of a formal launch. Much like a registered direct offering, in a CMPO, an underwriter (rather than a placement agent) confidentially markets a potential CMPO to a small number of institutional investors, often without initially disclosing the name of the issuer, until the potential investor provides an indication of its firm interest and agrees not to trade in the issuer's securities until the CMPO is either completed or abandoned. The investor can then be brought "over the wall" to negotiate the terms of the CMPO, after which the offering "flips" from confidential to a public offering, involving a prospectus and other public filings which inform the market of the CMPO. Following the public announcement, a short public offering period usually takes place overnight, which is designed to potentially attract additional investors (including retail investors) into the deal and to demonstrate marketing efforts required for the transaction to be considered a "public" offering within the meaning of applicable stock exchange rules.

Advantages of a CMPO. Because a CMPO is initially marketed on a confidential basis (with the public marketing component only occurring if there is sufficient demand from the investors targeted through the confidential marketing), if, for any reason, the CMPO is abandoned, the market is not typically made aware of that fact, and the issuer is able to mitigate or avoids the associated downward pricing pressure that may be triggered by an abandoned or failed marketed public offering. Additionally, similar to a registered direct offering, because the securities in a CMPO are sold pursuant to an effective registration statement, the securities can be immediately resold by investors and, consequently, may not be subject to as great an illiquidity discount as might be the case in other alternative offering structures. Unlike most registered direct offerings, however, assuming the marketing effort during the brief public offering period is sufficient to satisfy stock exchange requirements for a "public" offering, a CMPO will not be subject to the "20 percent rule."

Additional considerations related to CMPOs. As is the case with registered direct offerings and ATMs (see more on ATMs below), prior to conducting a CMPO, the issuer must have an effective registration statement on file with the SEC. The public offering phase of a CMPO must satisfy the applicable Nasdaq or New York Stock Exchange (NYSE) criteria to qualify as a "public offering." If a CMPO does not qualify as a "public offering," additional exchange rules may be implicated, including the requirement to obtain shareholder approval under the 20 percent rule, as described below in more detail. In addition, an issuer may find the due diligence process to be challenging, because of the often-compressed timelines for CMPOs that may cause the underwriters' due diligence to consist of a barrage of activity in a short period of time.

Conclusion

Regardless of the type of transaction being pursued, even if the securities to be issued are initially unregistered (as would be the case in a PIPE), or if the issuance is not considered by the applicable stock exchange to be a "public offering" (as is typically the case in registered direct offerings), issuers remain subject to general anti-fraud rules, including Rule 10b-5 under the Securities Exchange Act of 1934 and, in the case of a transaction pursuant to a registration statement, are also subject to potential liability under Sections 11 and 12 of the Securities Act, for material misstatements or omissions in connection with the sale of those securities.

Companies conducting capital-raising transactions are also likely to face challenging Regulation FD questions and other issues related to material non-public information (MNPI). The fact that an issuer is contemplating a capital-raising transaction may itself constitute MNPI. Accordingly, an issuer should evaluate and, during the course of any offering, may need to re-evaluate, whether such an offering can be conducted when the company or its corporate insiders are in possession of MNPI, particularly if a blackout period has been imposed. If an issuer plans to disclose any MNPI solely to investors or potential investors in the offering, issuers typically require investors to enter into confidentiality agreements that obligate them to keep any MNPI confidential and not to trade in the issuer's securities until the "cleanse" date — the earlier of the date on which the MNPI has been disclosed to the public (which may be subject to a deadline imposed by the confidentiality agreement) or the date on which the MNPI is no longer material. Ultimately, any MNPI related to an offering and provided to investors during the negotiation would ordinarily be disclosed in a prospectus supplement and/or in a current report on Form 8-K.

As reflected by the robust PIPE activity reported by Private Raise for 2022 and 2023, the equity capital markets remained open to public companies even in a challenging market. ATMs and ELOCs have continued to increase in popularity, providing companies the flexibility to issue a limited number of shares from time to time to a finance provider or into the market when market opportunities arise. Companies looking to raise a larger amount of capital in one offering can consider traditional PIPEs, registered direct offerings and CMPOs.

This article is a summary for general information and discussion only. It is not a full analysis of the matters presented and may not be relied upon as legal advice. Any company exploring or pursuing any of the transactions described above should consider engaging directly with legal counsel.

