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SEC/CORPORATE

SEC Further Extends Filing Deadlines for Companies Impacted by COVID-19

On March 25, the Securities and Exchange Commission issued an order extending conditional relief (the Modified Order) for reporting and proxy delivery requirements for public company registrants and other filers in the wake of the coronavirus disease 2019 (COVID-19). The Modified Order provides filers with an additional 45 days to make filings pursuant to Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d) of the Securities Exchange Act of 1934, as amended (the Exchange Act), Exchange Act Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D, and Exchange Act Rules 13f-1, and 14f-1, that would have been due during the period of March 1-July 1, 2020 (the Relief Period), subject to the conditions discussed below. This relief covers, among others, reports on Form 10-K, 20-F, 10-Q, 8-K and 6-K, as well as Schedules 13G and 13F but, as noted, expressly excludes Schedule 13D filings and also is not available for filings under Section 16 of the Exchange Act (i.e., Forms 3, 4 and 5).

The Modified Order supersedes the SEC's March 4 order (the Original Order), which was discussed in Katten's March 17 Securities Advisory, by extending the end of the Relief Period from April 1 to July 1. Consistent with the Original Order, it is a condition to a filer availing itself of the relief under the Modified Order that the filer 1) is unable to meet a filing deadline due to circumstances related to COVID-19; and 2) if the filer is a reporting company, issues a current report on Form 8-K or Form 6-K, as applicable, with (A) a statement that the filer is relying on the Modified Order; (B) a summary of why the relief is necessary in the particular circumstances; (C) the estimated date by which the company expects to make the filing; (D) one or more company-specific risk factors explaining the impact, if material, of COVID-19 on its business; and (E) if the reason the filing cannot be timely made relates to the inability of any person, other than the registrant, to furnish a required opinion, report or certification, the Form 8-K or Form 6-K, as applicable, shall include as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the deadline for such report to be filed.

Consistent with the Original Order, the Modified Order also conditionally exempts companies preparing for their upcoming annual meetings from the requirement to furnish proxy statements and other soliciting materials to securityholders where, as a result of COVID-19, common carrier services have been suspended in the area where the securityholder resides and the company has made a good faith effort to furnish the proxy materials to the securityholder.

In a press release announcing the Modified Order, SEC Chairman Jay Clayton said, "Health and safety continues to be our first priority," and the Modified Order provides temporary, targeted relief to issuers affected by COVID-19 while still encouraging public companies to "provide current and forward-looking information to their investors." The SEC also reiterated in the press release, as previously clarified in connection with the Original Order, that:

- For purposes of 1) eligibility to use Form S-3 or Form F-3, as applicable, including as it relates to well-known seasoned issuer status; 2) eligibility to use Form S-8; and 3) the current public information eligibility requirements of Rule 144(c) under the Securities Act of 1933, as amended, a company that relies upon the Modified Order will be considered current and, with respect to eligibility to use Form S-3 or F-3, timely in its filing requirements under the Exchange Act, if the company (A) was current and, as applicable, timely in its Exchange Act filing requirements as of the first day of the Relief Period; and (B) files any report due during the Relief Period within 45 days of the original filing deadline for such report.

- A company that receives an extension on filing an annual or a quarterly report pursuant to the Modified Order will be deemed to have a due date 45 days after the original filing deadline for the report, and, if it is unable to file the report on or before the extended due date, the company will be permitted to rely on Rule 12b-25.

Consistent with the SEC's statements in connection with the Original Order, the press release reminds issuers to contact the SEC's Division of Corporation Finance directly if they are in need of additional assistance relating to administrative difficulties or other challenges in their efforts to comply with the requirements under the federal securities laws.

The Modified Order is available here, and the press release is available here.

BROKER-DEALER

SEC Grants Temporary Exemption From Certain Requirements of Rule 606 of Regulation NMS

On March 25, the Securities and Exchange Commission issued an Order granting the application by the Financial Information Forum (FIF) and Securities Traders Association (STA) for a temporary exemption from certain requirements of Rule 606 of Regulation NMS under the Securities Exchange Act of 1934, which requires broker-dealers to disclose certain information regarding the handling of their customers' orders, as a result of COVID-19. The SEC granted the request of FIF and STA that the SEC: 1) delay the date by which broker-dealers must provide the public report of first quarter 2020 data required by Rule 606(a) to May 29, 2020; and 2) extend the date that broker-dealers that outsource routing must begin to collect the monthly customer-specific data for not held NMS stock orders required by Rule 606(b)(3) to June 1, 2020, and extend to July 29, 2020, the date by which broker-dealers must provide the customer-specific report of June 2020 data for customer requests that are made on or before July 17, 2020.

