Katten

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SEC/CORPORATE

SEC Issues C&DI on Use of Form S-3 by SPACs

On September 21, the Division of Corporation Finance of the Securities and Exchange Commission issued a new Compliance and Disclosure Interpretation (C&DI) addressing, and limiting, the ability of shell companies, including special purpose acquisition companies (SPACs), to use Form S-3 during the 12 months following a business combination.

Form S-3 provides a short-form registration statement for the registration of securities by eligible public companies. Form S-3 allows registrants to incorporate by reference on both an historical and a going-forward basis to their reports filed pursuant to the Securities Exchange Act of 1934 (Exchange Act). Accordingly, Form S-3 is a preferred form for registered offerings because of the reduced time and expense in preparing the filing (compared to a long form registration on Form S-1) and because Form S-3 can more easily be used for shelf offerings.

Generally, to be eligible to use Form S-3, a registrant must, among other things, have been subject to the reporting requirements of Section 12 or 15(d) of the Exchange Act and have filed all materials to be filed pursuant to Sections 13, 14 and 15(d) of the Exchange Act for at least 12-calendar months immediately preceding the filing of the Form S-3.

Typically, there are several reasons following a business combination between a SPAC and an operating company where the post-business combination combined company may be required to file a registration statement to register securities. These may include the registration of the issuance of shares of common stock issuable upon the exercise of warrants by public shareholders, the resale of rollover shares held by sellers in the business combination and the resale of shares held by private placement investors, the SPAC sponsor and by officers and directors. The use of registration statements takes on enhanced importance in this context because the safe harbor for the public resale of shares provided by Rule 144 of the Securities Act of 1933 is unavailable to former shell companies (including SPACs) until one year after the combined company has filed required Form 10 Information with the SEC following the business combination.

Whether and to what extent the post-business combination combined company is entitled to use the SPAC's pre-combination reporting history to satisfy the eligibility requirements to use Form S-3 for such registrations during the 12 months following the business combination has been the source of some uncertainty and inconsistent market practice. The C&DI addresses some of these issues in different contexts, and generally limits the availability of Form S-3 during the 12 months following the business combination, as follows:

- **Registrant is a new entity following the business combination:** The C&DI provides that, where the registrant is a new entity following the business combination between the SPAC and the operating company, the new registrant would need 12-calendar months of Exchange Act reporting following the business combination in order to become Form S-3 eligible.
- **Registrant is a successor registrant:** General Instruction I.A.6 of Form S-3 provides that a "successor registrant" can rely on the reporting history of its predecessor for determining Form S-3 eligibility where the succession was "primarily for the purpose of changing the state of incorporation" or forming a holding company when the "assets and liabilities of the successor at the time of succession were substantially the same" as the those of the predecessor or when all predecessors met the required conditions for the use of

Form S-3 at the time of succession. The C&DI provides that even in cases where a post-business combination registrant is a successor registrant to a SPAC, the registrant would not be able to rely on the pre-reporting history of the SPAC because the succession would not have been for purposes of changing the state of incorporation or forming a holding company and the private operating company would not have met the requirements to use Form S-3 prior to the business combination.

- **Registrant is not a new entity and not a successor registrant:** The C&DI provides that "Form S-3 is premised on the widespread dissemination to the marketplace of an issuer's Exchange Act reports over at least a 12-month period." In all cases involving the combination of a SPAC with an operating company, in addition to the specific situations described above, where the combined company lacks a 12-month reporting history, the C&DI provides, the staff of the Division of Corporation Finance "is unlikely" to be able to accelerate the effectiveness of a registration on Form S-3, which requires that the Staff give "due regard to the adequacy of the information respecting the issuer theretofore available to the public,…and to the public interest and the protection of investors." Accordingly, registrants should expect that the use of Form S-3 would not be available in these cases involving a SPAC until 12-calendar months have elapsed following the business combination.

The C&DI, Question 115.18, is available here.

SEC Adopts Amendments to Shareholder Proposal Rules

On September 23, the Securities and Exchange Commission voted to adopt amendments to the rules governing the process for the submission of shareholder proposals to be included in a registrant's proxy statement. Rule 14a-8 of the Securities Exchange Act of 1934 (Exchange Act) requires registrants holding a shareholder meeting that is subject to the Exchange Act proxy rules to include in their proxy statement proposals submitted by shareholders, so long as the applicable procedural and substantive requirements are met.

