Katten

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DUE TO THE INDEPENDENCE DAY HOLIDAY, *CORPORATE & FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON JULY 3. THE NEXT ISSUE WILL BE DISTRIBUTED ON JULY 10.

SEC/CORPORATE

SEC Division of Corporation Finance Issues Additional Disclosure Guidance Related to COVID-19 Pandemic

On June 23, the Division of Corporation Finance (the Division) of the Securities and Exchange Commission issued CF Disclosure Guidance: Topic No. 9A (Topic 9A) providing additional disclosure considerations for public reporting companies regarding operations, liquidity and capital resources disclosures in light of business and market disruptions related to the COVID-19 pandemic. Topic 9A supplements CF Disclosure Guidance Topic No. 9 issued by the Division on March 25, 2020 and discussed in Katten's advisory "COVID-19 Impact on Public Disclosure on SEC Reporting Companies."

The Division notes, in Topic 9A, their view that it is important for reporting companies to provide robust and transparent disclosures about how such companies are addressing short- and long-term liquidity and funding risks in light of current economic conditions. Noting that, while some companies have made relevant disclosures in earnings releases, the Division encourages reporting companies to evaluate, in light of materiality considerations, the extent to which such disclosures should also be included in Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A).

In Topic 9A, the Division encourages reporting companies to consider a broad range of questions in preparing disclosures related to COVID-19 and current economic conditions, including among others:

- What are the material operational challenges that management and the Board of Directors are monitoring and evaluating?
- How is your overall liquidity position and outlook evolving?
- Have COVID-19 related impacts affected your ability to access your traditional funding sources on the same or reasonably similar terms as were available to you in recent periods?
- Are you at material risk of not meeting covenants in your credit and other agreements?
- Have you reduced your capital expenditures or ceased any material business operations or disposed of a material asset or line of business?
- Have you altered terms with your customers, such as extended payment terms or refund periods, and if so, how have those actions materially affected your financial condition or liquidity?

Further, Topic 9A provides that reporting companies that are receiving federal assistance under the CARES Act, including through loans or tax relief, should consider the impact of that assistance on their financial condition, results of operations, liquidity and capital resources. Consideration in disclosures should be given to the material terms and conditions of the federal assistance (including a company's expectations as to compliance with such terms and conditions), any restrictions imposed by the federal assistance (e.g., as to seeking other sources of funding or maintaining certain employment levels) and whether the reporting company expects to change its operations in any material way once the restrictions lapse.

Finally, Topic 9A reminds reporting companies to consider whether current conditions and events, taken as a whole, raise substantial doubt about the company's ability to meet its obligations as they become due within one

year after issuance of the financial statements (and, accordingly, continue as a going concern) and if so, to provide required disclosures in the company's financial statements and consider appropriate disclosures in the company's MD&A.

Topic 9A is available here.

BROKER-DEALER

SEC and Antitrust Division of DOJ Sign MOU

On June 22, the Securities and Exchange Commission and the Department of Justice's Antitrust Division announced a Memorandum of Understanding (MOU) that is intended to foster collaboration between the agencies with respect to the enhancement of competition in the securities industry.

The MOU includes regular discussions between the agencies to review relevant law enforcement and regulatory matters, including periodic meetings among the agencies' officials. The MOU also provides for exchanges of information and expertise.

The SEC press release is available here.

SEC Chairman Speaks on Modernizing US Equity Market Structure

On June 22, Securities and Exchange Commission Chairman Jay Clayton and Brett Redfearn, the Director of the SEC's Division of Trading and Markets, spoke together on an SEC-sponsored virtual forum about modernizing the US Equity Market Structure. Chairman Clayton identified the market for thinly traded securities, retail fraud and National Market System (NMS) market data and access as three current targets for SEC initiatives.

Director Redfearn indicated that one such initiative with respect to thinly traded securities may be to provide incentives to market makers with regard to this segment of the markets. Director Redfearn also discussed the potential to adjust the market structure of Regulation NMS as it relates to thinly traded securities.

