FORUM FOR US SECURITIES LAWYERS IN LONDON

US SECURITIES LAW DIGEST: June 2020

Please find below the **June 2020** issue of the ***US Securities Law Digest*** (the "Digest"). This Digest is intended to provide a compilation of recent legal news relevant to a capital markets practice in the London and international markets. The news pieces have been collected and summarized from various sources, and links to the original sources are provided.

As with our March 2020 Digest (available here) and April 2020 Digest (available here), this issue also features a comprehensive round-up of the impact of COVID-19 on US securities laws and capital markets.

Please visit our website here, where you will find all past Forum content, including past digests, podcasts & webinars, and our Capital Markets Glossary (2015). The updated glossary will be published later this year. You can also download our first series of podcasts featuring topics ranging from blockchain and capital markets to dark pools on iTunes here.

Thank you to Dan Teplin of Reed Smith for his assistance in preparing this Digest.

Please feel free to forward this email on to any colleagues or contacts who may be interested. We continue to welcome any feedback that you may have about the Digest.

Best regards,

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US SECURITIES LAW DIGEST:

June 2020

CAPITAL MARKETS UPDATES

Modernizing U.S. Equity Market Structure

On June 22, Securities and Exchange Commission ("SEC") 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.

See the Katten alert here. (June 26, 2020)
See the SEC Statement "Modernizing U.S. Equity Market Structure" by Chair Clayton and Director Redfern here. (June 22, 2020)

Corp Fin issues supplemental Disclosure Guidance: Topic No. 9A Coronavirus (COVID-19)

On June 23, the staff of the Securities and Exchange Commission's ("SEC's") Division of Corporate Finance ("Corp Fin") issued Disclosure Guidance: Topic No. 9A, which supplements CF Topic No. 9 with additional views of the staff regarding disclosures related to operations, liquidity and capital resources that companies should consider as a consequence of business and market disruptions resulting from COVID-19. You might recall that, in March, the staff issued CF Topic No. 9, which offered the staff's views regarding disclosure considerations, trading on material inside information and reporting financial results in the context of COVID-19 and related uncertainties. As with the original guidance, the new supplemental guidance includes a valuable series of questions designed to help companies assess, and to stimulate effective disclosure regarding, the impact of COVID-19, in advance of the close of the June quarter. As

See the Cooley update here. (June 24, 2020)
See the SEC's Disclosure Guidance: Topic No. 9A here. (June 23, 2020)

A Conversation with SEC Chairman Jay Clayton: Long-Term Investing, Sustainability and the Role of Disclosures

On June 23, 2020, Jay Clayton, Chairman of the US Securities and Exchange Commission ("SEC") discussed his perspectives on long-term investing, sustainability and the role of disclosures during a webinar hosted by FCLTGlobal, a non-profit organization that develops research and tools that encourage long-term investing and business decision-making.

See the Mayer Brown blog here. (June 23, 2020)
See the FCLTGlobal video with Chair Clayton here. (June 23, 2020)

SEC Chairman Clayton Provides Public Statement Regulation Best Interest and Form CRS

On June 15, Chairman Jay Clayton of the Securities and Exchange Commission (the "SEC") made a public statement (Statement), which covered several topics related to Regulation Best Interest (Reg BI) and Form CRS. Among other things, the Chairman confirmed that the compliance date for Reg BI and Form CRS will be June 30, 2020 and emphasized the SEC's focus on issues related to Main Street investors, including the creation of a new investor-focused resource to assist such investors with reviewing the Form CRS and researching firms and financial professionals.

See the Katten Muchin Rosenman alert here. (June 19, 2020)
See the Cadwalader Wickersham & Taft alert here. (June 16, 2020)
See the SEC Statement here. (June 15, 2020)

SEC proposes rule for funds in making good-faith fair value determinations

On April 21, 2020, the U.S. Securities Commission (the "SEC") proposed a new rule under the Investment Company Act of 1940 (the "1940 Act") to govern the valuation practices and the role of boards of directors regarding the fair value of the investments of registered investment companies and business development companies. If adopted, Rule 2a-5, (the "Proposed Rule") would: (i) create a framework for determining fair value in good faith for purposes of section 2(a)(41) of the 1940 Act and rule 2a-4 thereunder; (ii) define when market quotations are "readily available"; (iii) permit fund boards to assign fair value determinations to an investment adviser; and (iv) require investment advisers to report to boards of directors (both periodically and promptly) regarding many aspects of the fair value determination process and to facilitate board oversight.

U.S. Government Support Grows for Nasdaq's Compliance Proposals for Chinese Companies

Nasdaq recently proposed rules intended to impose stricter requirements on companies looking to go public or be listed on Nasdaq that have their businesses principally administered in certain jurisdictions defined by Nasdaq as "Restrictive Markets" (including China) or whose auditors' qualifications raise concerns and the Senate's recently passed bill to delist companies that have not had PCAOB inspections of their auditors for three consecutive years, the White House, the Secretary of State, and the Chairman of the SEC have taken actions or released statements in support of the goals of these proposals.