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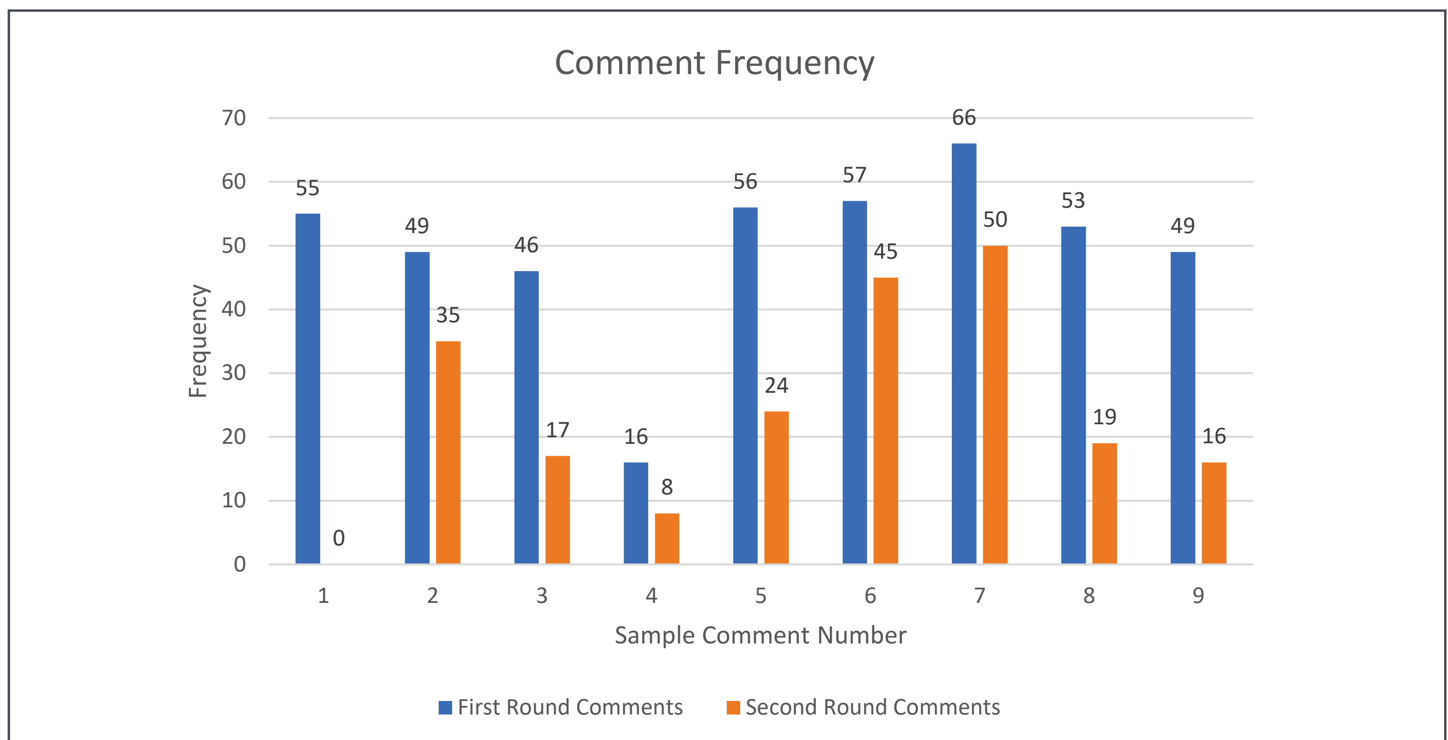
[1] In 2021, US-listed companies raised over $155 billion in proceeds through their initial public offerings, compared to only $8.6 billion in 2022. In the first quarter of 2023, global IPO volumes fell 8 percent as compared to global IPO volumes in the first quarter of 2022, with proceeds down by 61 percent. "What will it take for the IPO market to return," EY, April 20, 2023

SEC Turns Up Heat on Climate-Related Comment Letters

By Ryan A. Lilley and Farzad Damania

In September 2021, the Securities and Exchange Commission (SEC) provided a sample comment letter, which included nine potential climate-related comments the SEC may issue to companies regarding their climate-related disclosure or absence thereof. We have reviewed and analyzed the climate-related comment letters issued to over 70 companies on a stand-alone basis. Initially, it appeared that the SEC focused exclusively on larger companies with a market capitalization exceeding approximately $3.5 billion. However, during the second half of 2022, the SEC issued comments to companies with market capitalizations as low as approximately $500 million. Additionally, the SEC appears to be issuing significantly more first-round comments per company and about the same number of second-round comments per company. In our initial review of climate-related comment letters issued to 25 companies as of April 2022, the SEC issued 4.7 first-round comments per company. However, the SEC now issues an average of 6.1 first-round comments per company, representing a 30 percent increase. Companies responding to such comment letters continued to receive an average of approximately three second-round comments.

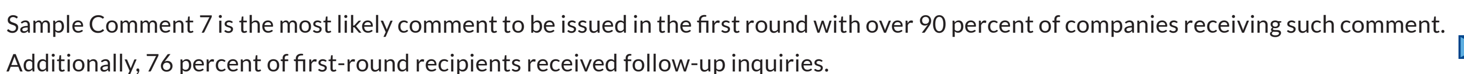
The chart below shows the frequency at which each sample comment has been issued in first- and second-round comment letters:



We note comment frequency for the following three sample comments:

- **Sample Comment 7**: "If material, discuss the physical effects of climate change on your operations and results. This disclosure may include the following:
  - severity of weather, such as floods, hurricanes, sea levels, arability of farmland, extreme fires, and water availability and quality;
  - quantification of material weather-related damages to your property or operations;
  - potential for indirect weather-related impacts that have affected or may affect your major customers or suppliers;
  - decreased agricultural production capacity in areas affected by drought or other weather-related changes; and
  - any weather-related impacts on the cost or availability of insurance."

Sample Comment 7 is the most likely comment to be issued in the first round with over 90 percent of companies receiving such comment. Additionally, 76 percent of first-round recipients received follow-up inquiries.



- **Sample Comment 6**: "To the extent material, discuss the indirect consequences of climate-related regulation or business trends, such as the following:
  - decreased demand for goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources;
  - increased demand for goods that result in lower emissions than competing products;
  - increased competition to develop innovative new products that result in lower emissions;
  - increased demand for generation and transmission of energy from alternative energy sources; and
  - any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions."

