

## BROKER-DEALER

### **SEC Issues No Action Letter on Treatment of Reserved Powers Trust as Non-US Person by Non-US Investment Adviser for Registration Exemption**

On March 5, the Securities Exchange Commission's Division of Investment Management issued a no-action letter (the No-Action Letter) relating to the treatment of a Reserved Powers Trust as a non-US person by a non-US investment adviser in relying on the foreign private adviser exemption in section 203(b)(3) of the Investment Advisers Act of 1940 (the Advisers Act). Section 203(a)(30) of the Advisers Act defines a foreign private adviser as an investment adviser that has "fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser and less than \$25 million in aggregate assets under management from such clients and investors."

Specifically, the SEC staff indicated that a Reserved Powers Trust may be treated as a non-US person by a non-US investment adviser "in determining the number of clients and private fund investors in the United States, or the amount of its assets under management attributable to clients and investors in the United States," when relying on the foreign private adviser exemption.

[The No-Action Letter.](#)

[The Request for No-Action.](#)

### **FINRA Adopts Rules to Address Brokers With a Significant History of Misconduct**

On March 10, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 21-09 announcing FINRA's adoption of new rules to address brokers with a significant history of misconduct and the broker-dealers that employ them. FINRA adopted the following rules:

- Amendments to the Rule 9200 Series (Disciplinary Proceedings) and the Rule 9300 Series (Review of Disciplinary Proceeding by National Adjudicatory Council and FINRA Board; Application for SEC Review) authorize Hearing Officers to impose conditions and restrictions on disciplined Respondents, and require member firms to adopt heightened supervision plans regarding associated persons who are disciplined Respondents.
- Amendments to Rule 9556 (Failure to Comply with Temporary and Permanent Cease and Desist Orders, or Orders that Impose Conditions or Restrictions) grant FINRA staff the authority to bring an expedited proceeding against a Respondent that fails to comply with conditions and restrictions imposed by Hearing Officers and create the process for the new expedited proceeding.
- Amendments to Rule 9522 (Initiation of Eligibility Proceeding; Member Regulation Consideration; and Requirements for an Interim Plan of Heightened Supervision) require a member firm that files an application to continue associating with a disqualified person to include an interim heightened supervision plan that would be in effect throughout the application review process.
- Amendments to Rule 8312 (FINRA BrokerCheck Disclosure) require FINRA to release through BrokerCheck which firms are "taping firms," which are member firms with a specified percentage of registered persons who have been associated with disciplined firms in a registered capacity in the last three years.

- Amendments to Rule 1000 Series (Member Application and Associated Person Registration), among other things, require a member firm to file a continuing membership application (CMA) when a natural person seeking to become an owner, control person, principal or registered person of the member has one or more “final criminal matters” or two or more “specified risk events” in the prior five years.

The above rule changes also apply to capital acquisition brokers (CABs), and FINRA amended CAB Rule 111 and Funding Portal Rule 900(b) to reflect those changes.

Amendments to FINRA Rule 9200 Series, FINRA Rule 9300 Series, and FINRA Rule 9556 become effective April 15. Amendments to FINRA Rule 8312 become effective May 1. Amendments to FINRA Rule 9520 Series and Funding Portal Rule 900 become effective June 1. Amendments to FINRA Rule 1000 Series and the Capital Acquisition Broker Rule 100 Series become effective September 1.

[Regulatory Notice 21-09.](#)

### **FINRA Issues Guidance on Common Sales Charge Discounts and Waivers for Investment Company Products**

On March 4, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 21-07 (Notice) providing additional background and guidance on sales charge discounts and waivers for investment company products.

The Notice provides an overview of common volume-based sales charge discounts and sales charge waivers for mutual funds, 529 plans, non-traded real estate investment trusts and non-traded business development corporations.

The Notice reminds firms to establish and maintain adequate supervisory systems and written supervisory procedures and adequately train their associated persons regarding sales charge discounts and sales charge waivers. The Notice provides topics of considerations for firms to improve their compliance programs, including supervision, recordkeeping, eligibility tracking and training.

[FINRA Regulatory Notice 21-07.](#)

### **FINRA Alerts Firms of Ongoing Phishing Campaign Involving “finra-online.com” Domain Name**

On March 4, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 21-08 (Notice) warning member firms of an ongoing fraudulent phishing campaign involving the domain name “finra-online.com.” The email asks the recipient to respond to an issue of “regulatory non-compliance for which your immediate response is required” and then asks the recipient to click on a link or document. The notice notes that the domain name “is not connected to FINRA and firms should delete all emails originating from this domain name.”

[FINRA Regulatory Notice 21-08.](#)

### **FINRA Board of Governors Approves Soliciting Comments on Amendments to Borrowing and Lending Rule**

The Board of Governors of the Financial Industry Regulatory Authority (FINRA) met on March 3 and 4, when, among other actions, it approved the publication of proposed amendments to FINRA Rule 3240 (Borrowing From or Lending to Customers) for comment. The proposed amendments aim to “strengthen the general prohibition of the rule, narrow or update some exceptions, and align the rule more closely with recently adopted FINRA Rule 3241 (Registered Person Being Named a Customer’s Beneficiary or Holding a Position of a Trust for a Customer).”