See the Winston & Strawn alert here. (June 18, 2020)

Key Considerations for Non-US Companies Listing in the US

The United States continues to be the destination of choice for many non-U.S. companies looking to go public. For a number of reasons, the New York Stock Exchange and Nasdaq have become desirable listing venues for many international companies in a range of sectors. Though the U.S. Securities and Exchange Commission (the "SEC") registration and review process can be a daunting prospect, the process is in fact less burdensome than some companies fear. Accordingly, listing in the U.S. can actually be easier than doing so in many other jurisdictions. However, certain rules and regulations in the U.S. present unique considerations for companies looking to go public. Relatedly, the legal framework administered by the SEC treats certain non-U.S. companies that meet the definition of foreign private issuers ("FPIs") differently from their U.S. counterparts. That legal framework provides accommodations to FPIs designed to make the registration and reporting process less burdensome, including through harmonization of U.S. rules and procedures with applicable local law standards. This article discusses some of the key issues FPIs should consider at least one year in advance of listing.

See the Skadden Arps alert here. (June 17, 2020)

Direct listings – Something New, or Variations on a Theme?

This article discusses the direct listings of Spotify (2018) and Slack (2019) in the United States. In many respects, these transactions resemble the traditional "introduction" which has been utilised in the UK for many years for a number of purposes. The article contemplates what sets the new model of direct listing apart, is it something which could be attractive for issuers seeking to list in London, and if so, how could the structure be implemented? This article discusses these questions and more.

See the White & Case alert here. (June 15, 2020)

On May 20, 2020, the Securities and Exchange Commission (the "SEC") adopted amendments to requirements for financial disclosures about acquired and disposed businesses. These rules have remained largely unchanged for numerous years, even as many other SEC rules and forms have undergone significant revisions in the same period. The amendments are intended to reduce the complexity and costs associated with the determination of whether and when financial information regarding an acquired or disposed business is required and with the preparation of historical financial statements and pro forma financial information. The amendments are effective as of January 1, 2021; however, voluntary compliance is permitted in advance of the mandatory compliance date provided that the amendments are applied in their entirety.

See the Covington & Burling alert here. (June 11, 2020)

SEC Chair Supports Foreign Companies Delisting Bill

In May, the Senate passed the Holding Foreign Companies Accountable Act, which would amend SOX to impose certain requirements on a public company that is audited by a registered public accounting firm with a branch or office located in a foreign jurisdiction that the PCAOB is "unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction." And, as previously discussed, Nasdaq has also proposed rule changes aimed at addressing the same issue. (*see below*) A number of key players are speaking up to endorse these actions.

Under the proposed federal legislation, after three years of non-inspections, the company's securities can be barred from being traded on a national securities exchange, over the counter or through any other method within the jurisdiction of the SEC. As reported by Bloomberg, SEC Chair Jay Clayton on Tuesday signaled that he supported the legislation, viewing it as "a very sensible way to approach a problem that's been around for a while….This is a problem that I believe needs to be addressed and I hope it can be."

See the Cooley alert here. (June 8, 2020)
See the Bloomberg article here. (June 2, 2020)

FINRA Shares Practices to Transition to a Remote Work Environment during COVID-19

On May 28, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-16 to share common themes observed through discussions with small, mid-size and large firms about the steps they reported taking to transition their associated persons and supervisory procedures to a remote work environment during the coronavirus (COVID-19) pandemic.

See the Katten update here. (June 5, 2020)

Regulated Funds and Activism: SEC Staff Issues No-Action Position on Permissibility of Reliance on State Control Share Acquisition Statutes by Closed-End Funds

On May 27, 2020, the staff of the Division of Investment Management of the SEC ("Staff") withdrew previously issued Staff guidance addressing the relationship between state control share acquisition statutes ("control share statutes") and the voting requirements of Section 18(i) of the Investment Company Act of 1940, as amended ("1940 Act"), and adopted a new no-action position in its place ("No-Action Position"). Control share statutes have been adopted by approximately half the states in the United States as a defensive measure to protect corporations and their existing shareholders from hostile or speculative takeovers. However, these control share statutes had previously been viewed by the Staff as being inconsistent with Section 18(i), which requires that every share of stock issued by a registered management company must be a "voting stock" and have "equal voting rights" as every other share of outstanding stock.

The No-Action Position replaces the Staff's prior position expressed in its letter to Boulder Total Return Fund Inc. ("Boulder Letter"), which discussed the interplay between Section 18(i) and the Maryland Control Share Acquisition Act ("MCSAA"). In the Boulder Letter, the Staff stated that by opting into the MCSAA, which limits the voting rights of control shares except to the extent approved by a Maryland corporation's shareholders, a closed-end fund would be operating in a manner "inconsistent with the wording of, and purposes underlying, Section 18(i)." Notably, the Staff had articulated its position on an informal basis for several years prior to issuance of the Boulder Letter, which followed court decisions that ran contrary to the Staff's then-current view on the topic.

See the Schulte Roth alert here. (June 3, 2020)
See the SEC's "Control Share Acquisition Statutes: Staff Statement, Division of Investment Management" here. (May 27, 2020)

Staying Inside — FCA's New Guidance on Market Conduct During COVID-19

On May 27, 2020, the FCA published its Primary Market Bulletin 28, which provides an update for issuers on temporary relief for the timing of the publication of half-yearly financial reports, going concern assessments, and shareholder engagement.