Sample Comment 6 is the second most likely first-round comment to be issued with 78 percent of companies receiving it and the most likely comment to get follow-up questions at a rate of 79 percent.

- **Sample Comment 1**: "We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report."

Sample Comment 1 is the fourth most likely comment to be issued in the first round but is notable because Companies appear to be least at-risk to draw additional comments based on their response to Sample Comment 1. Of the comment letters we reviewed, 55 companies were issued Sample Comment 1 and no companies were reissued Sample Comment 1.

Of the 73 companies for which we reviewed comment letters, only four companies avoided second-round comments altogether. These four companies acknowledged climate-related risk to their companies, defined terms such as "materiality," supported conclusory statements and cited relevant public filings whenever possible. While there can be no assurance that the SEC will not issue additional rounds of comments, companies that provide detailed analysis and support for conclusory statements appear to be the least likely to draw additional rounds of comments.

Going Forward

Starting in the first quarter of 2022, climate disclosure has been among the three most frequent topics drawing comment letters with respect to Form 10-K and Form 10-Q filings. In light of the SEC's proposed climate-change disclosure rules (see SEC Proposes Climate-Related Disclosure Requirements), we anticipate that the SEC will continue to issue comment letters similar to the comment letters discussed above. To avoid multiple rounds of comment letters from the SEC, companies should review their disclosures in light of the SEC's focus areas and consider providing as much detail as they can. While there is no sure-fire way to ensure that the SEC will not re-issue comments or issue a second or even third round of comments, there are steps companies can consider taking to reduce their securities compliance costs related to these climate-change comment letters, including the following:

- gathering company-specific climate change data;
- carefully considering the risks and potential financial and operational impact of climate change;
- disclosing such data and climate-related risks in periodic SEC filings; and
- providing details for the basis of company decisions related to materiality.

While companies may take each of these steps and still receive multiple comment rounds from the SEC, companies following these steps may be less likely to receive such comments and will be in a better position to adequately respond to the SEC.

For additional insight into climate-related comment letters, please see our initial review of the SEC's comment letters.

SEC No-Action Letters on Proxy Materials and Other Developments Reinforce Commission-Wide Commitment to ESG

By Danette Edwards, Richard Zelichov and Trevor Garmey

Any doubts about the commitment of the Securities and Exchange Commission (SEC or Commission) to environmental and social governance (ESG) disappeared in recent months, as its Division of Corporation Finance (DCF) slammed the door on requests by prominent issuers to exclude shareholder proxy proposals related to human rights, diversity, equity and inclusion ("DEI"), and climate change.

Read in isolation, the DCF decisions, which were memorialized in no-action letters from the SEC staff (Staff), may not seem groundbreaking. But when considered alongside other SEC activity, including (1) the growing number of ESG-focused comments from DCF, (2) numerous public statements about the importance of ESG by high-ranking SEC officials, (3) the SEC's recent $55.9 million settlement with Vale SA regarding its sustainability reports and ESG disclosures, and (4) the anticipated release of the final SEC rule on climate-related disclosures, the DCF proxy rulings reflect an agency-wide emphasis on "values-based" capitalism.

In this article, we start by analyzing DCF's no-action letters and demonstrate how the Staff has narrowly interpreted Rule 14a-8(i)(12)(i) of the Securities Exchange Act of 1934 (the Exchange Act) and related regulations, empowering activists to demand action on matters that, until recently, were not the focus of shareholder scrutiny. We then frame the no-action responses in the broader context of SEC actions across multiple Divisions and commentary from Commission leaders, demonstrating that the emphasis on ESG starts at the top, and filters down to ordinary matters of corporate regulation. Finally, we provide key takeaways for issuers struggling to manage the expanding impact of ESG across corporate operations.

I. The No-Action Letters

Shareholders of public companies may seek to have matters acted on by the board or management of a company by submitting proposals for inclusion in a corporate proxy statement if the proposal meets certain conditions. Even if more than fifty percent of the shareholders' votes are cast in favor of the proposal, the proposal is typically non-binding on a company or its board. As a practical matter, however, it is difficult for the board and management simply to ignore proposals that have support from a majority of shareholders. The SEC's rules concerning shareholder proposals do not require that the board or management include every proposal that is submitted and Rule 14a-8(i)(7) of the Exchange Act allows the exclusion of proposals concerning "ordinary business operations." Traditionally, when activists sought information on how a corporation was responding to a matter of broad social concern, issuers could exclude the proposal by

demonstrating the absence of any nexus between the issue and corporate operations. However, DCF issued a bulletin (the "2021 guidance") on November 3, 2021, regarding Rule 14a-8 of the Exchange Act, which instructed the Staff to focus not just on whether a proposal related to "ordinary business operations," but also indicated that they should consider whether a proposal addressed a "significant social policy." Put another way, the guidance informed issuers that (1) the Staff had discretion to determine matters of social significance, and (2) shareholder proposals implicating these matters cannot be excluded, regardless of the relevance to corporate operations. As discussed in more detail below, the recent no-action letters from DCF broadly align with the 2021 guidance.

