

CORPORATE & FINANCIAL

WEEKLY DIGEST

August 21, 2015

Volume X, Issue 32

SEC/CORPORATE

US Court of Appeals for the District of Columbia Circuit Upholds Decision on Conflict Minerals Rule

On August 18, the US Court of Appeals for the District of Columbia Circuit issued its opinion on the rehearing of the lawsuit challenging the Securities and Exchange Commission's conflict minerals rule. The ruling upheld the court of appeals' previous ruling that, to the extent that the conflict minerals rule requires an issuer to disclose that any of its products "have not been found to be 'DRC conflict free,'" the rule violates the First Amendment's prohibition against compelled speech. A copy of the court's full opinion is [here](#).

As noted in the [Corporate & Financial Weekly Digest edition of May 2, 2014](#), following the court of appeals' initial ruling regarding the First Amendment challenges to the conflict minerals rule, Keith Higgins the director of the SEC's Division of Corporation Finance, issued a public statement advising issuers that they are expected to file any reports required by the conflict mineral rule on or before the scheduled due date and comply with those portions of the rule that were upheld by the court. Accordingly, the ruling by the court of appeals to reaffirm its earlier decision is not expected to have a practical impact on issuers already complying with the conflict minerals rule, although it is possible that the SEC's Division of Corporation Finance may issue interpretative guidance on the conflict minerals rule now that the court of appeals has issued its opinion.

DERIVATIVES

See *"CFTC Issues Order of Exemption From Registration as a DCO to ASX Clear (Futures) Pty Limited and Requests Public Comment on a Petition by Korea Exchange, Inc. for Exemption From DCO Registration"* and *"CFTC Proposes Cleared Swap Reporting Amendments"* in the CFTC section.

See *"ESMA Recommends Changes to EMIR"* in EU Developments section.

CFTC

CFTC Issues Order of Exemption From Registration as a DCO to ASX Clear (Futures) Pty Limited and Requests Public Comment on a Petition by Korea Exchange, Inc. for Exemption From DCO Registration

The Commodity Futures Trading Commission has issued an order of exemption from registration as a derivatives clearing organization (DCO) to ASX Clear (Futures) Pty Limited (ASX).

This is the first order that the CFTC has issued under Section 5b(h) of the Commodity Exchange Act, which permits the CFTC to exempt a clearing organization from DCO registration requirements if there is comparable, comprehensive supervision in the clearing organization's home country.

Subject to the terms and conditions of the order, ASX is now permitted to clear proprietary swap positions for US clearing members.

Concurrently, the CFTC has requested public comment on a petition by Korea Exchange, Inc. (KRX) for exemption from registration as a DCO under section 5b(h). Comments in the KRX petition must be submitted on or before September 1.

More information on the ASX order is available [here](#).

More information on the KRX petition is available [here](#).

CFTC Proposes Cleared Swap Reporting Amendments

The Commodity Futures Trading Commission has proposed to amend Part 45 of its regulations insofar as they relate to the reporting to a swaps data repository of swaps that are cleared by a derivatives clearing organization (DCO). The proposed amendment is designed to better accommodate the multi-swap framework of such cleared swaps. Specifically, the CFTC has proposed to define the terms “original swap” and “clearing swap” as follows: (1) an original swap is a swap that has been accepted for clearing by a DCO; and (2) a clearing swap is a swap created by the DCO with the DCO as a counterparty. As proposed, original swaps would include swaps commonly referred to as “alpha” swaps, whereas clearing swaps would include swaps commonly referred to as “beta” and “gamma” swaps.

The proposed amendments would modify certain creation data (which includes primary economic terms (PET) and confirmation data) and continuation data reporting obligations. Swap execution facilities, designated contract markets and reporting counterparties would continue to report PET data for swaps intended to be submitted to a DCO, but would no longer report confirmation data for these swaps. DCOs would report PET and confirmation data for all clearing swaps. DCOs would also report all continuation data for original swaps and clearing swaps. Swap dealers and major swap participants would no longer be required to report daily valuation data for cleared swaps.

In addition, the proposed amendments would require DCOs to assign a unique swap identifier (USI) for all clearing swaps. DCOs must include, among other things, the USI for each clearing swap when reporting the termination of the corresponding original swap.

The CFTC’s proposing release is available [here](#).

The CFTC’s related fact sheet is available [here](#).

UK DEVELOPMENTS

New FCA Handbook and PRA Rulebook Websites to Launch Next Week

On August 17, the UK Financial Conduct Authority (FCA) announced on the front page of its online rulebook, which currently also includes the rules of the Prudential Regulation Authority (PRA) and guidance from both Authorities, that new and separate FCA Handbook and PRA Rulebook websites will be launching on August 29. Any persons attempting to visit the current online rulebook after August 29 will be redirected to the new websites of the FCA Handbook and PRA Rulebook.

Both the FCA and the PRA were formed on April 1, 2013 from divisions of the UK Financial Services Authority (FSA), which was perceived by the UK government to have failed to adequately supervise UK banks during the financial crisis of 2007–2008. Consequently, the UK government elected to restructure financial regulation in the United Kingdom and abolished the FSA, splitting its responsibilities between the PRA and the FCA. The two new websites with separate sets of rules represents the final separation of the two Authorities.

The FCA is the United Kingdom’s principal regulator of investment firms (some of which may also be regulated by the PRA). As well as authorizing (i.e., licensing) firms, it conducts supervision and enforcement activities. It also has the power to regulate UK-based conduct relating to the marketing of financial products and can place specific requirements on products and require firms to comply with minimum standards. The FCA also supervises individuals working in the UK financial services sector through its approved persons regime, which requires that they receive approval from the FCA before undertaking regulated activities. Its statutory objectives include: (1) protecting consumers; (2) enhancing market integrity; and (3) promoting competition.