With respect to retail fraud, Chairman Clayton cited proposed amendments to Rule 15c2-11 that are designed to increase the availability of issuer information and modernize the rules governing quotations for over-the-counter (OTC) securities. Director Redfearn focused on enhancing transparency for OTC securities by requiring that information about the issuer and its security be current and publicly available and reducing regulatory burdens on broker-dealers with respect to OTC securities that are less susceptible to fraud and manipulation.

With respect to NMS market data and access, Chairman Clayton referred to SEC initiatives for this year intended to address the process for review of NMS market data fee changes, governance of the NMS market data plans and infrastructure for NMS market data. Director Redfearn indicated that the SEC would soon consider a staff recommendation to rescind an exception to the normal procedure for review and approval of NMS plan amendments under Rule 608 of Regulation NMS that allows fee changes to be immediately effective. Director Redfearn also highlighted the SEC's requirement that self-regulatory organizations (SROs) submit a proposed new NMS plan to adjust the voting rights for exchange groups with multiple SROs and expand voting participation to key stakeholders with a diversity of views. Next, Director Redfearn discussed expanding the content of NMS market data and highlighted a proposal to lower the round lot size for many higher-priced securities while not expanding the scope of the trade-through rule, Rule 611 of Regulation NMS, to the new round-lot quotes. Further, Director Redfearn indicated that another majority objective of the Regulation NMS market data proposal is to reduce the latency of its infrastructure compared to the exchange proprietary data feeds.

Lastly, Chairman Clayton and Director Redfearn discussed the SEC's role in ensuring that exchange fees for market data and connectivity comply with the Securities Exchange Act of 1934.

The SEC transcript of the speech is available here.

SEC Approves Changes to FINRA's Suitability and Non-Cash Compensation Rules

On June 19, the Financial Industry Regulatory Authority (FINRA) issued a regulatory notice that it had amended its Capital Acquisition Broker (CAB) suitability rule and rules governing non-cash compensation to align with the Securities and Exchange Commission's Regulation Best Interest (Reg BI) with respect to the requisite standards of conduct.

Specifically, FINRA has amended its suitability rule, FINRA Rule 2111, to state that it will not apply to recommendations subject to Reg BI. Similarly, FINRA's non-cash compensation rules have been amended so that the addressed arrangements must also be consistent with the applicable requirements of Reg BI.

These changes were approved by the SEC and become effective on June 30, 2020, the compliance date of Reg BI.

FINRA Regulatory Notice 20-18 is available here.

DERIVATIVES

See "CFTC Approves Two Final Rules and Two Proposed Rules at June 25 Open Meeting" in the CFTC section.

Prudential Regulators Revise Initial Margin Rules for Uncleared Swaps

On June 25, the five prudential regulators responsible for the margin rules for bank swap dealers (the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Farm Credit Administration and the Federal Housing Finance Agency) adopted one final rule and one interim final rule that modify their original framework for margining uncleared swaps.

The final rule amends the original swap margin rule in the following noteworthy ways:

1. It permits swaps entered into prior to an applicable compliance date (legacy swaps) to retain their legacy status in the event that they are amended to replace a discontinued interest rate.

2. It exempts non-cleared swaps between a bank and its affiliates from the initial margin requirements (subject to a limit equal to15 percent of then bank's tier 1 capital), but clarifies that swaps between a bank and its affiliates also are subject to sections 23A and 23B of the Federal Reserve Act of 1913 and Regulation W.

3. It introduces an additional compliance date for initial margin requirements (the so-called Phase 6).

4. It clarifies that initial margin trading documentation is not required prior to the time that a swap dealer is actually required to collect or post initial margin.

5. It permits legacy swaps to retain their legacy status in the event that they are amended due to technical amendments, notional reductions or portfolio compression exercises.

The interim final rule aligns the US schedule for the phase-in of initial margin for uncleared swaps with the revised global schedule recommended by the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) under which Phase 5 entities (with average annual notional swap portfolios of $50 billion to $750 billion) must comply starting September 1, 2021 and Phase 6 entities (with average annual notional swap portfolios of $8 billion to $50 billion) must start compliance on September 1, 2022.