The SEC Order is available here.

SEC Staff Issues Statement Regarding Authentication Documentation Retention Requirements in Light of COVID-19 Concerns

On March 24, the Securities and Exchange Commission, on behalf of the staffs of the Division of Corporation Finance, the Division of Investment Management and the Division of Trading and Markets issued an announcement with respect to the authentication document retention requirements of Rule 302(b) of Regulation S-T in light of health, transportation and other logistical issues raised by the spread of COVID-19. Rule 302(b) requires that each signatory manually sign a signature page or other document authenticating his or her signature that appears in typed form within the electronic filing with the SEC. Though the requirement to retain the paper original of the authentication document remains, SEC staff will not recommend enforcement action with respect to Rule 302(b) if:

- a signatory retains a manually signed signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b);
- such document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

A signatory also may provide to the filer an electronic record of such document when it is signed.

The SEC announcement is available here.

SEC Provides Conditional Regulatory Relief for Registered Transfer Agents and Certain Other Persons Affected by COVID-19

On March 22, the Securities and Exchange Commission announced that registered transfer agents and certain other persons would be provided with conditional relief from their regulatory obligations under federal securities laws through May 30, 2020. Among other conditions, persons that wish to avail themselves of the regulatory relief must provide written notice to the SEC that such person is taking advantage of the relief, a description of the specific regulatory obligations that the person is unable to comply with, and a statement of reasons explaining why the person is unable to comply with such obligations. However, transfer agents shall continue to be subject to the requirements of Securities Exchange Act of 1934 Rule 17Ad-12, which requires transfer agents to adequately safeguard securities and funds in their possession or custody.

The press release and SEC Order are available here.

SEC Approves CBOE Proposed Rule Change Regarding Off-Floor Position Transfers

On March 19, the Securities and Exchange Commission approved a proposed rule change filed by Cboe Exchange, Inc. (CBOE) related to permissible off-floor position transfers. Generally, CBOE requires a Trading Permit Holder (TPH) to effect transactions in listed options on an exchange. However, certain types of transfers involving TPH positions are permitted to be effected off the exchange. The approved rule change adds four types of additional off-floor transfers:

1. transfers to correct a bona fide error in the recording of a transaction or the transferring of a position to another account;
2. transfers between accounts where there is no change in ownership, provided that the accounts are not in separate aggregation units or otherwise subject to information barrier or account segregation requirements;
3. consolidation of accounts where no change in ownership is involved; and
4. transfers through operation of law from death, bankruptcy, or otherwise.

Additionally, the approved rule change also codifies prior guidance that that off-floor transfers cannot net against another position and that no position transfer may result in preferential margin or haircut treatment.

For more information on the rule change, please see the September 27, 2019 edition of *Corporate & Financial Weekly Digest*.

The SEC Order approving the rule change is available here.

FINRA Issues Regulatory Notice Regarding Amendments to its Corporate Financing Rule

On March 20, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-20 regarding recent amendments to FINRA Rule 5110 (Corporate Financing Rule – Underwriting Terms and Arrangements), which requires member firms participating in a public offering to file certain documents and information with FINRA regarding the underwriting terms arrangements. The amendments to Rule 5110 reorganize and improve the readability of the rule, including specific revisions to the following areas: 1) filing requirements; 2) filing requirements for shelf offerings; 3) exemptions from filing and substantive requirements; 4) underwriting compensation; 5) venture capital exceptions; 6) treatment of non-convertible or non-exchangeable debt securities and derivatives; 7) lock-up restrictions; 8) prohibited terms and arrangements; and 9) defined terms.

The implementation date for amended Rule 5110(a)(3)(A), (a)(4)(A)(ii) and (a)(4)(A)(iii) was March 20, 2020. The implementation date for all other provisions in amended Rule 5110 is September 16, 2020.

For more information on the amendments to Rule 5110, please see the January 17, 2020 edition of *Corporation & Financial Weekly Digest*.

Regulatory Notice 20-20 is available here.

