

## SEC/CORPORATE

### **SEC Division of Corporation Finance Issues Four FAQs Addressing the SEC's Conditional Relief Order**

On May 4, the Securities and Exchange Commission's Division of Corporation Finance (the Division) issued four frequently asked questions (FAQs) related to the SEC's conditional relief order (the Order) that was issued in the wake of the Coronavirus Disease 2019 (COVID-19). As detailed in the [March 27, 2020 edition of the \*Corporate & Financial Weekly Digest\*](#), the Order gives publicly traded companies an additional 45 days to file certain reports, including most periodic or current reports, that would have been due during the period of March 1-July 1, if the company is unable to meet a filing deadline due to circumstances related to COVID-19. In order to take advantage of the relief, an issuer must, among other things, issue a current report on Form 8-K or Form 6-K, as applicable, with a summary of why the relief is necessary in the particular circumstances.

The FAQs address the following issues:

The first FAQ reiterates that a reporting company availing itself of the relief under the Order must issue a current report on Form 8-K or Form 6-K, as applicable, with (1) a statement that the filer is relying on the Order; (2) a brief description of why the relief is necessary in the particular circumstances; (3) the estimated date by which the company expects to make the filing; (4) one or more company-specific risk factors explaining the impact, if material, of COVID-19 on its business; and (5) 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.

The remaining FAQs address the interplay between reliance on the Order and its impact on a company's ability to file and otherwise use a registration statement on Form S-3. Specifically, the first Form S-3-related FAQ clarifies that a registrant may conduct shelf takedowns using an already-effective registration statement on Form S-3, even if the registrant is relying on the Order with respect to the filing of periodic reports under the Securities Exchange Act of 1934 (the Exchange Act). However, such a registrant will need to determine that the prospectus complies with Section 10(a)(3) of the Securities Act of 1933 (the Securities Act), which requires that, when a prospectus is used more than nine months after the effective date of the registration statement, the information contained in the prospectus must be as of a date not more than 16 months prior to its use, if the information is known to the user of the prospectus or can be furnished by the user without unreasonable effort or expense. The FAQ reminds registrants that, even if a registrant is able to conduct a takedown using a prospectus that contains information older than 16 months, if such information cannot be furnished without reasonable effort or expense, the registrant will need to determine when it is necessary or appropriate to update the prospectus to ensure the accuracy and completeness of its disclosure.

The second Form S-3-related FAQ provides guidance as to when a registrant that has an effective Form S-3 must assess its Form S-3 eligibility, if that registrant relies on the Order. Rule 401(b) under the Securities Act provides that, if an amendment to a registration statement and prospectus is filed to meet the requirements of Section 10(a)(3) of the Securities Act, as described above, the form and contents of the amendment must meet the requirements under the applicable rules and forms as in effect on the date the amendment is filed. For that reason, a registrant that properly relies on the Order must reassess its Form S-3 eligibility on the date when it files the Form 10-K that updates the Form S-3 in order to comply with Section 10(a)(3) of the Securities Act, including

to confirm that it has made all required filings pursuant to Section 13, 14 or 15(d) of the Exchange Act for at least 12 months immediately preceding the filing of the Form 10-K. The Form 10-K will be considered timely, if all of the conditions to rely upon the Order are met with respect to the filing.

The third Form S-3-related FAQ clarifies that even if a registrant is relying on the Order to delay a required filing, that registrant may still file a new registration statement on Form S-3 during the period between the original due date of the required filing and the due date as extended by the Order, even if the registrant has not filed the required report prior to filing the registration statement. The Division will consider the registrant to be current and timely in its Exchange Act reporting for purposes of the registrant's eligibility to use Form S-3, so long as the registrant issues a Form 8-K or a Form 6-K, as applicable, that contains the disclosure required to rely upon the Order. However, a registrant will no longer be considered current and timely for Form S-3 eligibility purposes, if it fails to file the required report by the extended due date for such filing. The FAQ reminds registrants relying on the Order that the staff of the Division will be unlikely to accelerate the effective date of a Form S-3, until any information required to be included in the Form S-3 is filed and encourages registrants with "compelling and well-documented facts" to contact the Division to discuss their specific capital raising needs.

The full text of the FAQs is available [here](#).

### **Proposed Amendments to the Delaware General Corporation Law Concerning Virtual Shareholder Meetings During Emergency Conditions**

As previously discussed in our March 26 advisory titled, "Virtual Shareholder Meetings in the Wake of COVID-19: Legal and Practical Considerations," the Securities and Exchange Commission issued guidance to public companies on providing notice of a change to a virtual shareholder meeting in the wake of the coronavirus (COVID-19) pandemic. On April 7, Delaware Governor John Carney issued an order that permitted public companies that had already provided notice of in-person shareholder meetings prior to the April 7 order to switch to virtual meetings by complying with the SEC's guidance. In an effort to provide certainty to Delaware companies complying with the SEC's guidance that such notice will also comply with the applicable requirements under the Delaware General Corporation Law (DGCL), including Delaware companies that provided notice of their shareholder meetings but after Delaware's April 7 order, legislation has been proposed that would amend Section 110 of the DGCL to permit the board of directors of a Delaware public company, during an emergency, to notify shareholders of any postponement or change in the place of a shareholder meeting (including to hold the meeting solely by means of remote communication) solely by a document that is publicly filed by the company with the SEC. As proposed, the legislation would be effective retroactive to January 1 with respect to any emergency condition that occurred on or after such date, and related to any action taken on or after such date, concerning shareholder meetings held during the pendency of the emergency condition.