The amended rules, originally proposed on November 5, 2019, as discussed in the November 8, 2019 edition of *Corporate & Financial Weekly Digest*, update the ownership thresholds required for a shareholder to be eligible to submit a proposal, revise the "one-proposal" rule and increase the level of support that a proposal must receive to be eligible for resubmission at future shareholder meetings.

In enacting the amended rules, the SEC noted a balancing of the interests of the shareholder proponents in having access to the company's proxy materials and the associated resources with the costs associated with reviewing, considering and voting on shareholder proposals, which are largely borne by the registrant and its other shareholders.

Eligibility and Ownership Thresholds

Under legacy Rule 14a-8(b), in order to submit a proposal for inclusion in a registrant's proxy statement properly, the shareholder proponent must have continuously held at least $2,000 or 1 percent of the registrant's securities entitled to vote on the proposal for at least one year as of the date the proposal was submitted.

Under amended Rule 14a-8(b), to be eligible to submit a shareholder proposal for inclusion in the registrant's proxy statement, a proponent must demonstrate continuous ownership of the registrant's securities entitled to vote on the proposal, of at least:

- $2,000 for at least three years;
- $15,000 for at least two years; or
- $25,000 for at least one year.

The amended rules provide that a shareholder proponent is not permitted to aggregate its holdings with those of other shareholders in order to satisfy the ownership threshold. Each shareholder proponent must satisfy at least one of the three ownership thresholds set forth above.

The amended rules also require a shareholder proponent to provide the registrant with a written statement that it is available to meet with the registrant, either in person or via teleconference, at specified times and dates no less than 10-calendar days, nor more than 30-calendar days, after submission of the proposal. A shareholder proponent must include contact information and identify specific business days and times (which must include more than one date and time) when the shareholder is available to discuss the proposal with the registrant. The time specified must be during the regular business hours at the registrant's principal executive offices. If no such regular business hours are disclosed in the registrant's proxy statement, the shareholder should identify times between 9:00 a.m. and 5:30 p.m. on business days in the time zone of the registrant's principal executive offices.

Shareholder Representatives

The amended rules further require that any shareholder using a representative to submit a proposal for inclusion in a registrant's proxy statement must provide documentation that, among other things, identifies the shareholder submitting the proposal and the shareholder's representative, includes the shareholder's statement authorizing the representative to submit the proposal on its behalf, identifies the topics of the proposal to be submitted, includes a statement supporting the proposal from the shareholder and is signed by the shareholder.

These rules are designed to ensure that when a representative, who may not qualify to submit a proposal in its own name, speaks and acts for a shareholder, there is a meaningful degree of assurance as to the shareholder's identity, role and interest in the proposal being submitted.

One-Proposal Rule

The "one-proposal" rule under legacy Rule 14a-8(c) provides that a shareholder may not submit more than one proposal to a registrant for inclusion in a proxy statement for any particular shareholder meeting. The amended rules expand the limitation to apply to each "person," rather than each shareholder. As a result, a proponent may not submit one proposal in its own name and also serve as a representative to submit a second proposal. Also, a person desiring to serve as a representative for multiple shareholders cannot submit more than one proposal for any one meeting in such capacity.

Resubmission Thresholds

Under legacy Rule 14a-8(i)(12), a registrant may exclude a shareholder proposal from its proxy statement if the proposal addresses substantially the same subject matter as another proposal that has been previously included in the registrant's proxy statement within the preceding five years and voted on within the preceding three years and support for that proposal in the most recent vote thereon was less than 3 percent of the votes cast if voted on once within the preceding five years, less than 6 percent of the votes cast if voted on twice within the preceding five years and less than 10 percent of the votes cast if voted on three or more times within the preceding five years.

Under amended Rule 14a-8(i)(12), a shareholder proposal may be excluded from a registrant's proxy statement where it addresses substantially the same subject matter as a proposal previously included in the registrant's proxy statement within the preceding five years if the most recent vote occurred within the preceding three years and support for the proposal in the most recent vote thereon was:

- less than 5 percent of the votes cast if previously voted on once;
- less than 15 percent of the votes cast if previously voted on twice; or
- less than 25 percent of the votes cast if previously voted on three or more times.