Additionally, the FCA has published its Market Watch 63 newsletter on market conduct and transaction reporting issues, setting out its expectations for issuers and market participants in relation to identifying, handling, and disclosing inside information in the context of increased capital raising events, alternative working arrangements, and the additional challenges created by the pandemic. The FCA has also provided guidance on short selling activities, managing conflicts, and market conduct in relation to credit default swaps.

See the FCA's Market Watch 63 Newsletter here. (May 2020)

SEC Issues Relief for Investment Companies in Response to COVID-19

Due to the unprecedented Coronavirus Disease 2019 (COVID-19) pandemic, the Securities and Exchange Commission ("SEC") has issued relief to investment companies and investment advisers from certain requirements under both the Investment Company Act of 1940, as amended (the 1940 Act), and the Investment Advisers Act of 1940, as amended (the "Advisers Act"). The relief issued for investment companies has thus far included (i) exemption from the requirement that certain votes by investment company boards be cast in person, (ii) relief from timely filing Forms N-CEN and N-PORT, (iii) relief from requirements to transmit timely annual and semi-annual reports to shareholders, and (iv) relief from timely prospectus delivery requirements for additional share purchases by current shareholders of an investment company. The SEC also issued an order permitting open-end funds and separate accounts to (i) borrow from an affiliated person, (ii) enter into certain interfund lending arrangements, and (iii) to deviate from their fundamental policies to engage in certain borrowing in order to meet redemption requests. The SEC staff has also issued no-action letters permitting affiliated purchases of debt securities so funds can have more liquidity to meet redemptions. Finally, the SEC staff has offered guidance on funds' continuing disclosure obligations during the pandemic.

See the Greenberg Traurig update here. (May 29, 2020)

High Yield Bonds: Know Your Numbers (COVID-19)

The coronavirus pandemic has had an unprecedented impact on many businesses, including those with outstanding high yield bonds. The incurrence covenant regime (and absence of any maintenance covenants) means that, provided liquidity is sufficient to make interest payments, high yield issuers may be able to push through the period. However, issuers (and bondholders) should be mindful of the key numbers to consider when a high yield default is on the horizon, to ensure they are organized for any default scenario.

See the White & Case alert here. (May 29, 2020)

FINRA Updates COVID-19 Guidance

The Financial Industry Regulatory Authority (FINRA) has updated its FAQs regarding coronavirus-related regulatory relief to address:

- situations in which a member firm is unable, as required by FINRA Rule 3110(e), to verify some of the information in an initial or transfer Form U4 due to the COVID-19 outbreak;
- the extension of expiring qualification examination windows until June 30, 2020, including for individuals who were designated to function as Operations

Rule 1210.04, respectively, otherwise would have had 120 days to pass the appropriate qualification examination;
- the extension of deadlines for Rule 3120 reports until June 30, 2020 for member firms with reports that would otherwise be due between March 1 and June 1, 2020;
- the extension of deadlines for Rule 3130 certifications until June 30, 2020 for member firms with certifications that would otherwise be due between March 1 and June 1, 2020 (and CCO meetings, as required as a condition for those certifications, can be conducted virtually); and
- the extension, until June 30, 2020, of the currently-available temporary exemption from fingerprinting requirements, provided that certain notification requirements are met.

Note that FINRA also has emphasized that member firms must document their reliance on any temporary relief provided by FINRA during the COVID-19 pandemic.

See the Katten update here. (May 20, 2020)
See the FINRA FAQs during COVID-19 here.

SEC Adopts Changes to Financial Disclosure Requirements for Acquisitions and Dispositions

On May 21, 2020, the Securities and Exchange Commission ("SEC") adopted extensive changes to the financial disclosure requirements for business acquisitions and dispositions. The amendments are intended to reduce the complexity and costs associated with the preparation of historical financial statements and pro forma financial information, primarily by amending Rule 3-05 and Article 11 of Regulation S-X. The amendments are welcome developments that represent an additional example of the SEC taking concerted action to ease disclosure requirements with respect to capital formation in a manner that ensures investors continue to have access to meaningful information. The amendments will be effective on January 1, 2021, but voluntary compliance will be permitted in advance of the effective date.

See the Skadden update here. (May 28, 2020)
See the SEC Press Release here. (May 21, 2020)
See the SEC Final Rule here. (May 21, 2020)

Nasdaq Targets Emerging Market Companies with Proposed Listing Standards

The Nasdaq stock exchange recently proposed three new rules designed to tighten listing standards for certain companies based in emerging markets — in particular, emerging market jurisdictions that have secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by U.S. regulators, which the rule proposals define as being "Restrictive Markets." The focus of these rule proposals is consistent with recent statements and actions by U.S. regulators and legislators on emerging market risks.

below, are likely to affect only small issuers. However, in light of the recent focus by the SEC and Public Company Accounting Oversight Board ("PCAOB") on the PCAOB's inability to inspect the audit work and practices of auditors in certain countries, the Audit Qualification Proposal, as discussed below, may require, even for larger issuers, meaningful engagement with Nasdaq staff to address concerns about the quality of financial reporting and auditing, even if all enumerated criteria for initial or continued listing on the Nasdaq are satisfied.

