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BROKER-DEALER

SEC Committee to Focus on the Order Protection Rule at Upcoming Meeting

On April 17, the Securities and Exchange Commission announced that its Equity Market Structure Advisory Committee (Committee) will hold its first meeting on May 13. The Committee, which was created earlier this year to formally solicit advice and recommendations related to equity market structure issues, will focus on Rule 611 of Regulation National Market System at the meeting. Among other things, Rule 611, known as the order protection rule, requires a trading center, which includes national securities exchanges, exchange specialists, alternative trading systems, over-the-counter market makers and block positioners, to establish, maintain and enforce written policies and procedures that are reasonably designed to prevent trade-throughs—the execution of trades at prices that are inferior to displayed and immediately accessible quotations at other trading centers—or, if relying on one of the rule's defined exceptions, that are reasonably designed to ensure compliance with such exception.

Interested persons may submit comments on the Committee's agenda prior to the meeting.

The SEC's announcement is available here.

CFTC

CFTC Issues No-Action Relief to SEFs and DCMs in Connection with Swaps with Operational or Clerical Errors

On April 22, the Commodity Futures Trading Commission's Division of Market Oversight and Division of Clearing and Risk (Divisions) issued CFTC Letter No. 15-24 to provide no-action relief to enable swap execution facilities (SEFs) and designated contract markets (DCMs) to correct operational or clerical errors for swaps that have been submitted for clearing.

The Divisions' straight-through processing guidance of September 2013, formerly required that a swap that was not timely accepted for clearing be declared void *ab initio*. CFTC Letter 13-66, issued in October 2013, modified this requirement to permit the resubmission of trades to a derivatives clearing organization (DCO) where a swap executed on a SEF was rejected by the DCO because of a clerical or operational error, and permitted any such "new" trade to be resubmitted for clearing without execution on a SEF. CFTC Letter No. 14-50, issued in April 2014, provided similar relief to DCMs. CFTC Letter No. 14-62, issued in May 2014, extended this "new trade, old terms" relief to package transactions where the combined trade would have been accepted for clearing, but the processing of one leg of the transaction before the other caused the trader to exceed its credit risk limits and the trade to be rejected for clearing. CFTC Letters Nos. 13-66 and 14-50 expired on June 30, 2014; CFTC Letter No. 14-62 initially was scheduled to expire on September 20, 2014, but was subsequently extended through February 16, 2015.

CFTC Letter No. 15-24 effectively continues the relief that has previously been granted, subject to certain additional conditions, and extends it to permit the correction of errors involving trades that have previously been cleared. Specifically, after a trade has been rejected for clearing for non-credit reasons, a SEF or a DCM may

permit a new trade to be executed noncompetitively with terms and conditions that match the original trade's terms and conditions (not including any errors in the original trade). Additionally, this relief applies to a situation where an error has not been discovered until after a swap has been cleared. In such a case, the SEF or DCM may permit prearranged trades between the original parties that (1) offset the swaps carried on the DCO's books and (2) reflect the terms to which the parties originally assented. In both cases, under this relief, the CFTC will not bring an enforcement action as a result of these new trades under CFTC Regulations 37.9(a)(2), 38.500, 37.203 or 38.152 regarding methods of execution or pre-arranged trading.

This relief is subject to the following conditions: (1) the pre-arranged transactions must be only for (a) the correction of an operational or clerical error or omission made by the SEF, DCM, one of the counterparties or an agent of one of the counterparties that caused a trade to be rejected from clearing, or (b) the purpose of offsetting swaps carried on a DCO's books where a clerical or operational error or omission made by the SEF, DCM, a counterparty or its agent is not identified until after the trade has been cleared; (2) the SEF or DCM must have error trade rules that are consistent with CFTC regulations; (3) the new trade must be executed on the SEF or DCM (but may be pre-arranged) and must be submitted for clearing (a) no later than one hour from the issuance of the notice, in the case of swaps rejected for non-credit reasons (CFTC Letter No. 13-66 required this to be accomplished within 30 minutes), or (b) no later than three days after the swap was executed, in the case of "erroneous cleared swaps"; (4) the SEF or DCM must have rules setting forth the conditions under which it will determine that an error has occurred, and the procedures it will follow to execute a new trade subject to this relief; (5) in the case of swaps rejected from clearing for non-credit reasons, if the new transaction is also rejected for clearing, it will be void *ab initio* and the parties will not be provided a second opportunity to submit a new trade; (6) the SEF or DCM must make an affirmative finding that the trade or some term therein resulted from an error; and (7) the SEF or DCM must report the swap transaction data to the relevant swap data repository as soon as technologically practicable after the original trade is rejected by the DCO.

