Katten
Katten Muchin Rosenman LLP

Corporate & Financial
Weekly Digest

October 6, 2017 Volume XII, Issue 38

SEC / CORPORATE

SEC Provides Regulatory Relief to Companies Impacted by Recent Hurricanes

On September 28, the Securities and Exchange Commission (SEC) announced its issuance of an order and its adoption of interim final temporary rules to provide regulatory relief to companies, including publicly traded companies, investment companies, accountants and transfer agents, affected by Hurricanes Harvey, Irma and Maria. The order and interim rules conditionally exempt affected persons from certain requirements of the federal securities laws for specified periods, and extend filing deadlines for specified reports and forms for issuers subject to reporting obligations under Regulation Crowdfunding and Regulation A.

With respect to registrants subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (Exchange Act), and persons required to make filings with respect to such registrants, the SEC order provides an extension to such registrants and persons for filing deadlines of Exchange Act reports, schedules and forms (including periodic and current reports, proxy statements, Schedules 13D and 13G and Section 16 filings) when each of the following conditions is satisfied:

- The registrant or other person is not able to meet a filing deadline due to Hurricane Harvey, Hurricane Irma or Hurricane Maria and their respective aftermaths;
- The registrant or other person files any report, schedule or form required to be filed with the SEC during the applicable period of relief on or before the applicable deadline (set forth below); and
- In any such report, schedule or form filed pursuant to the order, the registrant or other person discloses that the registrant or person is relying on the SEC's order and states the reasons why, in good faith, the registrant or person could not file on a timely basis.

When such conditions are met, affected registrants or other persons will be entitled to extended filing deadlines for reports, schedules or forms required to be filed within specified time periods as follows:

- Harvey: reports, schedules or forms due from and including August 25 to October 6 must be filed by October 10.
- Irma: reports, schedules or forms due from and including September 6 to October 18 must be filed by October 19.
- Maria: reports, schedules or forms due from and including September 20 to November 1 must be filed by November 2.

The order also provides an exemption from the requirements to furnish proxy and information statements, annual reports and other soliciting materials to security holders with mailing addresses in affected areas where the registrant's common carrier has suspended delivery service of the type or class customarily used by the registrant, and subject to meeting other conditions.

The temporary rules provide similar (but even further extended) relief for issuers subject to reporting obligations pursuant to Regulation Crowdfunding and Regulation A.

The SEC's press release provides additional guidance that clarifies the application of the regulatory relief provided by the order and the temporary rules. For example, a company relying on the order will be considered current and timely in its Exchange Act filings for purposes of Form S-3 eligibility, or current in its Exchange Act filings for purposes of Form S-8 eligibility and current public information eligibility requirements of Rule 144(c), during the applicable relief period, if the registrant was current (and timely, in the case of Form S-3 eligibility) in its Exchange Act filings as of the first day of the applicable relief period; and the registrant would continue to be considered current (and timely, in the case of Form S-3 eligibility) following the applicable relief period if it files any required Exchange Act report on or before October 10 (for those relying on the order due to Hurricane Harvey), October 19 (for those relying on the order due to Hurricane Irma), or November 2 (for those relying on the order due to Hurricane Maria), as applicable.

The SEC's press release on the SEC order and temporary rules is available here. The full text of the order is available here, and the full text of the temporary rules is available here.

BROKER-DEALER

FINRA Board of Governors Authorizes Rule Proposals at September Meeting

Last week, the Financial Industry Regulatory Authority Board of Governors (Board) had its September meeting. Among other things, the Board approved the publication of two rule proposals.

In particular, the Board authorized the publication of a proposed rule that would allow firms to use technology to conduct remote inspections of certain qualifying offices that have a limited number of associated persons and where only low-risk activities occur. Additionally, the Board agreed to publish a proposed rule that would provide investors with enhanced disclosures through BrokerCheck, such as additional information about individuals and firms with both broker-dealer and investment adviser registrations, and that would allow firms to include in BrokerCheck a comment about arbitration awards pertaining to the firm. The Regulatory Notices requesting comment on these proposals have not yet been published.

A full summary of the Board's September meeting is available here.

SEC Approves FINRA Rule Change to Subject Capital Acquisition Brokers to Pay-to-Play Rules

On September 29, the Securities and Exchange Commission approved the rule proposal of the Financial Industry Regulatory Authority to subject capital acquisition brokers (CABs) to the same pay-to-play restrictions already applicable to non-CAB member firms. As explained in more detail in this Katten advisory, CABs are FINRA members that are engaged in a limited range of broker-dealer activities, such as advising firms on capital raising and corporate restructuring or acting as a private placement agent to institutional investors (subject to certain conditions). CABs elect to be treated as such and are subject to a separate set of streamlined FINRA rules.

The SEC's pay-to-play rules prohibit an investment adviser and its covered associates from providing or agreeing to provide payment to any person to solicit a government entity for investment advisory services on behalf of the investment adviser, unless the person is a "regulated person." The SEC defines a "regulated person" to include a FINRA member firm subject to a FINRA pay-to-play rule. FINRA's new rule clarifies that CABs are subject to FINRA's pay-to-play rules, and CABs, therefore, constitute "regulated persons." Once the rule takes effect, an investment adviser and its covered associates could make payments to a CAB to solicit a government entity for investment advisory services. Certain pay-to-play recordkeeping requirements will also apply to CABs.

More information is available in the SEC release available here. Additional information on the rule proposal is available in the August 25 edition of the *Corporate & Financial Weekly Digest*.