DERIVATIVES

See "FINRA Issues Regulatory Notice Regarding Amendments to its Corporate Financing Rule" in the Broker-Dealer section, "Regulatory Relief Issued for CPOs and CTAs" in the CFTC section and "UK Parliament Considers Draft Brexit Statutory Instrument Relating to EMIR" in the Brexit/UK Developments section.

CFTC

Regulatory Relief Issued for CPOs and CTAs

In response to the COVID-19 pandemic, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued no-action relief to commodity pool operators (CPOs) extending the upcoming filing deadlines for required pool quarterly reports on CFTC Form CPO-PQR, as well as annual reports and periodic account statements provided to pool participants. National Futures Association (NFA) also issued similar relief to CPOs for pool quarterly reporting requirements on NFA Form PQR and to commodity trading advisors (CTAs) for quarterly filings on NFA Form PR.

Relief for CPOs

Under the relief from the DSIO, the deadline for Small (AUM <$150 million) or Mid-Sized CPOs ($150 million< AUM <$1.5 billion) to file their CFTC Form CPO-PQR annual reports, which are typically due within 90 days after year-end for Small and Mid-Sized CPOs, has been extended to May 15, 2020. The deadline for Large CPOs to file their Q1 2020 quarterly reports on CFTC Form CPO-PQR, which would typically be due within 60 days after quarter-end, has been extended to July 15, 2020. NFA has also similarly extended its deadlines for those CPOs filing on NFA Form PQR, extending the due date for the December 31, 2019 Form PQR to May 15, 2020, and the due date for the March 31, 2020 Form PQR to July 15, 2020.

DSIO also extended the filing deadline for pool annual reports that would otherwise be required to be filed with NFA and distributed to pool participants on or before April 30, 2020, on the condition that the annual certified financial statements for the affected commodity pools are filed with NFA and distributed to pool participants no later than 45 days after the original due date for such report.

Finally, DSIO extended the deadline for distributing periodic account statements to pool participants, typically required to be distributed on either a monthly or quarterly basis under CFTC rules, for all reporting periods ending on or before April 30, 2020, on the condition that such statements are distributed to participants within 45 days of the end of the applicable reporting period(s).

CPOs that comply with the terms of the DSIO's relief providing extended due dates for any of these reports for reporting periods ending on or before April 30, 2020 will be deemed to comply with NFA's analogous requirements.

Relief for CTAs

NFA also granted an extension for NFA Form PR, which would ordinarily be due from registered CTAs on May 15 for the quarter ending March 31, 2020, until June 30, 2020.

Both the DSIO and NFA relief is self-effectuating and does not require a separate filing or request from firms that elect to rely upon the relief.

More information about the DSIO's no-action relief for CPOs is available here. More information regarding relief from NFA rules for CPOs and CTAs is available here.

NFA Issues Regulatory Relief for Introducing Brokers

On March 26, National Futures Association (NFA) granted regulatory relief in response to the coronavirus (COVID-19) pandemic, which temporarily extends the deadline for the annual and periodic financial reports introducing brokers (IBs) are required to file.

NFA Financial Requirements Section 5 and CFTC Rule 1.10 require independent IBs to file certified financial reports as of the close of their fiscal year end within 90 days after the close of such fiscal year or within 60 days for IBs that are also broker-dealers registered with the Securities and Exchange Commission. In addition, IBs must file unaudited financial reports either semi-annually, quarterly or monthly within 17 business days of the date for which the report is prepared.

NFA is providing all independent IBs an extension of 30 calendar days for filing certified financial reports for fiscal years ending in December 2019 through March 2020. Further, NFA is providing all independent IBs an extension of 10 business days for filing the semi-annual, quarterly or monthly reports for reporting periods ending February through April 2020. All independent IB automatically qualify for the extensions.

More information is available here.

CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets

On March 24, the Commodity Futures Trading Commission (CFTC) issued final interpretive guidance regarding retail commodity transactions that involve digital assets. The interpretive guidance is designed to clarify the CFTC's views on the "actual delivery" exception to Section 2(c)(2)(D) of the Commodity Exchange Act (CEA) for digital assets that serve as a medium of exchange (otherwise known as "virtual currencies").

Section 2(c)(2)(D) of the CEA effectively prohibits commodity transactions involving retail clients that are entered into on a leveraged or margined basis other than transactions entered into on or subject to the rules of a licensed futures exchange, unless such transaction results in "actual delivery" within 28 days from the transaction date.