A. Eli Lilly

This "significant social policy" approach from the 2021 guidance is reflected in a recent Eli Lilly no-action letter. As You Sow is a California non-profit that seeks to "harness corporate responsibility and shareholder power to create lasting change." In late 2022, As You Sow submitted a proposal for inclusion in Lilly's 2023 proxy statement, on behalf of four individual shareholders. Specifically, As You Sow proposed that Lilly commission a report on the "effectiveness" of "diversity, equity, and inclusion efforts," using "quantitative metrics for hiring, retention, and promotion of employees." Lilly wrote to DCF on December 23, 2022, asking to strike the proposal because it related to "ordinary" business matters. Lilly argued that the proposal, at its core, addressed the management of a corporate workforce. According to the company, workforce management was a "prime example of an ordinary business matter," and prior SEC precedent supported exclusion. By letter dated March 10, 2023, the Staff disagreed, finding that the proposal implicated "human capital management issues" with a "broad societal impact"—the precise outcome called for by the 2021 guidance. The Staff also rejected Lilly's request to exclude the proposal under Exchange Act Rule 14a-8(i)(10), a provision allowing exclusion of proposals that have been substantially implemented by the company. Through counsel, Lilly provided an analysis of its prior efforts at diversity and inclusion, including public statements and disclosed metrics. The Staff disposed of Lilly's substantial implementation argument, finding that "… it appears that the Company's public disclosures do not substantially implement the Proposal." A final aspect of the Lilly letter deserves particular attention. Lilly drew attention to the SEC letter to Deere & Company dated January 3, 2022, where the Staff allowed Deere to strike a proposal seeking broader data on employment and training practices. Lilly pointed out similarities between the shareholder proposal to Deere and As You Sow's request. The Staff did not specifically address its prior Deere decision, where it found that the proposal "micromanage[d]" Deere. Nor did the Staff reference similar determinations it made during the prior season that arguably had "precedential" value. Rather, it seems that the Staff implicitly found the "precedent" distinguishable because As You Sow's proposal to Eli Lilly explicitly focused on DEI while the earlier Deere proposal did not. Even though the proposals sought very similar data, the inclusion of a request for DEI metrics by As You Sow carried the day in favor of the shareholder. The lesson for issuers is that going forward, a nexus to ESG and DEI can transform a workforce-related proposal from mundane or improper "micromanagement" to meaningful in the eyes of the Staff.

B. Similar Issuer Proposals

Also in late 2022, a coalition of activists submitted a shareholder proposal to another prominent issuer, asking the company to "conduct a third-party, independent racial equity audit" that analyzed the impact of corporate operations on certain populations, and provided recommendations for reducing that impact. After receiving the request, the company wrote to DCF, asking to exclude the proposal from its forthcoming 2023 proxy statement under Exchange Act Rule 14a-8(i)(12)(i). That provision allows issuers to strike shareholder proposals that address "substantially the same subject matter" as a proposal within the prior five years if the earlier proposal did not pass. The issuer pointed the Staff to an earlier 2022 proposal by a separate group of activists requesting that the company analyze the impact of corporate operations on marginalized populations and civil rights. Despite a reasoned argument by the company that demonstrated nearly identical language across the two proposals, and evidence that less than one percent of shareholders supported the previous proposal, the Staff required the company to include the proposal in its 2023 proxy materials. The no-action letter has two significant implications for issuers. First, at least in matters related to ESG, the Staff will narrowly construe the language of Rule 14a-8(i)(12)(i). And second, even trivial modifications to a prior proposal that do not alter the underlying substance of a previous request are now sufficient to circumvent the rule. In other words, issuers that defeat an ESG-related proposal in 2023 could very well face a nearly-identical proposal in 2024—and should expect little sympathy from the SEC.

II. The Increase in ESG-Related Comment Letters

DCF has also increased the frequency of comments on climate-related disclosures provided by issuers in quarterly and annual filings. This trend began in 2021 after DCF published a sample comment letter (the "sample letter") that provided nine climate-related comments that the Staff could potentially transmit to issuers to ensure compliance with Regulation S-K. The sample letter demonstrated the broad sweep of the SEC's interest in ESG matters and instructed issuers to expect comments on risk factors (including policy and regulatory changes), management decision and analysis (including changes in law omitted from SEC filings, past and future capital expenditures related to ESG, and the potential economic impact of climate change), and the impact of ESG and climate change on compliance costs.

Since releasing the sample letter, DCF has substantially increased the frequency of its comments related to climate change. Internal research by Katten demonstrates that companies now receive, on average, at least 6 first-round comments from the Staff. DCF is also issuing more comments with each letter, and frequently following up with additional comments seeking more information. And very few issuers are avoiding second-round comments. These findings are particularly significant in light of the pending release of the SEC's final rule on climate-related disclosures. Many of the comments pointed to gaps between risk disclosures and Corporate Social Responsibility (CSR) reports. Such comments demonstrate that DCF views Regulation S-K as a powerful tool to police "greenwashing" — the practice of including broad commitments to climate and social goals in CSR reports that do not reflect actual corporate behavior. Such comments also demonstrate that DCF may diverge from the holdings of some courts that statements in documents like CSR reports and codes of conduct are not actionable under the securities laws because they are "inherently aspirational." *See Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268 (9th Cir. 2017); *In re Plains All American Pipeline, L.P. Sec. Litig.*, 307 F. Supp. 3d 583 (S.D. Tex. 2018). The publication of the final rule on climate change-related disclosures is likely to accelerate these efforts to force more fulsome disclosures and to police them more intensely.