ANTITRUST

US Department of Justice Challenges Acquisition Seven Months After Closing

On September 26, the Antitrust Division of the US Department of Justice (DOJ) challenged Parker Hannifin Corporation's acquisition of CLARCOR Inc. The challenge was launched seven months after the parties completed the antitrust review required by the Hart Scott Rodino Act (HSR) and closed on the transaction. The DOJ seeks to unwind a portion of the acquisition by forcing Parker Hannifin to divest either Parker Hannifin's or CLARCOR's aviation fuel filtration assets, so that a separate competitor can be created in the aviation fuel filtration business. The complaint alleges that the parties are the only two US manufacturers of aviation fuel filtration products that meet the technical specifications required by airlines, the US military and other US purchasers of aviation fuel. The complaint further alleges that the parties are head-to-head competitors in the sale of aviation fuel filtration systems and aviation fuel filtration elements.

The DOJ press release announcing the lawsuit claims that Parker Hannifin failed to provide certain documents and data concerning the fuel filtration business and refused to enter into a hold separate agreement covering the fuel filtration assets while the DOJ concluded its investigation. In recent years the DOJ and the Federal Trade Commission have challenged a number of consummated M&A transactions where no HSR filing was required. This is a rare post-closing challenge where the parties went through the HSR process.

EU/BREXIT DEVELOPMENTS

ESMA Chairman Comments on MiFID II implementation and Brexit

On September 29, Reuters published comments from European Securities and Markets Authority (ESMA) Chairman Stephen Maijoor on the implementation of the significantly revised and updated Markets in Financial Instruments Directive (MiFID II and its subordinate regulations and directives) and the implications of Brexit.

The article reports that in connection with the upcoming implementation of MiFID II, Mr. Maijoor believes that "We [the European legislative bodies and regulators] are prepared for the 3rd of January deadline. We are not planning at all for chaos—that is not a word we recognize […] That is not to say there might not be some glitches at the start. It's a very broad piece of legislation, but overall we are confident about implementation."

Mr. Maijoor noted in the article that EU regulators would likely look differently on breaches of the new rules on January 4, 2018, from breaches that occur subsequently—which follows on from reports that the Financial Conduct Authority (FCA) has said that it will not punish firms for "not meeting all requirements straight away where there is evidence they have taken sufficient steps to meet the new obligations by the start date" (based on comments from Mark Steward, FCA executive director of enforcement, as reported on September 20). What is clear, though, is that firms across the European Union and elsewhere need to be able to show that they have taken steps to try to meet MiFID II's requirements if they are to avoid enforcement action.

The cross-over between MiFID II implementation and Brexit was noted in Mr. Maijoor's comments in that MiFID II had been drafted in such a way that the most liquid European markets (including, significantly, those of the United Kingdom) would be within the European Union; and the United Kingdom's departure would have some impact on the workings of the new rules, though the extent of the impact will depend on the outcome of the ongoing Brexit negotiations. To this end, Mr. Maijoor commented that ESMA has commenced an assessment of the implications of a "hard" Brexit (where UK and EU firms do not have easy access to each other's markets). It remains to be seen what those implications might be.

The article by Reuters is available here.

ESMA Translations of Guidelines on MiFID II Reporting, Recordkeeping and Clock Synchronization

On October 2, the European Securities and Markets Authority (ESMA) published the official, finalized versions of its Guidelines on transaction reporting, order recordkeeping and business clock synchronization under MiFID II—each translated into the official languages of the European Union.

The finalized Guidelines appear on ESMA's webpage in each of the official languages, with the English language version having been published originally almost a year ago on October 10, 2016 (also available from ESMA online here).

The Guidelines apply from January 3, 2018, when MiFID II takes effect across the European Union and European Economic Area (EEA) and apply to investment firms, trading venues, approved reporting mechanisms and national regulators, and are focused on the submission of transaction reports, order recordkeeping and the associated requirements for the synchronization of business clocks.

An ESMA press release of the same date notes that EU/EEA regulators are obliged to notify ESMA whether they will comply with the Guidelines or not within two months (i.e., before December 1).

ESMA Publishes Additional Guidance on Direct Electronic Access

On October 3, the European Securities and Markets Authority (ESMA) updated its questions and answers on market structures topics (Q&A) under the revised Markets in Financial Instruments Directive (MiFID II) and the accompanying Markets in Financial Instruments Regulation. The updated ESMA Q&A addresses several open questions regarding the provision and receipt of direct electronic access (DEA) services. In the first instance, ESMA responded to a question regarding the best execution obligations owed by the operator of an organized trading facility (OTF) when third-party brokers provide DEA to the OTF. ESMA restated that OTF operators owe best execution obligations to their clients trading on the OTF and should follow their best execution policy when executing client orders. ESMA also noted that the OTF operator's clients (the brokers using the OTF) owe best execution obligations to their underlying clients, and that a DEA order from such an underlying client to a broker using the OTF could be considered a client-specific instruction, in which case the order could qualify for a carve-out from the MiFID II best execution regime applicable to the broker.

Additionally, ESMA answered a question regarding the scope of the obligation on DEA providers to undertake suitability checks and controls with respect to their DEA clients. ESMA confirmed that the obligations that apply to DEA providers under MiFID II extend to cover clients that are not investment firms authorized under MiFID II, and further stated that all clients with access to a European trading venue through several layers of intermediaries (known as "sub-delegated" DEA) must be subject to the relevant controls and suitability checks in MiFID II and the relevant regulatory technical standards.

The updated ESMA Q&A 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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