

Regulatory and Enforcement Alert

Key Takeaways From the SEC's Settled Charges Against BMW – the SEC Continues Its Efforts to Police Corporate Bond Disclosures and Accords Special Credit to Cooperation Efforts During the Pandemic

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On September 24, 2020, the Securities and Exchange Commission announced a settled case against BMW AG (“BMW”) and two of its U.S. subsidiaries for inaccurate disclosures concerning BMW’s retail sales volume in the United States, while the company raised approximately \$18 billion from U.S. investors in various bond offerings.

The SEC’s order against BMW is noteworthy for at least two reasons. *First*, it reflects the SEC’s continued focus on bond offering disclosures, even in the absence of findings or allegations that proper disclosures would have impaired the ability of the company to make interest payments or repay principal to bondholders. *Second*, it demonstrates that the SEC is prepared to accord special credit for a respondent’s cooperation in the midst of the challenges posed by the global COVID-19 pandemic.

The SEC’s View of Materiality in Disclosures to Bondholders

The BMW case is the most recent example of the SEC’s willingness to hold a company liable for misstatements made in connection with bond offerings, whether or not such misstatements concerned matters that affected the likelihood that bondholders would be repaid. The SEC’s robust enforcement posture here thus echoes in some respects the agency’s action last year against Volkswagen AG. There, too, the SEC asserted that disclosure failures—in Volkswagen’s case, related to the company’s diesel emissions scandal—were material to bondholders without also asserting that the risk of default was significantly impacted by those failures.

While in Volkswagen, the SEC asserted that the price at which the company issued its debt was higher (*i.e.*, the interest rates that Volkswagen paid to bondholders were lower) as a result of the company’s misstatements, in BMW, the SEC did not find that the company had paid lower interest rates as a result of the company’s misstatements. The SEC simply relied on the company’s own characterization of the non-GAAP metrics relating to BMW’s U.S. retail sales as “key performance figures.” Indeed, by declining to seek disgorgement from BMW, the SEC may be tacitly acknowledging that the conduct at issue did not lead to better pricing or other concrete benefits to the company. Of course, the SEC can demonstrate that an issuer’s misstatements are material, and therefore actionable, without proving investor harm (or issuer benefit).¹ The BMW case thus serves as a reminder

¹ See Opinion of the Commission, *In re Moshe Marc Cohen*, SEC Admin. Proceeding File No. 3-15790 (Sept. 9, 2016) (“As a general matter, no showing of investor reliance or investor harm is required in [a] Commission enforcement proceeding.”) (citing cases).

to bond issuers that they should exercise caution in describing particular data points as important business barometers.

Cooperation With the SEC During the COVID-19 Pandemic

The SEC's order is also notable in its detailed description of BMW's cooperation, and its express reference to challenges raised by the global COVID-19 pandemic. Specifically, the order commends BMW for complying with the SEC's requested schedule and its prompt collection and production of "a significant volume of electronic documents, including documents that would otherwise have been difficult and time-consuming for [the SEC] to obtain; documents from sources outside of BMW's corporate offices, such as BMW employees working from remote locations; and translations of key documents." The order notes that BMW additionally made several current and former employees available for interviews with the SEC, and provided the SEC with "presentations and narrative submissions that highlighted critical facts."

The order states that the SEC elected to impose a "reduced" penalty of \$18 million in light of BMW's "extensive cooperation." (As is customary the SEC did not quantify the amount or percentage of the reduction.) Insofar as the items the SEC cites as evidence of BMW's cooperation are part of the standard cooperation checklist, the case may be suggestive of the SEC's willingness, during the COVID-19 pandemic, to accord extra credit for what some might view as ordinary course cooperation. At a minimum, BMW may serve as useful precedent for other companies negotiating settlements with the SEC to argue that their cooperation during the pandemic warrants a reduced penalty (or even reduced charges).

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