The CFTC's guidance elaborates on two primary factors that demonstrate the "actual delivery" of virtual currency retail commodity transactions:

1. no later than 28 days from the date of the transaction and at all times thereafter, a customer: (a) must secure possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement; and (b) must have the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue); and
2. the offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) may not retain any interest in, legal right, or control over any of the commodity purchased on margin, leverage, or other financing arrangement at the expiration of 28 days from the date of the transaction.

The CFTC's guidance is not intended to inhibit any particular activity but rather to clarify when certain activity is subject to the regulatory provisions made applicable by CEA section 2(c)(2)(D).

More information is available here.

NFA Increases Required Minimum Security Deposits for Forex Transactions

On March 20, National Futures Association (NFA) issued Notice to Members I-20-14, which announced the NFA Executive Committee's decision to increase the minimum security deposits under NFA Financial Requirements Section 12 due to increased volatility in the currency markets and the margin increases that CME and ICE implemented for foreign currency futures involving the Norwegian Krone and Mexican Peso. Minimum security deposits required to be collected and maintained by forex dealer members have been increased to the following:

- Norwegian Krone – 7 percent
- Mexican Peso – 10 percent

The increases became effective for both new and existing positions at 5:00 p.m. CT on March 22, 2020, and will remain in effect until further notice.

More information is available here.

BREXIT/UK DEVELOPMENTS

FCA and PRA Publish Guidance on Key Financial Workers Critical to COVID-19 Response

On March 20, the UK's Financial Conduct Authority (FCA) and the UK's Prudential Regulatory Authority (PRA) separately published guidance on steps for firms to take to identify key workers in the financial services industry (as, exceptionally during this crisis period while schools are closed, the children of such key workers may continue to attend UK schools).

The regulators acknowledge the exceptional circumstances caused by the COVID-19 pandemic but recognize the need for key workers in the financial services industry to continue work — specifically for the provision of essential financial services to consumers or to ensure the continued functioning of markets.

Both the FCA and PRA provide guidance to firms to help them identify their key financial workers, which includes:

- identifying the activities, services or operations that, if interrupted, are likely to lead to the disruption of essential services to the real economy or financial stability; and
- identifying the individuals who are essential to support those functions as well as any critical outsource partners who are essential to continued provision of services.

The regulators recommend that a firm's SMF1 chief executive officer (CEO) (or equivalent member of the senior management team) should be accountable for ensuring that only roles meeting the definition are designated.

The types of roles that may be considered as providing essential services could be:

- in the firm's overall management, such as individuals captured under the Senior Managers Regime;
- in the running of online services and processing;
- in the running of branches and providing essential customer services;
- to the functioning of payments processing and cash distribution services;
- in facilitating corporate and retail lending;
- in the processing of insurance claims and renewals; and
- in the operation of trading venues and other critical elements of market infrastructure.

The regulators ask firms to consider issuing a letter to all identified individuals, which can be presented to schools on request. They also suggest wording for the letter and that it should be signed by an appropriate person.

FCA guidance is available here and the PRA statement is available here.

UK Parliament Considers Draft Brexit Statutory Instrument Relating to EMIR

On March 24, a draft copy of the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc. and Transitional Provision) (EU Exit) Regulations 2020 (the Regulations) was published and laid before Parliament with an explanatory memorandum.

The Regulations are being made to ensure a coherent and functioning financial services regulatory framework for third-country central counterparties (CCPs) in the United Kingdom post-Brexit. It performs this function by addressing deficiencies in retained EU law in the European Market Infrastructure Regulation (EMIR), as amended by Regulation (EU) No. 2019/2099 (EMIR Supervision).

The key change under these Regulations is the expansion of the UK's existing CCP supervisory framework to cover third-country CCPs. This will ensure that the Bank of England (BoE) is able to undertake the relevant

supervisory responsibilities required under EMIR. To maintain continuity between EMIR and EMIR Supervision post-Brexit, the draft Regulations would update the UK legislation so that the BoE can consider third-country CCP applications before the end of the Brexit transition period, which is expected to be at the end of December 31, 2020.

The Regulations do not make any changes to the regulatory or supervisory framework for firms based in the UK.

The draft Regulations are available here and the explanatory memorandum is available here.