The PRA is a part of the Bank of England and is responsible for the prudential regulation and supervision of approximately 1,700 banks, building societies, credit unions, insurers and major investment firms. It sets standards and supervises such financial institutions at the level of the individual firm. Its statutory objectives include: (1) promoting the safety and soundness of firms; (2) securing an appropriate degree of protection for insurance policyholders; and (3) facilitating effective competition among the firms it supervises.

The FCA and PRA homepages will remain available [here](#) and [here](#), respectively.

The current website for the online rulebook is available [here](#).

EU DEVELOPMENTS

ESMA Recommends Changes to EMIR

Under Article 85(1) of the European Market Infrastructure Regulation (648/2012/EU) (EMIR), the European Commission (EC) is required to submit a general report on EMIR to the European Parliament and the European Council on the functioning of certain aspects of the EMIR framework. In connection with that review, the European Securities and Markets Authority (ESMA) published four reports providing information for the EC's review and also providing various recommendations on amending EMIR at both Level 1 and Level 2 provisions.

Report No. 1 – Review of the use of over-the-counter (OTC) derivatives by non-financial counterparties (NFC) – In Report No. 1, ESMA recommends (1) establishing a clear process to ensure that quasi-financial counterparties are identified and not commingled with corporates within the NFC category, and (2) simplifying the determination of NFC+/NFC- by removing the hedging criteria as this may not be the most relevant criteria in determining the systemic relevance of NFCs.

Due to the current classification system between financial counterparties (FCs) and NFCs, there are a number of market participants that operate in the financial markets that fall within the definition of an NFC. As an example, a hedge fund that is not managed by an authorized alternative investment fund manager (AIFM) would by default be categorized as an NFC. By addressing this existing classification gap, ESMA can then further assess whether classifying quasi-financial counterparties as NFCs is justified or whether they should be classified as FCs.

Report No. 2 – Review on the efficiency of margining requirements to limit procyclicality – Report No. 2 provides ESMA's assessment to the EC regarding the efficiency of margining requirements, which are intended to limit procyclicality and recommends changes at Level 1, including defining additional intervention capacity, as well as changes at Level 2 in the form of regulatory technical standards (RTS). The report highlights that further rules should be provided regarding counter-cyclical tools adopted by central counterparties (CCPs).

Report No. 3 – Review on the segregation and portability requirements – Report No. 3 consists of both a report to the EC on the application of segregation requirements under Article 39 and represents ESMA's recommendations under Article 85(1)(e) with respect to a CCPs policies on collateral margining and securing requirements. After identifying differences in practices among the CCPs, the report recommends changes to promote convergent practices primarily by issuing RTS.

Report No. 4 – ESMA input as part of the Commission consultation on EMIR review – Report No. 4 recommends amendments to EMIR in a number of areas including (1) the clearing obligation (streamlining the process to determine clearing obligations, introducing tools allowing suspension under certain market conditions and removing the frontloading requirement); (2) recognition of third country CCPs (proposals to review the entire equivalence and recognition process and allowing the jurisdiction decision to be governed by RTS); and (3) trade repositories (TRs)(increasing ESMA's supervisory and enforcement powers to improve the supervision of trade TRs, including timeframes to consider TR registration applications and other various improvements).

The text of Report No. 1 can be found [here](#).

The text of Report No. 2 can be found [here](#).

The text of Report No. 3 can be found [here](#).

The text of Report No. 4 can be found [here](#).

For more information, contact:

SEC/CORPORATE

David S. Kravitz +1.212.940.6354 david.kravitz@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt +1.312.902.5494 janet.angstadt@kattenlaw.com
Henry Bregstein +1.212.940.6615 henry.bregstein@kattenlaw.com
Kimberly L. Broder +1.212.940.6342 kimberly.broder@kattenlaw.com
Wendy E. Cohen +1.212.940.3846 wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr. +1.212.940.8593 guy.dempsey@kattenlaw.com
Kevin M. Foley +1.312.902.5372 kevin.foley@kattenlaw.com
Jack P. Governale +1.212.940.8525 jack.governale@kattenlaw.com
Arthur W. Hahn +1.312.902.5241 arthur.hahn@kattenlaw.com
Christian B. Hennion +1.312.902.5521 christian.hennion@kattenlaw.com
Carolyn H. Jackson +44.20.7776.7625 carolyn.jackson@kattenlaw.co.uk
Ross Pazzol +1.312.902.5554 ross.pazzol@kattenlaw.com
Fred M. Santo +1.212.940.8720 fred.santo@kattenlaw.com
Christopher T. Shannon +1.312.902.5322 chris.shannon@kattenlaw.com
Peter J. Shea +1.212.940.6447 peter.shea@kattenlaw.com
James Van De Graaff +1.312.902.5227 james.vandegraaff@kattenlaw.com
Robert Weiss +1.212.940.8584 robert.weiss@kattenlaw.com
Lance A. Zinman +1.312.902.5212 lance.zinman@kattenlaw.com
Krassimira Zourkova +1.312.902.5334 krassimira.zourkova@kattenlaw.com

UK/EU DEVELOPMENTS

Barry E. Breen +44.20.7776.7635 barry.breen@kattenlaw.co.uk
Neil Robson +44.20.7776.7666 neil.robson@kattenlaw.co.uk

.....
* [Click here](#) to access the *Corporate and Financial Weekly Digest* archive.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.
©2015 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London: Katten Muchin Rosenman UK LLP.