The SEC also proposed a related provision, referred to as the "Momentum Requirement," which was not adopted. The Momentum Requirement, if adopted, would have allowed a registrant to exclude a shareholder proposal that had been previously voted on three or more times in the last five years, even if it satisfied the 25 percent support threshold the last time the matter was voted on, if the proposal received support of less than 50 percent of the votes cast and support for the proposal declined 10 percent or more compared to the prior vote. The SEC ultimately opted not to adopt the Momentum Requirement, in part, out of a concern that it could lead to anomalous results and was unnecessarily complex.

Transition Period

The amended rule will apply to any shareholder proposal submitted for a shareholder meeting to be held on or after January 1, 2022. However, any shareholder that has continuously held at least $2,000 of a registrant's securities entitled to vote on a proposal for at least one year as of the effective date of the amended rules (60 days after publication of the rules in the *Federal Register*), and continues to hold at least $2,000 of such securities through the date of submission of a shareholder proposal, will not be required to satisfy the heightened ownership requirements for any shareholder meeting held prior to January 1, 2023.

The SEC's implementing release and the rules are available here.

SEC Issues C&DI on COVID-19 Related Benefits

On September 21, the Division of Corporation Finance of the Securities and Exchange Commission issued a new Compliance and Disclosure Interpretation (C&DI) regarding the treatment of benefits provided to executive officers in light of the COVID-19 pandemic and whether such benefits constitute perquisites or personal benefits that must be disclosed in a registrant's summary compensation table and included when determining the registrant's three most highly compensated officers (other than the registrant's principal executive officer and principal financial officer) for identifying the "named executive officers."

The C&DI reaffirms the SEC's existing two-step analysis for determining whether an item constitutes a perquisite or personal benefits, noting:

- "An item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties.
- Otherwise, an item that confers a direct or indirect benefit and that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, is a perquisite or personal benefit unless it is generally available on a non-discriminatory basis to all employees."

The C&DI notes that, in some cases, an item considered a perquisite or personal benefit in the past may not be considered as such when provided due to COVID-19. For example, enhanced technology needed to make an officer's home his or her primary workplace as a result of local stay-at-home orders would generally not be considered a perquisite or personal benefit because of the "integral and direct" relationship to the performance of the officer's duties. Conversely, the C&DI notes that items such as new health-related or personal transportation benefits provided because of new risks arising from COVID-19 are not integrally and directly related to the performance of the officer's duties and may be perquisites or personal benefits, even if they are only provided because of COVID-19, unless such benefits are generally available to all employees.

The C&DI, Question 219.05, is available here.

DERIVATIVES

See "EU Commission Adopts Time-Limited Decision for Continued Access to UK Central Counterparties" in the EU Developments section.

CFTC

NFA Announces Webinar to Debut Updated Annual Questionnaire

National Futures Association (NFA) recently redesigned its Annual Questionnaire, which applicants are required to submit with their NFA membership applications and current members are required to file annually. On September 29, at 9:30 a.m. CT/10:30 a.m. ET, NFA will host a webinar to address the transition to the new Annual Questionnaire.

Among other changes, the updated Annual Questionnaire:

1. uses dynamic question logic so that members will only be required to answer questions relevant to their operations;
2. consolidates specific questionnaires based on registration category into one master questionnaire;
3. includes new questions and clarifies existing questions; and
4. integrates material with other NFA systems, including NFA's Exemptions System and Online Registration System.

The redesigned Annual Questionnaire will launch on October 2.

Registration information for the webinar covering the new Annual Questionnaire is available here.

Joint Audit Committee Revises Earlier Regulatory Alerts to Conform to CFTC Letter No. 20-28

In response to CFTC Letter No. 20-28, the Joint Audit Committee (JAC) has issued Regulatory Alert #20-02 and Regulatory Alert #20-03. As reported in the September 18 edition of *Corporate & Financial Weekly Digest*, CFTC Letter No. 20-28 provided supplemental guidance and no-action relief with respect to CFTC Regulation 1.56 (prohibition of guarantees against loss) compliance and further no-action relief with respect to the treatment of separate accounts by futures commission merchants (FCMs), initially set out in CFTC Letter No. 19-17. Specifically, with regard to compliance with the requirements of CFTC Regulation 1.56(b), Letter No. 20-28 gives FCMs until March 31, 2021 to remove or otherwise negate any limited recourse or similar provisions that may be contained in customer agreements. With regard to compliance with CFTC Rule 39.13(g)(8)(iii), the staff extended the time-limited no-action position from June 30, 2021 to December 31, 2021.