FCA Updates Webpage on SFTR Approach to Reporting Requirements

On March 26, the UK's Financial Conduct Authority (FCA) updated its webpage on the Securities Financing Transactions Regulation (SFTR) to confirm its approach to supervisory reporting in the light of COVID-19.

The FCA acknowledged the European Securities and Markets Authority's (ESMA) updated statement of March 26, 2020, which addressed the challenges firms are facing to meet their reporting requirements under the SFTR before April 13, 2020. ESMA set out the following provisions in its statement:

- EU financial regulators (EUFRs) should not prioritize supervisory activity towards firms' compliance with the SFTR reporting obligation between April 13, 2020 and July 13, 2020;
- EUFRs should not prioritize supervisory activity towards firms reporting securities financing transactions (SFTs) under the Markets in Financial Instruments Regulation (MiFIR) when their counterparty is a member of the European System of Central Banks; and
- ESMA confirmed it will not prioritize trade repository registration ahead of April 13, 2020, but it will ensure TRs are registered before July 13, 2020.

The FCA supports the above statements made by ESMA and wishes firms to focus their resources on critical functions during this period. In addition, the FCA will not prioritize supervision relating to the reporting of SFTs for firms to which the backloading requirement specified in Article 4(1)(a) of SFTR applies.

The updated FCA webpage is available here.

The ESMA statement is available here.

EU DEVELOPMENTS

ESMA Publishes Statement on MiFIR Tick-Size Regime and COVID-19

On March 20, the European Securities and Markets Authority (ESMA) published a statement setting forth its approach to mitigate the impact of COVID-19 on the implementation of the tick-size regime for systematic internalizers (SIs) in EU financial markets under the Markets in Financial Instruments Regulation (MiFIR) and the Investment Firms Regulation (IFR) (the Statement).

In the Statement, ESMA notes that, in these exceptional circumstances, it will be difficult for SIs to comply with the new tick-size regime by March 26, 2020 (which was the deadline) and compliance with the new regime may in fact cause unintended operational risks. Consequently, ESMA does not expect EU financial regulators to prioritise supervisory actions relating to the new tick-size regime from March 26, 2020 until June 26, 2020. Furthermore, in the Statement, ESMA states that EU financial regulators should apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

ESMA acknowledges the importance of a timely implementation of this new tick-size regime to ensure a level-playing field throughout the EU markets. However, it also emphasizes that, on its own initiative, the relevant implementing measure has been amended in the past to ensure that SIs observe the tick-size regime up to standard market size.

The Statement is available here.

ESMA Publishes Statement on MiFID II Telephone Conversation Requirements During the COVID-19 Pandemic

On March 20, the European Securities and Markets Authority (ESMA) issued a statement to clarify how credit institutions and investment firms can handle the issue of recording telephone conversations under the revised Markets in Financial Instruments Directive (MiFID II) during the continuing COVID-19 pandemic (the Statement).

In the Statement, ESMA noted that under MiFID II, firms are required to record telephone conversations relating to transactions concluded when dealing on its own account and the provision of client order services that relate to the reception, transmission and execution of orders. ESMA also noted that due to the current exceptional circumstances, it may not be practicable in some instances, despite steps taken by firms, to record the relevant telephone conversations. If firms are unable to record such conversations, then ESMA expects them to consider what alternative steps they could take to mitigate any consequential risks.

ESMA does expect firms to deploy all possible efforts to ensure that these measures remain temporary and that recording of telephone conversations is restored as soon as possible.

In the UK, the UK's Financial Conduct Authority (FCA) has published a webpage on information for firms on COVID-19 response. Among various issues covered, the FCA states that it expects firms to continue to record calls, but that it accepts that it may not be possible to do so. In this case, firms should notify the FCA of their inability to record calls. The FCA also expects firms to consider what steps they could take to mitigate outstanding risks if they are unable to comply with their obligations to record voice communications.

ESMA's Statement is available here.

The FCA's webpage 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		
Mark J. Reyes	+1.312.902.5612	mark.reyes@katten.com
Mark D. Wood	+1.312.902.5493	mark.wood@katten.com
FINANCIAL SERVICES		
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	+1.212.94.8765	richard.marshall@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
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com
BREXIT/UK/EU DEVELOPMENTS		
John Ahern	+44.20.7770.5253	john.ahern@katten.co.uk
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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