The full text of the proposed legislation is available [here](#).

## **BROKER-DEALER**

### **FINRA and NASAA Report Progress Towards May 24 Launch of Online Testing**

On May 1, the Financial Industry Regulatory Authority and North American Securities Administrators Association reported progress toward the launch of an online test delivery service. The service is expected to include online delivery of the Securities Industry Essentials, Series 6, Series 7, Series 63, Series 65 and Series 66 exams.

This service is planned to launch on May 24. Candidates and firms will be able to begin scheduling online test appointments starting on May 11.

More information is available [here](#). Scheduling of an exam is available [here](#).

### **SEC Orders Submission of New NMS Plan**

On May 6, the Securities and Exchange Commission issued an order directing the equity exchanges and the Financial Industry Regulatory Authority to submit a new National Market System plan (NMS plan) with a modernized governance structure for the production of public consolidated equity market data and the dissemination of trade and quote data from trading venues. The order follows a Notice of Proposed Order issued

on January 8, that was followed by an extended comment period. Until the SEC approves a new NMS plan, the current NMS plans will continue to govern.

More information is available [here](#).

## **FINRA Warns of Fraudulent Phishing Emails Purporting to be from FINRA**

On May 4, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-12 to warn member firms of a widespread, ongoing phishing campaign involving fraudulent emails purporting to be from FINRA officers, including Bill Wollman and Josh Drobnik.

These emails generally originate from a source domain name of “@broker-finra.org,” which is not connected to FINRA. FINRA recommends that firms should delete all emails originating from this domain name and, if a password was entered into an attachment to any such email, change that password immediately and notify the appropriate individuals in their firm of the incident.

FINRA Regulatory Notice 20-12 is available [here](#).

## **CFTC**

### **CFTC Announces Global Markets Advisory Committee Meeting**

The Commodity Futures Trading Commission (CFTC) has announced that its Global Markets Advisory Committee (GMAC) will hold a meeting on May 19 at 10:00 a.m. (ET). At this meeting, the GMAC will hear presentations from (1) CFTC’s Office of International Affairs Director, Suyash Paliwal, on international coordination efforts in the time of COVID-19, and (2) the GMAC Subcommittee on Margin Requirements for Non-Cleared Swaps on its report and recommendations regarding the implementation of initial margin requirements for non-cleared swaps.

The meeting will be held via conference call in accordance with CFTC’s implementation of social distancing due to COVID-19. More information is available [here](#).

## **UK DEVELOPMENTS**

### **London Weekly Fireside Chat**

Katten is continuing our weekly, 15-minute fireside chat series featuring London partners Carolyn Jackson, Nathaniel Lalone and Neil Robson on notable UK and European developments from the prior week’s *Corporate & Financial Weekly Digest*. Please join us for our second installment Tuesday, May 12, at 1:00 p.m. Eastern / 6:00 p.m. London time. Topics include:

- ESG and a possible UK sustainable taxonomy regime for investment products
- The demise of the European Union’s (EU) open access regime for derivatives

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To view the recording from the first installment, please click [here](#).

### **BoE, FCA and PRA Statements on Regulators’ Temporary Transitional Power**

On April 30, the Bank of England (BoE) and the UK’s Prudential Regulation Authority (PRA) published a joint statement, and the UK’s Financial Conduct Authority (FCA) published a statement on HM Treasury’s proposed use of the UK financial services regulators’ temporary transitional power (TTP) for up to two years after the end of the Brexit transitional period in December 2020 (the Statements).

The Statements include the following noteworthy measures:

1. The UK regulators will apply the TTP after the transition period in largely the same manner as has been publicly stated to date;
2. The UK regulators intend to grant transitional relief on a broad basis (subject to certain specific carve-outs) for a period of 15 months after the end of the transition period (i.e. until March 31, 2022);
3. The application of the TTP to changes to EU measures due to come into force during the transition period will be considered as part of the UK's ongoing legislative process;
4. For incoming EEA firms, the TTP does not apply to the FCA and PRA temporary permissions regimes; and
5. Draft transitional directions and guidance will be updated in light of the transition period with more details to be published in due course.

The BoE and PRA Statement is available [here](#).

The FCA statement is available [here](#).

### **ESG: House of Commons EU Scrutiny Committee Letter Regarding the Taxonomy Regime**

On May 4, the House of Commons EU Scrutiny Committee (the Committee) published a letter to HM Treasury on the proposed regulation (the Taxonomy Regulation) on the establishment of a framework to facilitate sustainable investment (the Letter).