See the Sidley update here. (May 28, 2020)
See the Winston & Strawn update here. (May 28, 2020)

SEC's Investor Advisory Committee Makes Disclosure Recommendations

At a meeting of the SEC's Investor Advisory Committee last week, the Committee voted to make recommendations to the SEC on three topics: accounting and financial disclosure; ESG (environmental, social and governance) disclosure; and disclosure effectiveness. The ESG recommendation concluded that "the time has come for the SEC to address this issue," and it should be no surprise that there was some controversy—including some dissenting votes—surrounding that recommendation. While recommendations from SEC advisory committees often hold some sway with the commissioners, given the long-held views of the current commissioners, it seems highly unlikely that the ESG recommendation will have much traction—at least not in the near term. The recommendations come as the membership of the committee undergoes a substantial shift as many members time out on their appointments.

See the Cooley LLP alert here. (May 27, 2020)
See "Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC) Relating to Accounting and Financial Disclosure" here (May 5, 2020)

COVID-19: Considerations in Stock Option Repricing

In the past weeks, many companies, both public and private, have seen their stock prices and values decline because of the economic disruption caused by COVID-19.

As a result, outstanding stock options may no longer provide adequate incentives, as their exercise prices may be well above the current fair market value for the company's common stock (i.e., the options are "underwater"). In addition, for those companies that have a limited number of shares remaining available for issuance under their equity incentive plans, these underwater stock options may impair companies' ability to grant the equity awards needed to properly incentivize employees. Finally, underwater stock options may result in accounting charges for awards that do not provide any of the intended value to the optionholders.

One of the strategies available to many employers to rectify this issue is the "repricing" of the stock options to lower their exercise price per share to an amount

See the Lowenstein Sandler alert here. (May 27, 2020)

SEC Commissioners Raise Concerns about Emerging Market Risk and ESG Disclosures

At an Investor Advisory Committee meeting, SEC Chair Jay Clayton and SEC Commissioner Hester M. Peirce raised issues (see here and here) concerning (i) emerging market investment risk, most notably in China, and (ii) environmental, social and governance ("ESG") disclosures.

Mr. Clayton and Ms. Peirce highlighted the following:

SEC Chair Jay Clayton. Chair Clayton expressed concern about risks associated with investing in emerging markets, singling out China. He stated that U.S. retail investors' exposure to emerging market investments has "increased significantly" in the past decade due to (i) mutual funds that are managed both actively and passively and (ii) exchange-traded funds that invest in companies based on their respective indices.

He emphasized to the committee the importance of focusing on credit ratings' influence on the marketplace.

SEC Commissioner Hester M. Peirce. Commissioner Peirce argued that a new disclosure framework for ESG information is not necessary when there is already a disclosure structure that is able to address a myriad of information types. She raised concerns with ESG data providers "bombarding" issuers with questionnaires in order to provide assessments that the Commissioner described as being of "questionable value."

Commissioner Peirce noted that a number of foreign markets place an emphasis on ESG disclosures, and pointed out that the China Securities Regulatory Commission ("CSRC") is among them. She called that "interesting" given that the quality of financial disclosure by CSRC companies has been called into question. She generally characterized ESG disclosure as being "less transparent and less consistently applied" than traditional financial disclosures.

See the Cadwalader alert here. (May 22, 2020)
See the SEC Public Statement by Chair Clayton here. (May 21, 2020)
See the SEC Public Statement by Commissioner Peirce here. (May 21, 2020)

NASDAQ and NYSE Adopt Temporary COVID-19 Exceptions from Certain Shareholder Approval Rules

Nasdaq and NYSE both have recently adopted temporary relief from certain shareholder approval requirements for companies that need to raise capital due to the impact of COVID-19. The temporary relief will also allow limited insider

investors are often requiring participation by insiders to show insider support of and confidence in the company. Under existing Nasdaq and NYSE rules, shareholder approval is required for any issuance of common stock or securities convertible or exchangeable into common stock representing 20% or more of a company's outstanding common stock or voting power on a pre-transaction basis at a discount to the market price, other than a public offering for cash. Shareholder approval is also required under the equity compensation rules for certain issuances of common stock or securities convertible or exchangeable into common stock to employees, officers, directors or consultants. NYSE further requires shareholder approval for certain issuances to insiders, such as directors, officers and 5% or greater shareholders and their respective affiliates, under the related party rule.

For Nasdaq-listed companies, on May 4, the SEC designated immediately operative a temporary COVID-19 exception providing relief from the "20% rule" and limited relief from the executive compensation rule until June 30, 2020 subject to certain conditions.

For NYSE-listed companies, on May 14, the SEC designated immediately operative a new temporary COVID-19 exception providing relief from the "20% rule" and limited relief from the executive compensation and related party rules until June 30, 2020, also subject to certain conditions. NYSE's exception is substantially similar to the new Nasdaq exception. This new NYSE exception is available to companies in addition to the more limited prior NYSE temporary waiver of certain shareholder approval requirements through June 30, 2020, announced on April 6, 2020.