The final rule, which will be effective 60 days after publication in the *Federal Register*, available here.

The interim final rule, available here, is open for comment for 60 days and will be effective 61 days after publication in the *Federal Register*.

CFTC

NFA Sets Effective Date for Rule Amendments Related to NFA's Penalties and Disciplinary Procedures

On June 22, National Futures Association (NFA) issued Notice I-20-26 announcing that the recent amendments made to Part 3 of its Compliance Rules will become effective on August 31, 2020. NFA Compliance Rule 3-14 was amended to allow an NFA disciplinary panel to impose a monetary penalty of up to $500,000 per rule violation at the conclusion of an NFA disciplinary proceeding. This amendment is meant to further deter violations of NFA requirements and provide NFA's disciplinary panels with greater flexibility in assessing penalties. In addition, NFA also made several other minor amendments to its disciplinary procedures set forth in Part 3 of its Compliance Rules.

Notice I-20-26 is available here.

CFTC Approves Two Final Rules and Two Proposed Rules at June 25 Open Meeting

On June 25, the Commodity Futures Trading Commission held an open meeting where it approved two final rules, advanced two proposed rules and withdrew a previously proposed rule and supplemental proposal.

The two approved final rules include:

- Amendments to Part 37 of CFTC regulations that prohibit post-trade name give-up for swaps executed, pre-arranged, or pre-negotiated anonymously on or pursuant to the rules of a swap execution facility (SEF) and intended to be cleared. The final rule provides an exception for package transactions that include a component transaction that is not a swap intended to be cleared, including but not limited to US Treasury swap spreads. This rule becomes effective 60 days after publication in the *Federal Register*; however, the CFTC will phase in the compliance dates for the amendments. Swaps subject to the trade execution requirement under section 2(h)(8) of the Commodity Exchange Act (CEA) need not comply with the new rule until November 1, 2020, and swaps not subject to the trade execution requirement under section 2(h)(8) of the CEA need not comply with the new rule until July 5, 2021.
- Amendments to the CFTC's inter-affiliate exemption conditions under CFTC regulation 50.52, which exempts certain affiliated entities within a corporate group from the swap clearing requirement under the CEA. The amendments codify temporary alternative compliance frameworks established in prior no-action relief, which are intended to make an anti-evasionary condition workable for international corporate groups in the absence of foreign clearing regimes determined to be comparable to CFTC requirements. This final rule becomes effective 30 days after publication in the *Federal Register*.

The two proposed rules that were advanced include:

- Amendments to Part 38 of CFTC regulations that address the risk of electronic trading causing a market disruption on a designated contract market's (DCM) trading platform. The proposed regulations would establish three electronic trading risk principles for DCMs, which cover (1) the implementation of exchange rules applicable to market participants to prevent, detect, and mitigate market disruptions and system anomalies associated with electronic trading; (2) the implementation of exchange-based pre-trade risk controls for all electronic orders; and (3) the prompt notification of the CFTC by DCMs of any significant disruptions to their electronic trading platforms. Comments for this proposed rule must be received on or before the latter of 60 days from the date of the CFTC vote, or 30 days following publication in the *Federal Register*.
- An amendment to the margin requirements for uncleared swaps for swap dealers and major swap participants for which there is no prudential regulator. The proposal would delay the compliance date for the initial margin requirements for smaller entities not covered by the CFTC's May 28, 2020 interim final rule, which delayed certain entities' compliance date to September 1, 2021, in recognition of the challenges faced by the entities as a result of the COVID-19 pandemic. The proposal would delay the smaller entities' compliance date to September 1, 2022, to mitigate the potential for a market disruption that could result from a large number of entities that would come into the scope of compliance by September 1, 2021. This proposed rule has a 60-day comment period following publication in the *Federal Register*.