The Letter asks the UK government to consider possible consequences of the Taxonomy Regulation, particularly as classifying investments by sustainability is an untested and uncertain measure. The Committee claims that it is not yet clear how to meet this new sustainability criteria, and so firms may do so with little effort. For instance, when firms offer bonds, they can decide what disclosed information meets the sustainability taxonomy criteria.

In the Letter, the Committee also acknowledges that the Taxonomy Regulation is not expected to apply to the UK before Brexit, particularly as it is due to become applicable at the end of 2021. Nonetheless, the Committee would like to receive a response from HM Treasury by the end of May to clarify whether the government is considering establishing a similar legally binding domestic sustainability taxonomy for investment products.

For further information on the Taxonomy Regulation, please see the advisory prepared by Katten, available [here](#).

The Letter is available [here](#).

### **FCA Notice on Position Limits for Certain Commodity Derivative Contracts**

On May 5, the UK's Financial Conduct Authority (FCA) published a notice on its updated position limits for certain commodity derivative contracts traded on UK trading venues (the Statement).

In the Notice, the FCA has amended various position limits by removing the 2,500 de-minimis limit (the Limit) to reflect the changing market conditions. The FCA deemed that a 2,500 lot limit could impair market functioning or growth in the relevant contracts in ways which MiFID II sought to avoid.

The changes immediately apply to the following contracts:

1. Aluminium Monthly Average Futures (OA);
2. Steel Rebar (SR);
3. Hot Rolled Coiled China Steel (HC); and
4. Hot Rolled Coil North America (HU).

The FCA will replace the Limit with an announcement in due course, which may be subject to change depending on the outcome of ESMA's opinion on the Limit. The FCA will provide two months' notice before the new limits come into force.

The Notice is available [here](#).

## **FCA Statement on Modification by Consent in Relation to SM&CR**

On May 6, the Financial Conduct Authority (FCA) published a statement on the modification by consent (the Modification) in relation to the Senior Managers and Certification Regime (SM&CR) to extend the maximum period firms can arrange cover for absent senior managers as a result of the COVID-19 pandemic (the Statement).

The Statement sets out how the FCA has modified the 12-week rule to support firms using temporary arrangements. Firms can now extend the maximum period to arrange cover for a senior manager without being approved, from 12 weeks to 36 weeks, in a consecutive 12-month period.

The Modification is designed to give firms flexibility in managing their governance arrangements during the COVID-19 pandemic. The Modification by consent will take effect from the date a firm applies for it and will end on April 30, 2021. For a list of other measures introduced by the FCA to assist firms' governance, please see the Katten advisory on the FCA's expectations of solo-regulated firms, available [here](#).

According to the Statement, firms are also allowed to allocate prescribed responsibilities of the absent senior manager to an individual standing in for the absent senior manager.

Firms are expected to clearly document any changes to managers' responsibilities, but they will not be required to submit Form A applications or Form J and any Statement of Responsibilities notifications, where the changes are temporary and directly related to the COVID-19 pandemic.

Firms that want to use the Modification should submit an application into the FCA's Connect system. The FCA will list firms that have applied for the Modification on its website but will not identify if individuals have been ill with COVID-19.

The Statement is available [here](#).

## **BOE Publishes its Interim Financial Stability Report and Quarterly Monetary Policy Report**

On May 7, the Bank of England (BoE) published an interim financial stability report setting out its view of the performance of the UK's financial system during the COVID-19 pandemic and the outlook for the UK's financial stability, including its assessment of the resilience of the UK financial system (the Financial Stability Report). The BoE also published its quarterly monetary policy report that sets out its response to the COVID-19 pandemic in relation to the BoE's interest rate and the UK's level of inflation (the Monetary Policy Report).

The BoE notes that, as a result of the impact of the COVID-19 pandemic, investors have sold certain assets in order to obtain short-term highly liquid assets and cash. The BoE and other central banks have introduced a number of measures to meet the increased demand for cash and to calm the financial markets.

The BoE highlights that the UK government has provided the Coronavirus Job Retention Scheme to reduce the unemployment rate and protect household incomes. The BoE notes that it is in the collective interest of the banking system to continue to support the government schemes in place to provide credit to businesses to help them weather the current economic disruption. Failure to do so could trigger higher cash flow deficits, further losses for banks and businesses and an increase in unemployment.

In the Financial Stability Report, the BoE has advised that while there may be a need for short-term reprioritization, market participants should remain focused on the continued importance of removing reliance on Libor by the end of 2021.

In the Monetary Policy Report, the BoE notes that it will maintain its interest rate at 0.1 percent and continue with the £200 billion UK government bond and sterling non-financial investment-grade corporate bond purchases, financed by the issuance of central bank reserves, to take the total stock of these purchases to £645 billion.

The Financial Stability Report is available [here](#).

The Monetary Policy Report 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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SEC/CORPORATE

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