III. The Vale Enforcement Action

The agency-wide embrace of ESG was also on display in the recent settlement of an enforcement action involving Vale S.A., a resource extraction company based in Brazil. The Staff first announced charges against Vale in April of 2022, based on the alleged failure of Vale to accurately disclose potential

risks related to its Brumadinho dam, which collapsed in 2019. The Complaint alleged that Vale's public statements about the dam and its overall commitment to safety — many of which were broad and prophylactic — "belied the safety risks" of the dam. And the charges also focused on Vale's sustainability reports and ESG disclosures, alleging these were "materially false" and misled investors about the stability of the dam, the prevailing culture of safety, and the "actual risk of catastrophic financial consequences" should any dam collapse. In resolving the case, the SEC specifically addressed the importance of ESG. Associate Director of Enforcement Mark Cave stated that "… public companies can and should be held accountable for material misrepresentations in their ESG-related disclosures, just as they would for any other material misrepresentation."

IV. Statements by SEC Management

The overall approach to ESG articulated in recent years by senior SEC management may drive aggressive interpretations of materiality in ESG enforcement actions going forward. As recently as April 6, 2023, SEC Chairman Gary Gensler highlighted the importance of diversity, equity, and inclusion, and his belief that investors are critically concerned about the accurate disclosure of climate risks. Those remarks are part of a pattern of consistent messaging from Chair Gensler about the increasing importance of ESG to the Commission. That pattern began shortly after Gensler was confirmed, when he spoke in London about enforcement priorities, including climate-related risk disclosures and ensuring that issuers honored ESG-related commitments in their daily operations. Chairman Gensler also instructed the Staff to examine the accuracy of "human capital disclosures" — the precise topic at issue in the Eli Lilly no-action letter. Chairman Gensler has set the tone at the top on ESG, and other senior SEC leaders have reinforced that messaging. For example, in November of 2022, the SEC's Director of Enforcement Gurbir Grewal spoke at the Institute on Securities Regulation and vowed to bring enforcement actions against companies that misled investors about climate risks. Importantly, Director Grewal linked SEC priorities, including the formation of the Commission's ESG Task Force, to investor concern, promising to be "on top of" ESG issues, because they are "important to investors."

V. Takeaways and Best Practices

As noted above, none of these developments are necessarily profound in isolation. Because ESG enforcement to date is in its infancy — the ESG Task Force has so far only been linked to three enforcement actions — it can be dangerously easy to marginalize. After all, Vale is not the first issuer to face regulatory scrutiny after an industrial accident. And, DCF has periodically modified its approach to proxy statements in the past to reflect changes in SEC priorities. But when viewing these developments in the aggregate, only one conclusion is possible: the SEC is fully committed to meaningful action on ESG issues. Issuers should therefore consider the regulatory activity discussed above as the opening salvo of a broader SEC offensive on ESG. Issuers should also expect that the SEC will increasingly side with climate and social activists seeking information on ESG-related corporate behavior and carefully consider whether ESG-related disclosures (and omissions) will be deemed material to retail and institutional investors after the fact. Issuers who fail to heed these warnings may find themselves in the crosshairs of the SEC and other regulators.

Article first published on May 16, 2023, on katten.com.

Navigating the Regulatory Landscape – SEC Adopts New Rules Requiring Increased Disclosure on Stock Buybacks – Including Quarterly Reporting of Daily Repurchase Activity

By Mark Wood, Timothy Kirby, Alyse Sagalchik, Vlad Bulkin, Brandon Bucio and Michelle Mount

On May 3, 2023, by a 3-2 vote, the Securities and Exchange Commission (SEC) adopted amendments to disclosure rules (the "new buyback disclosure rules") relating to repurchases of equity securities by issuers (or repurchases on their behalf), a practice that has continued to attract regulatory attention as the pace and volume of stock buybacks has shown no signs of abating. Despite a brief dip during the COVID-19 pandemic, continued economic uncertainty and a now-effective federal excise tax on stock buybacks that imposes a 1 percent tax on all repurchase activity (net of issuances)[i], stock repurchases in 2023 by S&P 500 companies are projected to surpass $1 trillion for the first time, with announced buybacks as of January 2023 already reaching $132 billion, or more than triple the amount from the comparable period last year.

Under the prior disclosure rules, domestic SEC registrants were required to include in their periodic reports on Forms 10-Q and 10-K, tabular disclosure of the monthly aggregate totals for all repurchase activity during the applicable fiscal quarter(s) covered by the report.[ii] Similar requirements were also previously imposed on Foreign Private Issuers, (FPIs) and registered closed-end management investment companies that are exchange-traded (Listed Registered Closed-End Funds). The new buyback disclosure rules impose substantially enhanced disclosure requirements on each of these classes of issuers, including that: (i) domestic issuers disclose daily repurchase activity (rather than aggregate monthly totals) on a quarterly basis on a new exhibit to be filed with their Form 10-Q and Form 10-K filings, (ii) FPIs disclose such information in annual reports on Form 20-F and quarterly on a new "Form F-SR," (iii) issuers provide narrative disclosure regarding the objectives and rationale of each repurchase plan and all repurchase activity that takes place under such plans and (iv) issuers affirmatively indicate by check box whether any officers or directors have engaged in purchase or sale activity within four business days before or after the public announcement of a new repurchase plan (or an announcement of the increase of capacity under an existing plan).