Regulatory Alert #20-02 and Regulatory Alert #20-03 revise earlier Regulatory Alerts that the JAC had issued following publication of CFTC Letter No. 19-17 for the sole purpose of updating the no-action dates set out in Letter No. 20-28. Specifically, (1) Regulatory Alert #20-02 amends Regulatory Alert #19-04 and Regulatory Alert #19-06 to include the relevant time frames set out in CFTC Letter 20-28; and (2) Regulatory Alert #20-03 amends JAC Regulatory Alert #19-03 to give FCMs until March 31, 2021 to take corrective action to identify and rectify any customer and noncustomer agreements which are not in compliance with CFTC Regulation 1.56(b). The JAC emphasizes that all other requirements of the earlier Regulatory Alerts remain in effect.

UK DEVELOPMENTS

FCA Publishes Webpage for LIBOR Transition

On September 17, the UK's Financial Conduct Authority (FCA) published a new webpage for firms advising on the London Inter-bank Offered Rate (LIBOR) transition.

The key considerations set forth by the FCA include:

- analyzing balance sheet exposure and how affected firms can take appropriate action to move their stock of LIBOR linked contracts to alternative risk-free rates;
- implementing the necessary arrangements to identify their firms' exposure to LIBOR and to ensure their firms' transition does not harm their clients;
- conducting an end-to-end inventory of LIBOR exposure assessing the full range of processes and systems (e.g., all contracts, pricing, valuation, risk management and booking). Where third-party vendors provide critical systems, firms should get assurance for necessary software upgrades to be used for alternative rates;
- identifying whether the LIBOR transition will affect the finances and product choices available to clients or require a contract amendment or renegotiation. As always, firms should treat their clients fairly and take care to communicate with them in a clear and timely manner; and
- advising firms to familiarize themselves with the LIBOR transition path and accompanying statement outlined by the Working Group on Sterling Risk Free Reference Rates (RFRWG). Firms should consider how best to adopt the RFRWG targets, which were published in January and updated in April.

The FCA provides further information on the webpage relevant to specific firms based on the activities they undertake (e.g., asset management, benchmark administration, corporate finance (and similar) advice, custody services provision, principal trading and wholesale brokerage).

The FCA will continue to update the webpage periodically ahead of the end of 2021 and advise firms to check often to see what the LIBOR transition means for them.

The webpage is available here.

BREXIT/EU DEVELOPMENTS

EU Commission Adopts Time-Limited Decision for Continued Access to UK Central Counterparties

On September 21, the European Commission (Commission) adopted a time-limited decision to provide financial market participants 18 months within which they should reduce their exposure to UK central counterparties (CCPs) (the Decision).

The 18-month temporary equivalence Decision aims to facilitate the challenges created by the UK's withdrawal from the Single Market (i.e., Brexit). This period enables EU clearing members to develop strategies and strengthen their clearing capability to reduce their reliance on UK CCPs.

From January 1, 2021, UK CCPs will be considered "third-country CCPs" within the meaning of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR). A UK CCP will be unable to provide clearing services within the EU unless the European Securities and Markets Authority (ESMA) has recognized the UK CCP, which first requires the Commission to have determined that:

1. the legal and supervisory arrangements governing the UK CCP are equivalent to those of EMIR; and
2. the UK CCP is systemically important for the financial stability of the EU.

Considering the first requirement and based on the available information on UK CCPs, the UK's legal and supervisory framework will be in line with EMIR after January 1, 2021. Where changes have been made, the UK is expected to inform the Commission. The Commission, in cooperation with ESMA, will monitor the UK's legal and supervisory framework and reserve the right to amend, suspend, review or revoke their Decision.