The no-action relief under CFTC Letter No. 15-24 is set to expire on June 15, 2016.

CFTC Letter No. 15-24 is available here.

CFTC Issues No-Action Relief for SEF Confirmation and Recordkeeping Requirements and Confirmation Data Reporting Requirements

On August 14, 2014, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) granted no-action relief to swap execution facilities (SEFs) from the confirmation and recordkeeping requirements set forth in CFTC Regulations 37.6(b), 37.1000, 37.1001, and 45.2. On April 22, DMO extended and expanded the relief to additionally include confirmation data reporting requirements set forth in CFTC Regulation 45.3(a).

Pursuant to the relief, the staff will not recommend that the CFTC bring an enforcement action if, in a confirmation provided pursuant to CFTC Regulation 37.6(b), a SEF incorporates by reference terms from previously negotiated agreements between the counterparties without having first obtained copies of such agreements. Further, DMO also will not recommend enforcement action against a SEF for failing to maintain copies of the agreements incorporated by reference in the SEF's confirmation, as required under CFTC Regulations 37.1000, 37.1001 and 45.2(a).

In addition, the no-action relief excuses a SEF from reporting confirmation data that would otherwise be required to be reported pursuant to CFTC Regulation 45.3(a) if such data is contained solely in the terms of the underlying agreements that are incorporated by reference. However, a SEF must continue to report all terms the SEF is currently reporting pursuant to Part 45 of CFTC Regulations, even if such terms are contained in the incorporated agreements.

This relief applies only to non-cleared swap transactions executed on or pursuant to the rules of a SEF and is subject to certain conditions, including: (1) the inclusion of certain rules in the SEF's rulebook regarding the treatment and availability of the underlying agreements and (1) the continued reporting of all primary economic terms data as required under CFTC Regulation 45.3(a)(1).

This relief is set to expire on March 31, 2016.

CFTC Letter No. 15-25 is available here.

CFTC Provides Guidance on Calculating Projected Operating Costs by SEFs

On April 23, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) provided guidance to swap execution facilities (SEFs) regarding the calculation of projected operating costs and expenses for purposes of the financial resource requirements under SEF Core Principle 13 and CFTC Regulation 37.1303. SEF Core Principle 13 requires each SEF to have "adequate financial, operational, and managerial resources to discharge each responsibility" and further provides that the "financial resources of a SEF shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the SEF to cover the operating costs of the SEF for a one-year period, as calculated on a rolling basis." Regulation 37.1303 requires a SEF to make a reasonable calculation every fiscal quarter of its projected operating costs over a 12-month period in order to determine the amount needed to meet the financial resources requirements.

DMO's guidance clarifies that variable commissions paid to a SEF's employee voice brokers are not required to be included in a SEF's calculation of its projected operating costs. DMO reasoned that, unlike fixed salaries or compensation, variable commissions paid to employee voice brokers are not payable unless and until revenue is collected by the SEF.

CFTC Letter No. 15-26 is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

ESMA Issues Call for Evidence on Virtual Currency

On April 22, the European Securities and Markets Authority (ESMA) issued a call for information (Call for Evidence) on virtual currency. Unlike recent studies performed by the European Banking Authority and HM Treasury, ESMA is not calling for comment on virtual currencies as a payment technology or alternative form of money. In particular, ESMA is requesting information on three topics: 1) virtual currency investment products; 2) virtual currency based assets, securities and asset transfers; and 3) the application of distributed ledger technology to securities and investments. The Call for Evidence states that ESMA has been monitoring and analyzing virtual currency investment over the last six months to understand the developments in the market, the risk and benefits for investors, and the impact on market integrity and financial stability.

ESMA defines virtual currency investment products to include: collective investment schemes that invest in virtual currency related businesses and infrastructures; and derivatives such as options and contracts for differences that have virtual currencies as an underlying. ESMA is interested in learning more about those assets and securities as well as asset transfers that are virtual currency-based and are exclusively traded using virtual currency distributed ledgers. Distributed ledgers, also known as blockchains, are those facilities used as a means of issuing, transacting in and transferring ownership of specified assets (such as securities) in a way that bypasses the traditional infrastructure for the public offer and issuance of securities, including exchanges, central securities depositories or other means of recording ownership. In addition, ESMA has issued the Call for Evidence to understand the distributed ledger technology more generally as it applies to securities and investments, whether or not they are inside or outside a virtual currency environment.