See the Shearman & Sterling alert here. (May 19, 2020)
See the SEC Release (Release No. 34-88875; File No. SR-NYSE-2020-43) here. (May 14, 2020)
See the SEC Release (Release No. 34-88805; File No. SR-NASDAQ-2020-025) here. (May 4, 2020)

SEC Eases Rules for Crowdfunding to Assist COVID-19 Recovery

The Securities and Exchange Commission ("SEC") issued temporary final rules on May 4, 2020 relaxing certain requirements of Regulation Crowdfunding to enable small companies to raise capital faster and gain access to the funds sooner. The rules were adopted to help small businesses recover from the financial impact of closures and safety measures designed to slow the spread of COVID-19. The amendments apply to securities offerings initiated under Regulation Crowdfunding between May 4 and August 31, 2020.

See the Frost Brown Todd update here. (May 13, 2020)
See the SEC Temporary Amendments to Regulation Crowdfunding, SEC Rel. No. 33-10781 here (May 4, 2020).

COVID-19: Weekly Oversight and Enforcement Report

WilmerHale's COVID-19 Oversight and Enforcement Report offers a concise weekly roundup of notable congressional, executive branch, and state attorney general oversight and enforcement activity relating to the COVID-19 pandemic.

See the Wilmer Hale update here. (June 25, 2020)
See the Wilmer Hale update here. (June 18, 2020)
See the Wilmer Hale update here. (June 11, 2020)
See the Wilmer Hale update here. (June 4, 2020)

SEC Enforcement, Post-COVID: Applying Lessons from the 2008 Crisis to Look Ahead

This article, originally published in the Investment Advisers Association newsletter, analyzes the past to look ahead to a post-COVID world and SEC enforcement risk. Review from prior enforcement actions from the 2008 Crisis reveal the following themes: (i) failure to adequately disclose "bad news" in the face of red flags, including a variety of valuation and liquidity issues; (ii) crisis, as a form of real life stress test, with the result that certain products or investments are exposed as riskier than represented (either at sale or in subsequent reporting or disclosures) or certain financial operations or controls are proven to be deficient; and (iii) actual "bad acts" taken in response to the crisis, such as insider trading, market abuse, risky trading strategies, and mismanagement of redemption requests.

See the Baker McKenzie alert here. (June 17, 2020)

How regulatory enforcement in the UK and US is shifting during the pandemic

Regulators and prosecuting agencies are faced with the questions of whether they can, or should, enforce regulatory requirements and legislation to the same extent as they did before the coronavirus pandemic. It is no secret that corporations and individuals are facing incredible challenges, from the difficulties posed by remote working to budgetary and time constraints. Should these agencies accept that corporations and individuals cannot operate at the same high level of regulatory compliance? Should they be more lenient if they make mistakes due to the environment in which key decisions must now be taken? Given the stretch on resources, it is inevitable that both corporations and regulators will make mistakes. The need to prioritise resources in some areas will undoubtedly mean that other areas do not receive as much attention as before.

See the TLT LLP alert here. (June 17, 2020)

After a two-year review by the Financial Industry Regulatory Authority ("FINRA"), the Office of Financial Innovation released its Artificial Intelligence ("AI") in the Securities Industry Report (the "Report") on June 10, 2020. FINRA's goal was to learn about the emerging challenges confronted by broker-dealers ("Firms") and other market participants as they introduce AI-based applications into their businesses. The Report provides an overview of AI technology, explores its diverse, multifaceted applications in the securities industry and identifies the challenges and legal considerations with leveraging this technology. FINRA requests industry feedback on topics covered in the Report by August 31, 2020.

See the Sidley Austin LLP alert here. (June 17, 2020)
See the Katten Muchin Rosenman LLP alert here. (June 12, 2020)

CFTC Approves Both Interim Final Rule and a Proposed Rule and Extends No-Action Relief in Response to Covid-19

The Commodity Futures Trading Commission (CFTC) unanimously approved an interim final rule on May 28, 2020, in order to grant an extension of the compliance schedule for uncleared swaps in response to the many operational challenges entities are facing in the wake of the COVID-19 pandemic. It also approved a proposed rule exempting certain foreign persons from registration as a commodity pool operator (CPO). Recently, the CFTC extended previous waves of no-action relief in response to the coronavirus.

See the Covington & Burling LLP alert here. (June 17, 2020)

How Regulatory Enforcement in the UK and US is Shifting During the Pandemic

The question for regulators and prosecuting agencies at the moment is whether they can, or should, enforce regulatory requirements and legislation to the same extent as they did before the coronavirus pandemic.

Corporates and individuals are facing incredible challenges, from the difficulties posed by remote working to budgetary and time constraints. Should they accept that corporates and individuals cannot operate at the same high level of regulatory compliance? Should they be more lenient if they make mistakes due to the environment in which key decisions must now be taken?

Regulators and prosecuting agencies alike are facing challenges in a wide variety of areas, including resourcing, technology and the prioritisation of risks. This means that many are struggling to complete the supervisory agendas they had set for 2020 and to follow up on how the regulated are implementing the requirements or guidance.

Given the stretch on resources, it is inevitable that both corporates and regulators will make mistakes. The need to prioritise resource in some areas will undoubtedly

In such times, it is vital that corporates and senior managers avoid 'group think' or 'snap decisions' and have a clear record of the rationale for any decisions that need to be made. This should be done with specific consideration as to the individual corporate, its senior management and its customers or clients.