Considering the second requirement, the 18-month Decision provides ESMA with time to conduct a comprehensive review of the systemic importance of UK CCPs and their clearing services or activities in the EU from January 1, 2021 onwards. Once a review has been made, ESMA will recommend to the Commission on whether a UK CCP should be recognized or not.

The Decision is available here.

ESG: EU Survey on Mandatory Disclosure Templates for Use by Financial Services Firms

On September 21, 2020, the European Supervisory Authorities (ESAs) published a survey setting out the details on mandatory disclosure templates on sustainability-related disclosures in financial services (the Survey).

The Survey concentrates on including pre-contractual and periodic disclosures on Environmental Social and Governance (ESG) matters alongside/together with existing disclosure requirements under EU sectoral legislation by financial market participants, including alternative investment fund managers, Undertakings for the Collective Investment in Transferable Securities (UCITS) management companies, insurance undertakings, institutions for occupational retirement provision and pan-European personal pension product providers.

The ESAs propose to standardize disclosures by requiring the use of specific templates across different financial products in different EU member states. The ESAs recognize the need for standardization of disclosures, which would promote comparability with respect to ESG information, in line with certain requirements of the EU Regulation on sustainability-related disclosures in the financial services sector (SFDR).

Three illustrative mock-ups of templates are available on the Survey webpage. The final content of the templates is subject to the outcome of concurrent consumer testing and the final report of the ESAs on the draft regulatory technical standards under the SFDR.

The deadline for comments on the Survey is October 16.

The Survey is available here.

ESMA Publishes Consultation Paper on MiFIR Reference Data and Transaction Reporting

On September 24, the European Securities and Markets Authority (ESMA) published a consultation paper examining transaction reporting and reference data obligations under the Market in Financial Instruments Regulation (MiFIR) (the Consultation Paper).

Since MiFIR's implementation in 2018, ESMA has identified areas of improvement to simplify the current reporting system and promote transparency.

The key areas addressed by ESMA in the Consultation Paper include:

- requiring transaction reporting from Undertakings for the Collective Investment in Transferable Securities (UCITS) management companies and alternative investment fund managers (AIFMs) that provide one or more Markets in Financial Instruments Directive (MiFID) services to third-parties;
- applying consistency throughout MiFID regarding the use of certain words (e.g., users, members and participants);
- revising the ToTV (traded on a trading venue) concept;
- obligating all instruments traded off-venue where the underlying is a benchmark to fall within the scope of transaction reporting;
- clarifying requirements under the Market Abuse Regulation and MiFID to remove inconsistency surrounding reference data obligations; and
- merging European Market Infrastructure Regulation (EMIR) and MiFIR reporting regimes while considering EMIR Refit where there are common elements (e.g., identification and classification of instruments), while maintaining fundamental differences necessary for the financial stability of the EU.

ESMA calls for all stakeholders within the securities markets, particularly investment firms and credit institutions performing investment services and activities and trading venues to respond to the Consultation Paper.

The deadline for comments on the Consultation Paper is November 20. ESMA intends to submit its final review report to the European Commission in the first quarter of 2021.

The Consultation Paper is available here.

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

For more information, contact:

SEC/CORPORATE

Brian J. Hecht	+1.212.940.8516	brian.hecht@katten.com
Mark J. Reyes	+1.312.902.5612	mark.reyes@katten.com
Mark D. Wood	+1.312.902.5493	mark.wood@katten.com

FINANCIAL MARKETS AND FUNDS

Henry Bregstein	+1.212.940.6615	henry.bregstein@katten.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@katten.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@katten.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@katten.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@katten.com
Mark D. Goldstein	+1.212.940.8507	mark.goldstein@katten.com
Jack P. Governale	+1.212.940.8525	jack.governale@katten.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@katten.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Susan Light	+1.212.940.8599	susan.light@katten.com
Richard D. Marshall	+1.212.940.8765	richard.marshall@katten.com
Paul McCurdy	+1.212.940.6676	paul.mccurdy@katten.com
Fred M. Santo	+1.212.940.8720	fred.santo@katten.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@katten.com
Robert Weiss	+1.212.940.8584	robert.weiss@katten.com
Allison C. Yacker	+1.212.940.6328	allison.yacker@katten.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com

UK/BREXIT/EU DEVELOPMENTS

Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@katten.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@katten.co.uk

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