ESMA states in the Call for Evidence that it will be monitoring the evolution of virtual currencies in the applications discussed above to ensure that regulatory authorities are aware of significant market developments. ESMA further stated that it had no preconceived view as to whether any other regulatory action is needed and has no immediate plans to introduce any regulatory action, subject to assessing the information received from the Call for Evidence.

The consultation period will be open until July 21.

A copy of EMSA's Call for Evidence can be found here.

LITIGATION

Judge Declines to Dismiss Spoofing Charges Against High Frequency Trader

On April 16, the US District Court for the Northern District of Illinois denied a motion to dismiss "spoofing" charges against Michael Coscia, a high-frequency commodities futures trader, finding that the indictment was sufficient because it alleged that Coscia placed orders with an intent to cancel them. Coscia is charged with six counts of "spoofing" under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and six counts of commodities fraud under the 2009 Fraud Enforcement and Recovery Act.

In August 2011, Coscia developed a high-frequency trading strategy that used specially designed software to enter and cancel a series of large-volume "trade" and "quote" orders in milliseconds. According to the Indictment, this tactic allowed Coscia to manipulate the market to purchase contracts at lower prices or sell contracts at higher prices than the prices available in the market prior to his orders. The indictment alleges that Coscia created a "false impression regarding the number of contracts available in the market…to fraudulently induce other market participants to react," and that he reaped $1.5 million in profits.

The Commodity Exchange Act, as amended by the Dodd-Frank Act, prohibits "any trading, practice, or conduct … of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." Coscia argued that the anti-spoofing provision was vague and failed to distinguish "spoofing" from legitimate practices. He maintained that at the time of the alleged conduct there was no commonly understood meaning of "spoofing" in futures trading and the Commodity Futures Trading Commission was unable to establish rules and had yet to issue final interpretive guidance. He highlighted comments during a CFTC 2010 roundtable discussion regarding the difficulty of defining "spoofing." Despite the contentious debate between the CFTC and the industry over what constituted unlawful "spoofing" at that time, the District Court rejected his challenge to the statute. The District Court found that because the indictment tracked the statute by alleging that orders were placed with an intent to cancel them, this set Coscia's conduct apart from legal trading practices.

U.S. v. Coscia, No. 1:14-cr-00551 (N.D. Ill. Apr. 16, 2015)

SEC Grants Compliance Officer $1.4 to $1.6 Million Whistleblower Award

On April 22, the Securities and Exchange Commission announced that it is awarding a compliance officer between $1.4 million and $1.6 million for voluntarily providing the SEC with information that contributed to a successful enforcement action. According to the SEC, the compliance officer reported the misconduct after "responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it." Under Section 21F(b)(1) of the Securities Exchange Act of 1934, a whistleblower must provide the SEC with original information, which may be derived through independent knowledge or independent analysis. When the whistleblower is an employee whose principal duties involve compliance or internal audit responsibilities, the information generally will not be considered "original," absent an exception. The SEC determined that an exception applied here because the compliance officer "had a reasonable basis to believe that disclosure of the information…[was] necessary to prevent the relevant entity from engaging in conduct that [was] likely to cause substantial injury to the financial interest or property of the entity or investors."

This marks only the second occasion in four years since the SEC's whistleblower program has been in place that the SEC has made a whistleblower award to an employee with internal audit or compliance responsibilities. The first award was issued to a whistleblower who made an internal report of concerns of wrongdoing, but the company took no action. Since the whistleblower program commenced in 2011, the SEC has awarded 16 whistleblowers more than $50 million. Whistleblower awards can range from 10 percent to 30 percent of the money collected in a successful SEC enforcement action resulting in sanctions over $1 million. The SEC did not disclose the whistleblower's identity, noting that it is legally prohibited from doing so. It also did not disclose information about the enforcement action that was triggered by the whistleblower's disclosure.

SEC Whistleblower Award Proceeding, File No. 2015-2 (Apr. 22, 2015).

EXECUTIVE COMPENSATION AND ERISA

DOL Proposes to Revise Definition of "Fiduciary" Under ERISA

On April 20, the US Department of Labor (DOL) published a proposal to revise portions of the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended (ERISA) in the *Federal Register*. Following is a summary of the proposed new rules. Please note that parts of the proposal are very detailed, and that this is only a summary.