Overall, regulators have been keen to point out that while we all face challenges during the lockdown and as we emerge from it, it is the spirit as well as the letter of regulation that must be followed.

See the TLT update here. (June 17, 2020)

SEC Eager to Prosecute COVID-19 Misconduct Amid Flurry of Whistleblower Complaints

A Reuters article published on May 26, 2020 reports that the SEC has experienced an uptick in complaints amid the COVID-19 pandemic. According to the article, the SEC received about 4,000 complaints from mid-March through mid-May – a 35% increase from the previous year. With an abundance of tips at its disposal, the SEC is eager to investigate and prosecute COVID-19 related misconduct.

The article discusses how the COVID-19 pandemic has incited a wave of misconduct, ranging from loan and healthcare fraud to the production of counterfeit and substandard medical supplies, across a wide range of industries. The article quotes an SEC spokeswoman as stating: "Unfortunately, fraudsters often seek to exploit difficult situations like the ongoing pandemic for their own gain. The SEC frequently relies on the tips that we receive from the public."

According to the article, the SEC has already begun cracking down on COVID-19 misconduct.

See the Mintz Levin alert here. (June 9, 2020)
See the Proskauer alert here. (May 28, 2020)
See the Reuters article here. (May 26, 2020)

U.S. – Significant Increase in Complaints Brings Potential for Increased SEC Whistleblowing Activity

Among the myriad quarantine pursuits undertaken by the work-from-home crowd, whistleblowing appears to be proving popular. Recent reports indicate that the SEC received more than 4,000 Tips, Complaints, and Referrals ("TCRs") regarding possible corporate malfeasance between mid-March and mid-May. As noted by Division of Enforcement Co-Director Steve Peikin in a recent speech, that represents an approximate 35% increase over the same period last year. This surge in TCRs has resulted in the SEC initiating hundreds of new investigations of alleged misconduct in the contexts both of COVID-19 and many other traditional areas. After already facing challenges from the coronavirus pandemic, many employers may be surprised by this new COVID-19 side-effect.

Clearing Firm Settles FINRA Charges for Capital, Custody and Recordkeeping Violations

A clearing firm settled charges for violating a number of capital, custody and recordkeeping requirements. According to FINRA, the clearing firm violated:

- SEA Rule 15c3-3 ("Customer Protection-Reserves and Custody of Securities") and FINRA Rule 2010 ("Standards of Commercial Honor and Principles of Trade"), by neglecting to make correct customer and PAB reserve amount calculations;
- FINRA Rules 4110 ("Capital Compliance") and 2010, by failing to receive written permission by FINRA prior to making unsecured advances in excess of 10 percent of its net capital to its parent company, totaling over $1 million;
- SEA Exchange Act Rule 17a-3 ("Records to Be Made by Certain Exchange Members, Brokers and Dealers") and FINRA Rules 4511 ("General Requirements") and 2010, by failing to create and maintain required business records; and
- FINRA Rules 3110(a) ("Supervision") and 2010, by failing to (i) address deficiencies in its electronic systems, (ii) ensure that its backup manual processes complied with regulatory requirements and (ii) supervise the operation of its electronic storage systems.

To settle the charges, the clearing firm agreed to a (i) censure, (ii) $450,000 fine and (iii) submission of certification within 60 days by the clearing firm that it has implemented certain supervisory procedures.

See the Cadwalader update here. (June 8, 2020)

U.S. SEC Enforcement Division Pursues Coronavirus-Related Fraud Claims

Federal, state and local law enforcement and consumer protection agencies have been issuing alerts and investigating cases regarding efforts by fraudsters to exploit the coronavirus crisis for profit. The SEC is taking similar action, focused on the use of public securities markets to carry out fraud.

Since the onset of coronavirus, or COVID-19, the SEC has suspended trading in the stock of more than 30 companies in connection with coronavirus-related fraud, pursuant to its authority to suspend trading temporarily where it believes that information about a company is unreliable or inaccurate.

See the Bryan Cave Leighton Paisner update here. (June 5, 2020)

SEC Announces Record-Breaking $50 Million Award to Whistleblower

On June 4, 2020, the SEC announced a nearly $50 million award to a whistleblower who provided the SEC with detailed, first-hand information that assisted the agency

under the SEC's whistleblower program and far surpasses the next-largest individual award of $39 million in September 2018.

See the Proskauer alert here. (June 5, 2020)
See the SEC's Securities Exchange Act of 1934 Release No. 89002; Whistleblower Award Proceeding File No. 2020-20 here. (June 4, 2020)

Failure to Disclose Perks Continues to Attract SEC Enforcement

All the focus on COVID-19 disclosures notwithstanding, the SEC has not taken its collective eyes off the basics. This Order discusses settled charges against Argo Group International Holdings, Ltd. related to its failure to disclose in its proxy statements—for five years—millions in personal expenses and perks paid to its CEO, such as personal use of corporate aircraft and cars, "personal services provided by Argo employees and watercraft-related costs." Not to mention that the CEO was able to approve his own expense reports. According to the press release, Enforcement continues "to focus on whether companies are fully disclosing compensation paid to their top executives and have appropriate internal controls in place to ensure that shareholders receive information to which they are entitled."