Although the new amendments will likely invite enhanced scrutiny of share repurchase programs generally, it is notable that the final rules reflect a significant step-back from the even more onerous requirements contemplated by the SEC's original rule proposal, which, for example, would have imposed a next-day reporting obligation with respect to all repurchase events. The SEC's press release announcing the adoption of the final rules is available here and the text of the adopting release and a summary fact sheet are available here and here. The final rules will become effective 60 days after their publication in the Federal Register.

An overview of the material features of the new share repurchase disclosure amendments and certain considerations for issuers going forward is provided below:

(a) Execution Date	(b) Class of Shares (or Units)	(c) Total Number of Shares (or Units) Purchased	(d) Average Price per Share (or Unit)	(e) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(f) Aggregate Maximum Number (or Approximate Dollar Value of Shares or Units) that May Yet Be Purchased Under the Publicly Announced Plans or Programs	(g) Number of Shares (or Units Purchased on the Open Market	(h) Number of Shares (or Units) Purchased that are Intended to Qualify for the Safe Harbor in Rule 10b- 18	(i) Total Number of Shares (or Units) Purchased Pursuant to a Plan that is Intended to Satisfy the Affirmative Defense Conditions of Rule 10b5-1(c)
Total								

SEC Adopts New Rules Requiring Increased Disclosure on Stock Buybacks (cont.)

- Quarterly Reporting of Daily Repurchase Activity. The new buyback rule requires quarterly reporting by an issuer of daily repurchase data. The disclosure must be presented in a tabular format on a new Exhibit 26 to a company's periodic reports on Form 10-Q and Form 10-K, beginning with the first full quarter that starts on or after October 1, 2023 (i.e., for domestic issuers with a December 31 fiscal year-end, beginning with their upcoming 2023 Form 10-K filing). Later effective dates apply for FPIs and Listed Registered Closed-End Funds, but there are no delays or phase-in periods for other categories of registrants, such as smaller reporting companies. An example of the newly-required tabular disclosure, which must be provided in XBRL-tagged format, is presented below:
- Narrative Disclosure. In addition to the tabular disclosure described above, under the new rule, each company will also be required to disclose, with corresponding references to the relevant activity in the tabular disclosure: (i) the objectives and/or rationales for each share repurchase plan or program, (ii) the process used to determine the amounts of any repurchases that occurred under the relevant plan, (iii) the number and nature of any share repurchases that occurred other than through a publicly announced program (such as pursuant to equity compensation arrangements) and (iv) any policies, procedures or restrictions relating to the purchases or sale of equity securities by its officers and directors during a repurchase program. This disclosure is in addition to existing requirements that a company disclose: (a) the date each of its existing repurchase plans was publicly announced and went into effect, (b) the dollar or share amounts approved for repurchase with respect to such plans, (c) the expiration date of such plans and (d) each plan that has expired in the relevant period or under which the company does not intend to make any further purchases.
- Indication of Director or Officer Purchases or Sales Within Four Business Days of Plan Announcement. The amendments also require that an issuer indicate by a checkbox preceding the tabular disclosure whether any officer or director subject to reporting requirements under Section 16(a) of the Securities Exchange Act of 1934 (Exchange Act) purchased or sold shares that were the subject of the issuer's publicly-announced repurchase plan within four business days before or after the company's announcement of such plan (or its announcement of an increase of repurchasing capacity under the relevant plan). In determining whether to check the box for this purpose, domestic issuers are permitted to rely upon Section 16 filings (on Forms 3, 4 and 5) made by "Section 16" officers and directors. Since FPIs' officers and directors are not subject to reporting requirements under Section 16(a), FPIs will be required to ask their directors and

members of senior management to provide relevant written representations to assist FPIs in preparing and verifying their related disclosure. The SEC noted that additional disclosure that provides explanatory context with respect to any such activity may be included if the company believes such disclosure would be helpful to investors.