ERISA's definition of "fiduciary" includes any party who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a] plan, or has any authority or responsibility to do so." The DOL has come to believe that the current definition of "investment advice" is too narrow, and does not cover some parties who are giving potentially conflicted investment advice to ERISA plans (plans) and individual retirement accounts (IRAs) concerning the investment of plan assets. The new proposed definition provides that a person is a fiduciary with respect to a plan or IRA if the person gives advice (1) pursuant to an agreement, arrangement or understanding, (2) the advice is individualized or specifically directed for use in making investment decisions for a plan or IRA concerning securities or other property, (3) the advice is provided for a fee or other compensation and (4) the advice falls into one of four categories: (a) recommendations on acquiring, holding, disposing or exchanging securities or other property (including distributions from a plan or IRA), (b) recommendations on managing securities or other property (including distributions from a plan or IRA), (c) appraisals, opinions or other statements on the value of securities or other property in connection with a specific transaction involving those securities or other property, or (4) recommendations of a person to give the plan or IRA advice described in (a), (b) or (c) for a fee or other compensation.

This new definition is broader than the one in the current DOL regulation. It expands the categories of advice that can trigger fiduciary status, and does not require that the advice to be given on a regular basis, or be a primary basis for investment decisions in order for the advice-giver to be a fiduciary. In addition, it specifically addresses IRAs, even though IRAs are generally not plans subject to ERISA.

Certain classes of persons who provide advice described in the proposed definition are excluded from the definition of a fiduciary: (1) employees of a plan sponsor (e.g., a chief financial officer or corporate treasury personnel) who provide advice to a fiduciary of the employer's plan for no additional compensation, (2) "investment platform providers" that put together a set of investment alternatives (e.g., mutual funds) that a participant-directed plan (e.g., a typical 401(k) plan) could make available to its participants, (3) persons who provide certain financial reports and valuations to plans and collective investment funds, and (4) persons providing "investment education" to plan participants. There are also carve-outs, subject to strict conditions for counterparties that have provided advice of a type described in the proposed regulation that is: (1) given to a plan with under 100 participants where a plan fiduciary acknowledges that it is not relying on the counterparty to provide impartial advice or to act as a fiduciary, the counterparty discloses its financial interest in the transaction (e.g., that it will receive a commission) and the counterparty is not directly compensated by the plan or the plan's fiduciary, (2) advice by the counterparty to an independent fiduciary with at least $100 million in employee plan assets under management, where the counterparty acknowledges that it is not providing impartial advice or acting as a fiduciary, and the counterparty is not directly compensated by the plan or the plan's fiduciary and (3) advice from a regulated swap dealer to an independent plan fiduciary on potential swap transactions, where the fiduciary acknowledges in writing that it is not relying on the dealer's recommendations.

The DOL also proposed a prohibited transaction class exemption for a "best interest contract" that would allow advisers such as brokers and insurance agents to give investment advice (as defined in the proposed regulation) to a plan or IRA client and receive commissions or other compensation resulting from that advice, provided that they comply with strict requirements, including (1) a commitment to provide advice in the client's best interest, (2) adopting and following policies and procedures designed to identify and mitigate conflicts of interest and (3) disclosure (including disclosure on a webpage) on conflicts of interest such as hidden fees or payments from third parties. The DOL also proposed amendments to several current prohibited transaction class exemptions in order to harmonize them with the proposed "best interest contract" exemption, and a proposed prohibited transaction class exemption that would permit advisers to enter into principal transactions in debt securities with plans or IRAs under conditions similar to those of the "best interest contract" exemption.

This is an ambitious initiative by the DOL that already has drawn criticism and opposition. The comment period on the proposals runs until July 6. After the comment period has closed, the DOL stated that there also will be a public hearing on the comments and the DOL indicated that it intends to reopen the comment period then. Any results from this initiative likely will not appear for some time.

A link to the proposed regulation can be found here.

Click here for a link to the DOL's fact sheet and here for FAQs regarding the rule.

UK DEVELOPMENTS

FCA Publishes New Procedures and Forms for Disclosure of Material Changes by Non-UK Managers Marketing in the United Kingdom

On April 21, the Financial Conduct Authority (FCA) updated its webpage of guidance on the United Kingdom's national private placement regime (NPPR) for the marketing of non-EU funds in the United Kingdom by non-UK managers under the Alternative Investment Fund Managers Directive.

The FCA has published new notification forms that should be submitted to the FCA in the event that a non-UK manager, which had filed with the FCA to be eligible to conduct marketing in the United Kingdom under the UK NPPR, has any material changes to the information previously submitted to the FCA. The FCA also has published a guidance note to assist firms when completing these forms.

Firms should submit any such forms to NPPRChanges@fca.org.uk. The subject line of the email should contain the firm reference number (obtained when originally filing with the FCA) followed by the words "NPPR Material Change notification". Only one material change form may be submitted per email.