The CFTC also approved the withdrawal of the Regulation Automated Trading Proposed Rule and Supplemental Proposed Rule. In addition, the CFTC approved a final rule modifying regulations implementing the Volcker Rule's prohibition on banking entities investing in or sponsoring hedge funds or private equity funds. The vote concluded on June 24 and coincided with the rule's approval by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of Comptroller of the Currency (OCC), and the Securities and Exchange Commission. This final rule becomes effective October 1, 2020. For more information, see the June 26, 2020 edition of *Corporate & Financial Weekly Digest*.

The CFTC's press release, including links to voting drafts of the various rules considered at the meeting, is available here.

BANKING

See "Prudential Regulators Revise Initial Margin Rules for Uncleared Swaps" in the Derivatives section.

FDIC Publishes Final Rule Regarding the "Valid When Made" Doctrine

On June 25, the Federal Deposit Insurance Corporation (FIDC) published its final rule with respect to whether a loan made by a state-chartered bank is "valid when made" pursuant to the preemptive authority in Section 27 of the Federal Deposit Insurance Act (Final Rule).

The Final Rule confirms the longstanding banking law doctrine that a loan made by a state-chartered bank that is valid when made may be enforced by any subsequent assignor or transferee in accordance with its stated terms. As stated by the FIDC, a "State bank's statutory authority under section 27 to make loans at particular rates necessarily includes the power to assign the loans at those rates."

The FDIC further stated that the Final Rule did not address circumstances when a non-bank might be the "true lender," although it did note that consideration of this issue in a separate rulemaking was "warranted."

The Final Rule will be effective 30 days after its publication in the *Federal Register*. The Office of the Comptroller issued a similar rule related to loans made by national banks and federal savings banks on May 29, 2020, which is effective on August 1, 2020.

The Final Rule is available here.

Volcker Rule Regulators Make Changes to Covered Fund Rules

On June 25, the five regulators responsible for Section 13 of the Bank Holding Company Act of 1956 (Volcker Rule) approved a set of amendments that modify and clarify the covered fund provisions of the regulations implementing the Volcker Rule. (The five regulators are the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, and the Securities and Exchange Commission.) The final amendments are generally the same as those proposed in January of this year.

Among other things, the final rule:

1. Limits the extraterritorial impact of the rule on foreign funds offered by foreign banks to foreign individuals.

2. Permits certain low-risk transactions (including intraday credit and payment, clearing, and settlement transactions) between a banking entity and covered funds for which the banking entity serves as investment advisor or sponsor.

3. Simplifies existing provisions of the rule related to foreign public funds, loan securitizations, small business investment companies and public welfare investments.

4. Permits banking entities to invest in or sponsor certain types of funds that do not raise the concerns the Volcker Rule was intended to address, such as credit funds, venture capital funds, customer facilitation funds and family wealth management vehicles.

5. Clarifies that credit exposures to a covered fund would generally not constitute fund ownership interests under the Volcker Rule.

6. Clarifies the treatment of parallel investments made by a banking entity in the same underlying investments as a sponsored covered fund.

The amendments go into effect on October 1, 2020.

The amendments are available here.

BREXIT/UK DEVELOPMENTS

London Weekly Fireside Chat

Katten hosts a weekly, 15-minute fireside chat podcast series on notable UK and European developments from the prior week's *Corporate & Financial Weekly Digest*. This week, Neil Robson, Nathaniel Lalone and Carolyn Jackson explain the implications of a number of recent UK Government announcements regarding its proposals to make certain financial services regulatory reforms before the end of the Brexit transition period, with potentially significant divergences from EU legislation. Carolyn also digests the UK Financial Conduct Authority's (FCA) approach to cryptoasset regulation.

To listen to the podcast recording, click here.

FCA Statement on Cryptoasset Business Registration

On June 22, the UK Financial Conduct Authority (FCA) published a statement reminding businesses that carry out cryptoasset activities in the UK to register with the FCA by June 30, 2020 (the Statement).

In the Statement, the FCA explains that:

1. any businesses which began engaging in such activities after January 10, 2020 must be registered with the FCA before carrying out such business; and
2. any businesses that started carrying out the activities before January 10, 2020 and are not registered with the FCA by the January 10, 2021 deadline will have to cease carrying on such activities.