- Issuer 10b5-1 Trading Plans. In connection with their buyback programs, many companies adopt 10b5-1 trading plans, which, if properly adopted and executed, are designed to provide an issuer with an affirmative defense to insider trading claims relating to an issuer's purchase of securities. Consistent with the SEC's December 2022 adoption of amendments to disclosure requirements with respect to Rule 10b5-1 trading plans adopted by officers and directors (Katten's previous coverage of which is available here), the new buyback rule requires a company that adopts, modifies or terminates a Rule 10b5-1 trading plan to disclose the date on which it adopted, modified or terminated the plan, the duration of the plan, and the aggregate number of shares to be purchased or sold under the plan in its filings on Form 10-Q and Form 10-K. Note that, in contrast to the recent rule amendments applicable to officers and directors (and in a step back from previous iterations of the buyback disclosure rule proposals applicable to issuers which had included them), the SEC declined to impose under the new buyback disclosure rules additional conditions on the availability of the Rule 10b5-1 affirmative defense with respect to Rule 10b5-1 plans adopted by issuers, such as requiring a cooling-off period or limiting the use of overlapping plans.
- Foreign Private Issuers. The new rules require that FPIs (other than FPIs that are eligible to utilize the US-Canadian Multijurisdictional Disclosure System (MJDS)) provide the tabular disclosures described above of aggregate daily repurchase activity on a quarterly basis on new Form F-SR, beginning with each FPI's first full fiscal quarter that begins on or after April 1, 2024. The new rules replace the current requirements under Item 16E of Form 20-F to disclose monthly repurchase data. The disclosure requirements apply to any FPI that has a class of equity securities registered pursuant to Section 12 of the Securities Exchange Act and does not file Forms 10-Q and 10-K (e.g., because it instead files Forms 6-K and 20-F). New Form F-SR must be filed within 45 days of the FPI's fiscal quarter end. Additionally, the narrative disclosure requirements described above must be included in Form 20-F filings subsequent to the effective date and after the FPI's first Form F-SR has been filed.
- MJDS-Eligible Issuers. Since MJDS-eligible issuers are subject to a separate reporting regime that is, in most respects, governed by Canadian disclosure requirements promulgated by Canadian securities regulatory authorities, the SEC declined to extend the new buyback disclosure rules to MJDS-eligible issuers.
- Listed Registered Closed-End Funds. Listed Registered Closed-End Funds are required to provide the tabular and narrative disclosures described above semi-annually, beginning with the Form N-CSR that covers the first six-month period that begins on or after January 1, 2024. However, closed-end investment companies that elect to be regulated as business development companies under the Investment Company Act of 1940, as amended, will need to comply with the reporting requirements that apply to all registrants that file periodic reports on Form 10-K and Form 10-Q.

Considerations Going Forward

Agreements with intermediaries. In light of the new buyback disclosure rules, companies should evaluate their existing internal processes and procedures for collecting and reporting data related to share repurchases, including consulting with the agents and broker-dealers administering the execution of such repurchase programs on their behalf to ensure they are able to track and populate all of the information required to be disclosed (for example, whether any trading activity by directors and officers has occurred within four business days before or after a plan announcement as discussed above). Companies may wish to review the agreements in place with these intermediaries and update the agreements if necessary to ensure any additional required information by the issuer for compliance purposes is obligated to be provided.

Considerations around narrative disclosures. Companies will also need to carefully consider the content of their narrative disclosures with respect to repurchase activity and, specifically, the requirement that the "objectives or rationales" underlying their share repurchase plans and activity be disclosed. It is recommended that a company's board of directors carefully evaluate these matters and record the criteria and rationale behind their buyback programs in their board and committee meeting minutes and resolutions. In the SEC's adopting release, the SEC noted that the provision of "boilerplate disclosure" regarding objectives or rationales would not be considered sufficient and that repurchase plans and events must be analyzed on a case-by-case basis to ensure that any related disclosures are accurate (which may require the provision of

multiple objectives or rationales in the event of multiple plans and/or multiple purchases under singular or multiple plans). The SEC highlighted the following areas as potentially helpful contextual information issuers may wish to disclose:

- The source of funds for the repurchase and the decision to use such funds for repurchases as opposed to other expenditures.
- The anticipated impact of the repurchases on the value of remaining shares.
- Whether the issuer believes its stock is undervalued at the time of repurchase.

Compliance and training measures. To ensure compliance with the new buyback disclosure rules, companies may wish to consider establishing specific disclosure controls, including quarterly reviews of repurchase disclosure. It may also be appropriate to establish or supplement periodic training programs for management and directors that engage with the public (for example, on earning calls) regarding the contours of the new rules, in order to ensure that the nature and content of their dialogue is consistent with the company's existing disclosure and that proper controls regulating the timing and nature of their trading activity is monitored. Issuers may also wish to consider whether updates to their insider training policies prohibiting trading activity within the four business days before or after an announcement of a new repurchase program is appropriate, given the new requirement that issuers indicate via check box whether such activity has occurred.

Strategic timing considerations. Given the increased amount of information that will be available regarding repurchase plans and activity, and the increasingly granular nature of such information, companies should expect increased scrutiny of both their existing plans and of specific repurchases from regulators and the public. As a result, thought should be given to both the timing and optics of announcements with respect to repurchases, the plans themselves, and specific repurchase events, particularly when sale or purchase activity by prominent insiders may overlap with activity under an issuer's repurchase plan, to avoid suggestions of impropriety.

*Subsequent Legal Challenges. On May 12, the US Chamber of Commerce (Chamber of Commerce), the Texas Association of Business, and the Longview Chamber of Commerce (collectively the "Petitioners") filed a lawsuit in the US Court of Appeals for the Fifth Circuit that requested the SEC be prohibited from implementing its new share repurchase rules. Based on public statements (as the materials submitted to the court have not yet been made public), the Petitioners argued that certain procedural defects exist with respect to the enactment of the new share repurchase disclosure rules, including that the cost-benefit analysis used as justification of adoption should be updated to account for the 1 percent excise tax on share repurchases implemented under the Inflation Reduction Act of 2022 and that the rules force companies to disclose important managerial decisions, which results in compelled speech in violation of the First Amendment.

The Chief Policy Officer at the Chamber of Commerce stated that "the lawsuit seeks to protect returns for investors as well as the ability of companies to make decisions free from government micromanagement." Issuers should continue to comply with the new rules adopted by the SEC until a court hears the case to either amend or repeal the new share repurchase rules.

Article, published first as a client advisory on May 12, was updated on May 23 to include information on subsequent legal challenges.