For more information, see the FCA's NPPR webpage.

EU DEVELOPMENTS

European Council Approves Strengthened EU Anti-Money Laundering Rules

On April 20, the European Council of Ministers adopted its version of new rules aimed at preventing money laundering and terrorist financing in the form of a draft new European Union Directive and Regulation (Draft Rules). The Draft Rules, once implemented into EU law, will strengthen EU rules against money laundering and ensure consistency with the approach followed at the international level.

With the European Council of Ministers having adopted its version of the Draft Rules, this will now mean that the European Parliament, with which agreement was reached on December 16, 2014, can adopt the Draft Rules at its forthcoming meeting. Once adopted by both the European Council of Ministers and the European Parliament, all that would then be required is for the European Commission to publish the Draft Rules in their final format and then the Regulation will be binding EU law and EU countries would have to amend their national anti-money laundering rules in line with the new directive.

The Draft Rules reflect the need for the EU to adapt its legislation to take account of the development of technology and other means at the disposal of criminals. The main elements are:

- extension of the scope of EU anti-money laundering rules, with requirements for providers of gambling services and persons trading in goods at a much lower threshold (EUR €10,000 instead of EUR €15,000) to apply checks to cash payments;
- application of a risk-based approach, using evidence-based decision making, to better target risks; and
- tighter rules on customer due diligence.

There are also specific provisions on the development of a central register of the beneficial owners of EU companies. This central register will be accessible to EU regulatory authorities, financial intelligence units and, as

part of customer due diligence, obliged entities such as banks. Certain persons who can demonstrate a legitimate interest should also be able to access at least the following stored information:

- name;
- month and year of birth;
- nationality;
- country of residence; and
- nature and approximate extent of the beneficial interest held.

For gambling services posing higher risks, the Draft Rules require service providers to conduct due diligence for transactions of EUR €2,000 or more. In proven low-risk circumstances, EU countries can exempt certain gambling services from some or all requirements, in strictly limited and justified conditions. Such exemptions will be subject to a specific risk assessment. Casinos will *not* be able to benefit from exemptions.

The Draft Rules identify that full traceability of fund transfers can be particularly important in the prevention, detection and investigation of money laundering and terrorist financing. While existing EU legislation already requires payment service providers to accompany transfers of funds with information on the payer, the Draft Rules also require information on the payee to be included. Under the Draft Rules, the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority will be asked to issue guidelines addressed to EU regulators and payment service providers on measures to be taken when they receive transfers of funds with missing or incomplete information on the payer or the payee.

The text of the regulation is available here.

The text of the of the directive is available here.

ESMA Consults on Knowledge and Competence Requirements

Under the original EU Markets in Financial Instruments Directive (MiFID) framework, investment firms must ensure that their personnel have the "skills, knowledge and experience" necessary for their particular functions. Article 25(9) of the revised MiFID (MiFID II) requires the European Securities and Markets Authority (ESMA) to establish guidelines that specify the criteria for assessing the knowledge and competence of an investment firm's personnel that provide investment advice or information regarding financial instruments and services (Relevant Personnel). On April 23, ESMA set out its proposals for such guidelines in a consultation paper (CP). In the CP, ESMA notes that the national competent authorities (NCAs) of many EU member states already impose certain knowledge and competence obligations on Relevant Personnel; nevertheless, in ESMA's view, MiFID II requires that such personnel have both an "appropriate qualification" as well as "appropriate experience".
ESMA's proposed guidelines would require NCAs to set out the "appropriate qualifications" applicable to Relevant Personnel in their jurisdiction, including where appropriate degree or other examination requirements. While NCAs would have some flexibility in establishing these requirements, at the very least ESMA's proposed guidelines would require an NCA to establish express criteria—such as content, length and type of course—against which a given qualification may be measured. ESMA also proposes to require NCAs to identify a minimum period of "appropriate experience" for Relevant Personnel, which may differ depending on the corresponding qualification and the service being provided. ESMA has also proposed a potential grandfathering provision for Relevant Personnel with not less than five consecutive years of providing the same service which, at an NCA's discretion and subject to a specific assessment by the investment firm in question, could be deemed to meet the MiFID II knowledge and competence standards.

The CP contains a series of questions for which ESMA requests public comment. The consultation period will close on July 10. ESMA intends to publish a final report in the fourth quarter of 2015, with the final guidelines taking effect from January 3, 2017.

The CP can be found here.

This coincides with the "ESMA Issues Call for Evidence on Virtual Currency" piece reported in Digital Assets and Virtual Currency.

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