See the Cooley alert here. (June 5, 2020)
See the SEC's Securities Exchange Act of 1934 Release No. 89009; Accounting and Auditing Enforcement Release No. 4146; Administrative Proceeding File No. 3-19822 here. (June 4, 2020)

Insurance Underwriter Settles SEC Charges for Understating CEO Pay in Proxy Statements

An international insurance underwriter settled Securities and Exchange Commission ("SEC") charges for understating in its definitive proxy statements the perquisites and personal benefits paid to its CEO.

According to the SEC order, the company failed to disclose $5.3 million that it had paid on the former CEO's behalf. Among the undisclosed benefits were use of corporate aircraft, helicopter trips, housing costs, transportation for family members, personal services, club memberships, and tickets and transportation to entertainment events, retirement plan benefits, insurance coverage, medical premiums, and financial planning services. The SEC also found that the company failed to correct the information even after it discovered potential inaccuracies in its proxy statements.

As a result, the SEC found violations of, among other sections, Exchange Act Sections 14 ("Proxies") and 13 ("Periodicals and other reports").

To settle the charges, the company agreed to (i) cease and desist from further violations of federal securities laws and (ii) pay a civil money penalty in the amount of $900,000.

As COVID-19-Related Fraud Increases, the SEC Ramps Up Enforcement and Investors File Suit

Since the start of the pandemic there has been an influx of fraudulent schemes related to the COVID-19 pandemic, including financial schemes in which scammers claim that the products or services of publicly-traded companies can prevent, detect, or cure COVID-19. In these "pump-and-dump" schemes, the scammers "pump," or increase, the stock price of a company by spreading these positive, but false, rumors, causing investors to purchase the stock. Then, they quickly "dump" their own shares before the hype ends. After the scammers reap their profit from the sales, the stock price drops and the remaining investors lose money. This alert discusses how the Securities and Exchange Commission ("SEC") and private investors are responding to these "pump and dump" schemes and other COVID-19-related financial misconduct.

See the Montgomery McCracken Walker & Rhoads alert here. (June 3, 2020)

Broker-Dealer Fined for Falsely Advertising Trading Volumes

A broker-dealer settled FINRA charges for falsely advertising overstated trading volumes in certain securities through a subscription-based provider of market data.

According to FINRA, the broker-dealer violated FINRA rules by overstating its securities trading volume by including internal booking entries as actual executed trades and publishing the overstated trading volume through Bloomberg. Additionally, FINRA found that the broker-dealer violated additional FINRA rules after two of its trading desks failed to implement supervisory systems and written supervisory procedures.

To settle the charges, the broker-dealer agreed to a (i) censure and (ii) $150,000 fine.

See the Cadwalader alert here. (June 2, 2020)

SEC Settles with Blockchain Company over Unregistered ICO

On May 28, the Securities and Exchange Commission ("SEC") announced a settlement with a California-based blockchain services company resolving allegations that the company conducted an unregistered initial coin offering ("ICO") of digital asset securities. According to the order, the company raised over $25 million by selling "Consumer Activity Tokens" to nearly 9,500 investors, including U.S. investors, to raise capital to "develop, administer, and market a blockchain-based search platform for targeted consumer advertising." The company allegedly told investors that the tokens would increase in value and made the tokens available on third-party digital asset trading platforms after the ICO. However, the SEC found that the tokens constituted securities, and that the company allegedly violated Sections 5(a) and 5(c) of the Securities Act by distributing the tokens without having the

The order, which the company consented to without admitting or denying the findings, imposes a $400,000 penalty, and requires the company to disgorge $25.5 million and pay approximately $3.4 million in prejudgment interest. Additionally, the company is required to surrender all its remaining tokens to the fund administrator so they can be permanently disabled, publish notice of the order, and request the removal of the distributed tokens from all digital asset trading platforms.

See the Buckley alert here. (June 2, 2020)

Securities Enforcement Activity in the COVID-19 Era: A Backstop to Private Securities Litigation

Securities litigation and enforcement activity often surge in times of crisis. Indeed, bedrock federal securities regulations were borne out of an extended crisis: the stock market crash of 1929 and the decade-long Great Depression that followed.

COVID-19 has already set off a wave of securities litigation. These private lawsuits and putative class actions have been based on allegedly misleading statements in securities filings and public statements. But issues surrounding proof in the COVID-19 era, including demonstrating the "price impact" of alleged misrepresentations for purposes of reliance and loss causation, limit the viability of these claims.

As public companies anticipate the next wave of securities activity they should expect limitations on private lawsuits to prompt the Securities and Exchange Commission ("SEC") to ramp up civil enforcement. The Department of Justice ("DOJ") may even launch related criminal investigations in high-profile cases.

Steptoe discuss in this article recent COVID-19-related securities litigation and enforcement trends, special issues with reliance and loss causation, and best practices to avoid the expected onslaught of SEC enforcement and DOJ investigations.