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[i] The 1 percent federal excise tax on stock buybacks does not apply, among other exemptions, to repurchases by a regulated investment company (as defined in Section 851 of the Internal Revenue Code of 1986, as amended) or a real estate investment trust.

[ii] See Item 703(a) of Regulation S-K and Item 16E of Form 20-F. Previously, Foreign Private Issuers were required to report such information in Form 20-F filings with respect to each month in the fiscal year covered by such report. Registered closed-end management investment companies that are exchange-traded were also required to disclose such share repurchase activity, semi-annually on Form N-CSR.

SEC Adopts T+1 Settlement Cycle

By Alexa Rollins

On February 15, 2023, the Securities and Exchange Commission (SEC) adopted amendments to Exchange Act Rule 15c6-1, including an amendment that decreased the standard settlement cycle for most broker-dealer transactions in securities from two business days after the trade date (T+2) to one business day after the trade date (T+1) (*15c6-1(a)*). Additionally, security-based swaps are now excluded from the settlement cycle requirements under Rule 15c6-1(a) (*15c6-1(b)*). Lastly, the settlement cycle for firm commitment underwritten offerings for securities that are priced after 4:30 p.m. ET was shortened from four business days after the date of the contract to two business days after the date of the contract (*15c6-1(c)*).

Note that parties may still vary settlement dates by express agreement at the time of the transaction. Moreover, the exceptions to Rule 15c6-1(a) and (c) remain on the whole, unaltered, meaning Rule 15c6-1(a) and (c) do not apply to contracts (i) for the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not distributed through an automated quotation system of a registered securities association or (ii) for the purchase or sale of securities that the SEC may exempt from the requirements of 15c6-1(a) if it finds that such exemption is consistent with the public interest and investors' protection.

According to the SEC, the final rules have been crafted to address recent bouts of volatility in the market, including the effects of the COVID-19 pandemic and the meme stock events of 2021, curtail market participants' exposure to liquidity, credit and market risks resulting from unsettled securities trades, and improve efficiency in the market, specifically by improving the processing of institutional trades and facilitating straight-through processing.

Practice Point - Derivative Securities

Investors and issuers alike would be well served to consider the impact of a T+1 settlement period on, among other things, certain derivative securities, such as convertible debt securities and warrants. For example, many such securities require that shares of common stock issuable upon conversion or exercise be delivered within the standard settlement period for equity trades effected by US broker-dealers. Accordingly, the issuer of such a security should ensure that it and its transfer agent are prepared to timely settle conversions or exercises, as applicable, following the effectiveness of new Rule 15c6-1(a). On the other hand, an investor that expects to settle trades effected through US broker-dealers by delivering shares of common stock issuable upon exercise or conversion of a derivative security should ensure that the instrument governing the terms of such exercise or conversion is drafted in such a manner that the issuer is obligated to deliver underlying shares within the T+1 settlement period.

Compliance Date

The compliance date for the rule amendments is May 28, 2024. However, unlike the rest of the amendments to Rule 15c6-1, the amendment to Rule 15c6-1(b) excluding security-based swaps became effective on May 5, 2023.

Save the Date

Society for Corporate Governance National Conference

June 20-23, Salt Lake City, Utah

Corporate governance professionals are gathering in Salt Lake City to take a deep dive into governance issues, learn the latest developments and network with industry leaders during "A Balanced Approach," the 2023 Society for Corporate Governance national conference. Session topics address a variety of topics, including balancing risk; the past, present and future of ESG; human capital management and diversity; cybersecurity and the board; the changing nature of work and employee demographics; and racial diversity.

Learn more about the 2023 Society for Corporate Governance National Conference.

The SPAC Conference

June 28-29, Rye, New York

Industry professionals focused on special acquisition companies join June 28-29 in Rye, New York, for The SPAC Conference to learn the latest information required to thrive in the SPAC market. Sessions cover the state of the market, the future of SPACs, minimizing risk, government regulation, and what public investors are looking for in a deal.

Learn more about The SPAC Conference 2023.

H.C. Wainwright 25th Annual Global Investment Conference

September 11-13, New York City, New York

A leading investment conference, the H.C. Wainwright Global Investment Conference draws together leaders from public and private companies, industry executives, business development executives, institutional investors, private equity firms and venture capitalists. Attendees hear the latest from industry leaders and benefit from investor one-on-one meetings and networking opportunities.

Learn more about the H.C. Wainwright 25th Annual Global Investment Conference.

43rd Annual Ray Garrett Jr. Corporate and Securities Law Institute

October 5-6, Chicago, Illinois

The preeminent conference of its kind in the Midwest, the Ray Garrett Jr. Corporate and Securities Law Institute, brings together senior officials from the SEC and leading securities practitioners. Sessions provide private practitioners and corporate counsel with a timely analysis of current securities and corporate law developments confronting publicly and privately held corporations.

Look here for details on as they are posted about the 43rd Annual Ray Garrett Jr. Corporate & Securities Law Institute.

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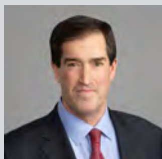

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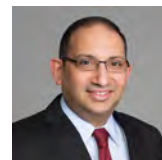

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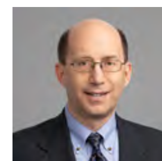

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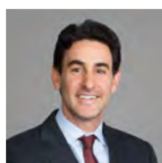

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