[FINRA Board of Governors meeting on March 3 and 4.](#)

## CFTC

### **NFA Proposes Compliance Rule 2-50 and Related Interpretive Notice**

On March 5, the National Futures Association (NFA) submitted to the Commodity Futures Trading Commission (CFTC) proposed new Compliance Rule 2-50 and a related Interpretive Notice. Proposed Compliance Rule 2-50 would require each Commodity Pool Operator Member (CPO Member) to provide notice to the NFA by 5:00 p.m. (CT) on the following business day whenever a commodity pool operated by the CPO Member (1) is unable to meet a margin call; (2) is unable to satisfy redemption requests in accordance with its subscription agreements; (3) has halted redemptions, and the halt is not associated with pre-existing gates or lockups, or a pre-planned cessation of operations; or (4) has received notice from a swap counterparty that the pool is in default.

The related Interpretive Notice provides more detailed information regarding the nuances of the events triggering the notice requirement. For example, the Interpretive Notice specifies that a CPO Member is not required to give notice on the day the pool receives a margin call that it cannot meet that same day if it reasonably expects to meet the margin call within the time period imposed by its futures commission merchant. Similarly, the mere fact that a pool is unable to meet a redemption request on the day the request is received does not automatically trigger the notice requirement, provided the redemption request can be met within the terms of the pool participant's subscription agreement (including any applicable grace period). With respect to commodity pools declared to be in default by a swap counterparty, the Interpretive Notice confirms that notice is required if the CPO Member does not reasonably believe the pool can cure the default within any previously agreed period, regardless of whether the pool is in negotiations with the swap counterparty to liquidate positions or disputes the default.

Overall, the Interpretive Notice emphasizes that the proposed Compliance Rule 2-50 is designed to ensure that CPO Members notify the NFA promptly of potential financial issues that may impact a CPO's ability to fulfill its obligations to pool participants or may result in a pool's unanticipated liquidation. In accordance with Section 17(j) of the Commodity Exchange Act, the NFA may make proposed Compliance Rule 2-50 and Interpretive Notice effective as early as 10 days after the CFTC receives the submission, unless the CFTC notifies the NFA that it will review the proposal for approval.

[Proposed Compliance Rule 2-50 and related Interpretive Notice.](#)

## UK DEVELOPMENTS

### **FCA Publishes Consultation Paper on Regulating Bidding for Emission Allowances Under UK ETS**

On March 8, the Financial Conduct Authority (FCA) published a consultation paper detailing its proposals to regulate bidding for emissions allowances on the UK auction platform under the UK Emissions Trading Scheme (ETS) (the Consultation Paper).

Upon the UK's withdrawal from the European Union, the UK ETS replaced the United Kingdom's involvement in the EU ETS from January 1.

The key areas addressed by the FCA in the Consultation Paper include:

- consulting on the UK Emission Trading Scheme Instrument 2021;
- proposing amendments to various FCA Handbook modules, which include the Principles for Business and Senior Management Arrangements, Systems and Controls, among other modules and guides; and
- consulting on the Technical Standards (Market Abuse Regulation) (UK Emissions Trading Scheme) Instrument 2021, which proposes changes to certain technical standards under the UK Market Abuse Regulation.

The consultation closes on April 6, so the FCA's rules are in place before the first post-Brexit UK ETS auction is held, which should be no later than the second quarter of 2021.

[The Consultation Paper.](#)

## **FCA Announces Annual Transparency Calculations for Equity and Equity-Like Instruments**

On March 9, the Financial Conduct Authority (FCA) announced its first, post-Brexit annual transparency calculations for UK equity and equity-like financial instruments in response to the UK Markets in Financial Instruments Regulation (the Press Release). The calculations will be available from April 1.

The calculations will be available through the FCA's Financial Instrument Transparency Reference System and will include:

- the liquidity assessment;
- the determination of the most relevant market in terms of liquidity;
- the determination of the average daily turnover relevant for the determination of the pre-trade and post-trade large in scale thresholds;
- the determination of the average value of the transactions and the related standard market size; and
- the determination of the average daily number of transactions on the most relevant market in terms of liquidity relevant for the determination of the tick-size regime.

The FCA expects market participants to monitor daily the release of the transparency calculations for equity and equity-like instruments to obtain the calculations for newly traded instruments.

[The Press Release.](#)

## **EU DEVELOPMENTS**

### **ECON Publishes Draft Report on Proposed Regulation on Markets in Cryptoassets**

On March 9, the European Parliament's Economic and Monetary Affairs Committee (ECON) published a draft report detailing recommendations to the European Commission on the proposed Regulation on markets in cryptoassets and amending Directive (EU) 2019/1937 (the Draft Report).

The Draft Report includes:

- a draft European Parliament legislative resolution; and
- suggested amendments to the proposed Regulation.

The European Central Bank published its opinion on the proposed Regulation in February.

[The Draft Report.](#)

### **European Commission Publishes Draft Delegated Act on FRANDT**

On March 10, the European Commission (the Commission) published a draft delegated act detailing the obligation on clearing members and clients when providing clearing services under fair, reasonable, non-discriminatory and transparent (FRANDT) commercial terms (the Delegated Act).

The key areas addressed by the Commission in the Delegated Act include:

- transparency requirements in respect of fees, prices, discount policies and other general contractual terms and conditions regarding the price list;
- reasonable commercial terms to provide unbiased and rational contractual arrangements;
- requirements that assist clearing services on a fair and non-discriminatory basis; and
- risk control criteria for the clearing member or client related to the clearing services offered.

The requirement to apply FRANDT terms will apply from June 18.

[The Delegated Act and Annex.](#)

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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