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CFTC

CFTC Extends Portfolio Margining on ICE Clear Europe

The Commodity Futures Trading Commission has issued an amended order authorizing futures commission merchants (FCMs) that are not clearing members of ICE Clear Europe Limited, but carry futures and options on futures positions cleared through ICE Clear Europe (1) to commingle and hold in segregated accounts established pursuant to Section 4d(a) and (b) of the Commodity Exchange Act customer funds used to margin, secure or guarantee futures traded on ICE Futures US with customer funds used to margin, secure or guarantee foreign futures and options traded on ICE Futures Europe and ICE Endex and (2) to provide for portfolio margining of such positions.

The CFTC granted this relief to ICE Clear Europe and its clearing members in May 2014, but such relief did not include FCMs that are not clearing members but carry contracts for customers that are cleared at ICE Clear Europe.

The amended order is available here.

CFTC Extends CCO Report Filing Deadline

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission has issued permanent no-action relief from the filing deadline for chief compliance officer (CCO) annual reports. Pursuant to CFTC regulations, the CCO of a registered futures commission merchant (FCM), swap dealer or major swap participant must file an annual report with the CFTC within 60 days after the end of the registrant's fiscal year.

DSIO has in the past extended the 60-day deadline through the issuance of temporary no-action relief. In CFTC Letter No. 15-15, DSIO has granted permanent no-action relief from the 60-day requirement so long as the CCO files the annual report within 90 days after the end of the registrant's fiscal year. DSIO also has granted relief from the requirement that the CCO of an FCM furnish the annual report simultaneously with the Form 1-FR-FCM or the FOCUS Report; the 60-day deadline for the filing of those documents remains unchanged.

CFTC Letter No. 15-15 is available here.

CFTC Issues Relief to Swap Dealers Regarding Legacy SPV Swaps

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission has issued no-action relief to swap dealers (SDs) from certain business conduct standards in dealing with counterparties that are structured finance special purpose vehicles (SPVs). The relief applies if an SD has entered into a swap with an SPV counterparty prior to October 11, 2013 and, subsequently, ratings triggers in the swap agreement between the SD and SPV require the SD to take specified remedial actions. Ordinarily, the SD would have to comply with CFTC business conduct standards in taking such remedial actions because they could cause the original swap to be considered as a new swap for regulatory purposes. In CFTC Letter No. 15-21, however, DSIO has ruled that an SD does not need to comply with the external business conduct standards in taking such

actions so long as certain conditions are met (including the condition that any remedial actions taken will not alter the material economic terms of the relevant swap).

CFTC Letter No. 15-21 is available here.

CME Updates Order Routing/Front-End Audit Trail Requirements

The CME Group Exchanges have updated their recordkeeping requirements for order routing/front-end systems connected to the CME Globex platform through CME iLink. These updates include: (1) clarifying the scope of requirements for multi-tier architecture systems, including Tier 1 and Tier 2 specifications; (2) clarifying the requirements for each message type supported on CME iLink; (3) adding fields to capture the appropriate message flow for advanced functionalities, to represent parent/child order relationship and to adapt to the new CME iLink architecture; and (4) removing fields that are redundant or yield no regulatory benefit. Affected members must comply with the modified requirements by April 1, 2016.

The CME Group Exchanges' Market Regulation Advisory Notice is available here. The CME Group Exchanges' certification under Part 40 of CFTC regulations, which includes additional details on the relevant updates, is available here.

LITIGATION

SEC Brings First Action Against Company for Potentially Stifling Whistleblowers With Confidentiality Statement

The Securities and Exchange Commission recently charged KBR, Inc., a Delaware corporation specializing in technology and engineering, with a Rule 21F-17(a) violation for using language in employee confidentiality statements that had the potential to stifle whistleblower activity. This was the first action of its kind taken by the SEC.

As part of its compliance program, KBR commonly conducts internal investigations responding to complaints of potential illegal activity at the company. KBR used a form confidentiality statement as part of the internal investigations in which witnesses agree to the following statement:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without prior authorization of the Law Department.

The form statement further provided unauthorized disclosure was grounds for disciplinary action up to and including termination. The form, as excerpted in the SEC's cease and desist order, did not expressly reference whistleblowing and/or reporting to a government agency.

The SEC alleged that KBR's form language violated Rule 21F-17(a), which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation … including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications." The SEC found a violation of Rule 21F-17(a) notwithstanding that it was unaware of any instance in which a KBR employee was in fact prevented from communicating with the staff or any instance in which KBR took action to enforce the form confidentiality statement.

KBR agreed to pay a $130,000 penalty to the SEC and modify its form to include the following statement:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity … or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures.

In the Matter of KBR, Inc., No. 3-16466 (SEC Apr. 1, 2015)

District Court Holds Individual Issues of Fact Predominate in Unjust Enrichment Class Action

The US District Court for the Eastern District of Pennsylvania recently denied class certification to a proposed class of third-party payors of prescription drugs. The plaintiffs brought a class action for unjust enrichment, claiming that Cephalon, Inc. improperly marketed a drug with limited approval by the US Food and Drug Administration (FDA), resulting in excessive payments for drugs that should not have been prescribed to the plaintiffs' members.

Cephalon, a pharmaceutical company, purchased drug developer Anesta Corporation in 2000. One of the drugs Anesta developed was Actiq, a pain-reliever for cancer patients. Actiq was approved by the FDA, but only under Subpart H, a special categorization for effective but risky drugs, and only for certain cancer patients not effectively treated by other drugs. Manufacturers of Subpart H drugs are required to follow a Risk Management Program (RiskMAP) designed to ensure compliance with the limited approval.

When Cephalon bought Anesta it amended the marketing plan for Actiq, which an internal audit by Cephalon determined was contrary to the RiskMAP (Cephalon later pleaded guilty to off-label promotion). The plaintiffs allege that by marketing outside what was allowed by the RiskMAP, Cephalon caused doctors to overprescribe Actiq, even though more effective and/or less expensive alternatives were available. Third-party payor plaintiffs sued Cephalon in 2007 alleging unjust enrichment.

The District Court held that the plaintiffs' class of third-party payors could not be certified because individualized issues predominate for two reasons. First, the court determined that the unjust enrichment law of each plaintiffs' home state would apply, and not all states apply the same law to unjust enrichment claims. Second, the court held that the determination of unjust enrichment is, by nature, a fact-sensitive question because, under an unjust enrichment theory, all facts and circumstances of the case must be considered.

Although the plaintiffs could allege certain elements commonly, they could not allege that each payment was unjust absent specific individualized facts. Because of differences in each physician's familiarity with Cephalon's marketing, physician judgment, patient response, and plaintiff decision-making, individual issues of fact predominated, and the plaintiffs' motion to certify the class was denied.

In re Actiq Sales and Mktg. Practices Litig., Civil Action No. 07-4492 (E.D. Pa. Mar. 23, 2015)

EU DEVELOPMENTS

ESMA Updates List of Authorized CCPs Under EMIR

On March 27, the European Securities and Markets Authority (ESMA) published an update to its list of central clearinghouses (List of CCPs) that are authorized under the European Markets Infrastructure Regulation (EMIR) as well as its Public Register for the Clearing Obligation under EMIR (Public Register). Taken in combination, the updates announce the extension of LCH.Clearnet Ltd.'s authorization as a CCP to cover certain cash settled over-the-counter (OTC) inflation rate swaps, which include (1) UK RPI, (2) EUR HICPxT, (3) FRF CPIxT and (4) USD CPI.

A copy of the updated List of CCPs can be found here. A copy of the Public Register can be found here.

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