The Statement is available here.

UK Government Statement on Legacy LIBOR Contracts

On June 23, the UK Government published a statement on the transition away from London Inter-bank Offered Rate (LIBOR) with a focus on legacy contracts (the Statement).

The Statement sets out the UK Government's intention to legislate to amend and strengthen the existing regulatory framework for benchmarks, rather than imposing legal changes on LIBOR-referencing contracts that are governed by English law. By the end of 2021, the UK Financial Conduct Authority (FCA) should be granted the appropriate regulatory powers to manage an orderly transition away from LIBOR in a way that protects consumers and ensures market integrity. In particular, the FCA may be able to help market participants identify certain legacy LIBOR contracts for specific limited continued use where there are no genuine or appropriate alternatives, and no realistic ability to be renegotiated or amended.

The Statement is available here.

HM Treasury Statement on the New Prudential Regime for Banks and Investment Firms

On June 23, HM Treasury published a policy statement (the Statement) on its approach to legislating for the new prudential standards in the forthcoming Financial Services Bill (the Bill).

HM Treasury intends to use the Bill to implement prudential standards for banks and other credit institutions relating to the EU's revised Capital Requirements Regulation (CRR II) and the new Investment Firms Prudential Regime (IFPR). According to the Statement, HM Treasury will delegate the responsibility for the implementation of the Bill for firms to the UK Prudential Regulation Authority and the UK Financial Conduct Authority.

HM Treasury aims to introduce the IFPR and updated prudential standards for credit institutions based on CRR II by summer 2021, subject to the timeline for the Bill to pass through Parliament.

For a more comprehensive discussion of this topic, please see this week's Katten podcast, available here.

The Statement is available here.

Brexit: UK Government Statement on Implementing Regulatory Reforms

On June 23, the House of Commons published a statement made by the UK Government on its approach to implementing financial services regulatory reforms before the end of the Brexit transition period (the Statement).

Generally, the Statement appears to suggest that the UK will not follow upcoming EU regulations on how financial transactions must be settled. The UK Government clarified that firms should continue to apply the industry's existing practices rather than the EU rules. Furthermore, any legislative changes in this space will be developed through dialogue with the financial services industry.

In particular, the Statement sets out the UK Government's approach to the following financial services legislation:

1. the Financial Services Bill that provides a new prudential regime for investments firms and updates regulations for credit institutions;
2. the new Investment Firms Prudential Regime (for more information on this regime and the Financial Service Bill, please see the June 26, 2020 edition of *Corporate & Financial Weekly Digest*;
3. the Fifth Capital Requirements Directive (CRDV);
4. the Bank Recovery and Resolution Directive II (BRRD II)
5. the Solvency II Directive;
6. the Central Securities Depositories Regulation (CSDR);
7. the Securities Financing Transactions Regulation (SFTR);
8. the European Market Infrastructure Regulation Refit Regulation (EMIR REFIT);
9. the Benchmarks Regulation (BMR);
10. the Market Abuse Regulation (MAR); and
11. legislation in relation to packaged retail investment and insurance-based products (PRIIPs).

The Statement is available here.

EU DEVELOPMENTS

Taxonomy Regulation Published in the *Official Journal of the EU*

On June 22, the Taxonomy Regulation was published in the *Official Journal of the European Union* and it will go into effect on July 12, 2020.

The Taxonomy Regulation establishes a framework to facilitate sustainable investment, introducing an EU-wide taxonomy of environmentally sustainable activities. The Taxonomy Regulation also amends the EU Regulation on Sustainability-Related Disclosures in the Financial Services Sector, introducing new disclosure requirements for a range of entities, including financial services firms and large public interest companies.

For more information on the Taxonomy Regulation, please see the January 10, 2020 edition of *Corporate & Financial Weekly Digest*.

For more information on ESG and sustainable finance in Europe, please see Katten's advisory "ESG and Sustainable Finance: The European Perspective."

The Taxonomy Regulation 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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