See the Steptoe update here. (May 28, 2020)

Private Equity Firm Settles Charges for Failures in Handling Material Non-Public Information

A private equity firm and registered investment adviser settled the Securities and Exchange Commission ("SEC") charges for failing to implement policies to prevent the misuse of material non-public information ("MNPI").

The SEC stated that the firm had made a major investment in a portfolio company which allowed it to appoint an employee to the company's board, thus enabling the firm to obtain MNPI. According to the Order, after obtaining potential MNPI about the portfolio company, the private equity firm purchased more than 1 million shares of the portfolio company's stock. The SEC found that the firm failed to consider the

The SEC concluded that the firm had not required its compliance staff to determine whether the employee-board member had possession of potential MNPI before it purchased the additional portfolio company shares. The SEC charged the private equity firm with violations of Investment Advisers Act Section 204A ("Prevention of Misuse of Non-Public Information") and Investment Advisers Act Section 206(4) ("Prohibited Transactions by Investment Advisers").

To settle the charges, the firm agreed to (i) cease and desist from further violating SEC regulations, (ii) a censure, and (iii) a $1,000,000 civil money penalty.

See the Weil update here. (May 29, 2020)
See the Cadwalader update here. (May 27, 2020)

SEC and FINRA Officials Speak: Regulators Discuss Enforcement, Regulatory Priorities

Since the outbreak of COVID-19, the U.S. Securities and Exchange Commission ("SEC") and FINRA have led the way among regulators in providing guidance and relief to market participants as the financial industry continues to confront the unprecedented challenges created by the pandemic. In a series of separate recent market discussions, SEC Division of Enforcement Co-Director Steve Peikin, FINRA Enforcement Department Head and EVP Jessica Hopper, along with FINRA's Chief Legal Officer and senior executives in FINRA's Member Supervision and Market Regulation teams, provided important updates to the industry on their respective efforts to continue to regulate effectively in the face of the current market.

On May 12, 2020, Co-Director Peikin discussed in his keynote address at the Securities Enforcement Forum West 2020 Program how the SEC Enforcement Division is responding to the crisis, including by forming a Steering Committee to coordinate the Division's response to coronavirus-related enforcement issues, proactively identify and monitor areas of potential misconduct, ensure appropriate allocation of resources, avoid duplication of efforts, coordinate the response with other state and federal agencies as appropriate, and ensure consistency in how the Enforcement Division addresses coronavirus-related matters. Co-Director Peikin also discussed the Division's efforts to provide meaningful guidance to the regulated community with respect to areas of potential focus, such as insider trading and corporate disclosures, and the Division's concern for meaningful disclosure to retail investors in the municipal securities market.

On May 19, FINRA EVP Hopper; Bari Havlik, EVP, Member Supervision; Thomas Gira, EVP, Market Regulation; and Robert Colby, EVP and CLO, participated in a webcast hosted by SIFMA. They discussed FINRA's enforcement and other regulatory priorities, including improving coordination and transparency in its enforcement efforts, use of market and data analytics to detect potential wrongdoing, and implementation, examination and potential enforcement of impending Regulation Best Interest (Regulation BI).

Although there is no debate that the pandemic has caused great disruption — to

conveyed a consistent message that, now more than ever, intra-agency teamwork and collaboration, as well as coordination between the SEC and FINRA, is critical to fulfilling their overarching mission to protect investors.

See the McGuire Woods update here. (May 26, 2020)

How Senators May Have Avoided Insider Trading Charges

On May 25, reporters revealed the Department of Justice had discontinued the investigations into coronavirus-related trading by Senators Kelly Loeffler, James Inhofe, and Dianne Feinstein (whose holdings are in a blind trust). The three Senators each had sold—and in Senator Loeffler's case, bought—large amounts of stock the same day or soon after a confidential senatorial briefing on January 24 by the CDC's Director and Dr. Anthony Fauci. Prosecutors' apparent direct communication of this result to the senators is somewhat unusual; ordinary defendants rarely get the security of knowing so promptly that the government has declined a case. The news also comes on the heels of reports that Department of Justice recently took control over these investigations from the Southern District of New York, raising the specter that this quick decision indicates further politicization of DOJ's mission, or at minimum indicates continued erosion of Main Justice's traditional deference to local U.S. Attorneys' Offices.

Setting aside those unusual overtones, which may cause further comment in days to come, one could hardly fail to note that Senator Richard Burr was absent from this list of closed investigations.

See the Forbes article by Morvillo Abramowitz here. (May 26, 2020)

LITIGATION UPDATES

Supreme Court Preserves SEC's Ability To Seek Disgorgement, With Limitations

The U.S. Supreme Court held on June 22, 2020, in *Liu v. SEC, No. 18-1501* (2020), that the Securities and Exchange Commission ("SEC") may seek a disgorgement award in a civil action in federal court that does not exceed a wrongdoer's net profits and is awarded for the victims of the wrongdoing, as such an award constitutes "equitable relief" permissible under Section 21(d)(5) of the Securities Exchange Act of 1934 (15 U.S.C. §78u(d)(5)).

Moving forward, the SEC will be free to continue to seek disgorgement in civil enforcement actions in federal court, but it will need to ensure that any such amounts are limited to the net profits from the alleged wrongdoing. It remains to be seen how courts will handle SEC-proposed disgorgement orders directing funds to the