

February 10, 2021

Disclosure in the Context of Extreme Price Volatility:
Guidance from the Division of Corporation Finance

The SEC's Division of Corporation Finance this week [issued](#) a public statement and related comments directed at companies seeking to raise capital in times of extreme stock price volatility, emphasizing that raising capital in such circumstances warrants the provision of specific, tailored disclosure to ensure investors have adequate information to make informed investment decisions. In its statement, the SEC specifically refers to companies that may be experiencing high short interest, reported short squeezes or reports of strong and atypical retail investor interest, including on social media. The SEC suggests impacted companies provide information on the prospectus cover page regarding recent stock price volatility, comparative stock price information prior to the volatile period, and any recent changes (or the absence of changes) in the company's financial condition or results of operations. The SEC's illustrative comments also suggest adding risk factors on price volatility and short squeeze investor risk, including a description of what typically happens after a short squeeze, as well as explaining in the use of proceeds disclosure that the company may not be successful in raising the maximum offering amount, and its priorities for received proceeds.

Issuers who find themselves in GameStop-style volatility and at the same time raising capital or engaging in stock buyback programs, including accelerated share repurchases, will need to be mindful of avoiding any material misstatements or omissions in their disclosure documents, including those which would typically not be subject to SEC review prior to their use, like automatically effective registration statements and prospectus supplements for takedowns from existing shelf registration statements. Companies and insiders must also be particularly mindful to avoid a failure to disclose fully and properly and avoid trading while in possession of non-public information.

Beyond these considerations for impacted companies, recent market volatility has resurfaced the broader lack of a comprehensive regulatory framework regarding short selling, and the potential risks that such a state of affairs poses to companies, investors and capital markets. While ISS recently raised legitimate concerns that "staged pack attacks" could spark a push for less transparency in ownership reporting, the right approach will require greater transparency and more complete and timely reporting. Last March, we [highlighted](#) non-U.S. financial regulators' decisions to regulate short selling in light of market volatility related to the pandemic, including by lowering the disclosure threshold for short positions, and we have reported on calls for enhanced regulations with respect to short selling in [France](#). We have also discussed calls for [regulatory reform](#) of the framework applicable to short selling in the U.S., designed to prevent the risks of "short and distort" manipulation. The major U.S. exchanges ([NYSE](#) and [Nasdaq](#)) have previously petitioned for enhanced disclosure of beneficial ownership of short positions. Accelerated and expanded Schedule 13F ownership reporting by institutional investment managers, including with respect to short positions, has also been [suggested](#).

Although we have so far seen little regulatory movement in the U.S., regulators and legislators are focusing on short selling and its impact in the context of recent market volatility, as evidenced by Treasury Secretary Yellen's meetings with the heads of the SEC, FRB and CFTC on the topic last week, and the hearings being held by the U.S. House Committee on Financial Services later this month. The time is ripe for improvement in this area, before the next dislocation.

Adam O. Emmerich
Wayne M. Carlin
Sabastian V. Niles
Hannah Clark

*If your address changes or if you do not wish to continue receiving these memos,
please send an e-mail to Publications@wlrk.com or call 212-403-1443.*