

CORPORATE & FINANCIAL

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BROKER DEALER

SEC Seeks Information to Assess Standards of Conduct and Other Obligations of Broker-Dealers and Investment Advisers

The Securities and Exchange Commission issued a request for data and other information that the SEC will review while considering alternative standards of conduct for broker-dealers and investment advisers when they provide personalized investment advice about securities to retail customers. A retail customer is defined as a natural person or his or her legal representative who receives personalized investment advice about securities from a broker, dealer or investment adviser and uses such advice primarily for personal, family or household purposes. The request for data summarizes the legal distinctions between investment advisers and broker-dealers, such as a fiduciary duty standard for investment advisers, and cites studies that suggest that many retail customers are not aware of the differences between investment advisers and broker-dealers.

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act grants the SEC the rulemaking discretion to adopt a uniform fiduciary standard of conduct for all broker-dealers and investment advisers when providing investment advice about securities to retail customers. In its request for data, the SEC provided that it is interested in receiving empirical and quantitative data and economic analysis relating to the benefits and burdens that could result from various alternative approaches to the standards of conduct and other obligations of broker-dealers and investment advisers.

Click [here](#) to read Release No. 34-69013.

DERIVATIVES

Frequently Asked Questions About Legal Entity Identifiers

The Office of Financial Research (OFR) of the US Treasury Department (which was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act) has been participating in a global effort to improve the infrastructure of the financial markets by creating a process for assigning every participant in financial transactions a Legal Entity Identifier (LEI), which is a unique identification number that facilitates transactional recordkeeping and reporting for financial transactions and can also be used for risk management purposes. On February 20, the OFR published a set of Frequently Asked Questions to educate the markets about the LEI project as it moves from the design phase toward implementation.

The regulations adopted by the Commodity Futures Trading Commission under the auspices of Title VII of the Dodd-Frank Act already require that every party entering into derivative transactions on or after July 12, 2013 have an LEI; however, since the global LEI framework is not yet in place, the CFTC has commissioned DTCC and

SWIFT to issue an interim form of identifier (CFTC Interim Compliant Identifier or CICI) that will meet the requirements of its swap rules.

The full set of Frequently Asked Questions can be found [here](#).

The CICI portal is available [here](#).

CFTC

CFTC Approves CME Swap Data Reporting Rule

On March 6, the Commodity Futures Trading Commission approved the Chicago Mercantile Exchange Inc.'s (CME) request to adopt CME Rule 1001. CME Rule 1001 addresses the CME's obligation, in its capacity as a derivatives clearing organization (DCO) and under Part 45 of CFTC regulations, to report cleared swap creation and continuation data to a selected swap data repository (SDR). In particular, CME Rule 1001 requires that the CME's DCO report its cleared swap data to the CME's SDR. During the public comment period of the CME's proposed rule, reporting parties and DCOs both claimed the right to choose the SDR and pointed to Part 45 as the source of that authority. Despite commenters' concerns that CME Rule 1001 was inconsistent with Part 45, the CFTC issued a 21-page statement in which it set forth its reasons for approving CME Rule 1001.

For more information, click [here](#).

NFA Proposes Amendment Permitting Certain Loans by Commodity Pools to Related Entities

On March 4, the National Futures Association (NFA) issued a proposed rule change and interpretive notice that would allow commodity pools to provide certain loans to related commodity pool operators (CPOs) and other affiliates. Pursuant to NFA Rule 2-45, commodity pools are prohibited from directly or indirectly loaning or advancing pool assets to the pool's CPO or other related parties. The proposed amendment clarifies that commodity pools operated by a registered CPO are permitted, subject to certain conditions set out in the related interpretive notice, to: (i) borrow securities from, or loan securities to, an affiliated pool to fulfill short sale borrowing and locate requirements; (ii) loan securities to an affiliate for cash financing purposes; (iii) guarantee the obligations of a subsidiary or affiliate in which the pool has a debt or equity investment; (iv) enter into repurchase or reverse repurchase agreements with affiliated pools; (v) make tax-related distributions to the CPO or a related party; and (vi) if the pool is a registered investment company or business development company, engage in certain loans or advances of fund assets permitted by the Investment Company Act of 1940 and certain rules, orders or no-action letters issued thereunder. The NFA is issuing this amendment and guidance to accommodate CPOs that were previously exempt from registration. Unless the Commodity Futures Trading Commission notifies the NFA that it intends to formally review the amendment, the amendment will become effective after ten days.

For more information, click [here](#).

LITIGATION

Supreme Court Denies SEC Extra Time to Bring Enforcement Actions for Civil Penalties

The US Supreme Court recently held that the Securities and Exchange Commission has five years from the date an alleged fraud occurs, not from the date of its discovery, to bring an enforcement action for civil penalties.

In *Gabelli et al. v. Securities and Exchange Commission*, the SEC claimed that two officials (Petitioners) at Gabelli Funds, LLC aided and abetted violations of the Investment Advisers Act of 1940, and sought civil penalties. The agency alleged that the improper conduct occurred from 1999 through 2002, but did not file its complaint until 2008. Petitioners moved to dismiss the claim, arguing that it was time-barred under the five-year statute of limitations. Petitioners claimed that the statute of limitations began running at the time of the alleged offense, and the SEC argued that it ran from the time the SEC "discovered" the wrongdoing.

The Supreme Court found that the SEC enforcement action accrued when the violations occurred, not when the SEC discovered them. The Court distinguished the SEC from the private plaintiff for whom the discovery rule originally evolved to protect. A private plaintiff may not know whether he has been wronged until well after the conduct occurs, and needs the extra time the discovery rule provides. In contrast, the SEC is an agency whose “very purpose” is to root out fraud, and has sufficient tools to do so. Thus, the Court declined to extend the “discovery” rule to the SEC’s action.

Gabelli et al. v. Securities and Exchange Commission, 568 U.S. ___ (2013).

Delaware Chancery Court Addresses Records Inspection Requests Standards

The Delaware Chancery Court recently addressed the limits of shareholder inspection rights, holding that such requests must be specifically related to a proper purpose.

Plaintiffs, shareholders in defendant American Cash Exchange, Inc. (ACE), sought access to various books and records to value their stock and investigate potential fiduciary duty breaches. Plaintiffs believed that ACE had made materially misleading statements about the company’s financial outlook, and had omitted key information in other disclosures, such as the failure of a condition to one of ACE’s major contracts. In addition, plaintiffs claimed that ACE engaged in improper transactions with its president and controlling shareholder.

In granting certain of plaintiffs’ demands, the court identified two requirements governing inspection rights: shareholders must submit proper purposes for their requests, and their requests must be tailored to satisfy the stated purposes. The court explained that “the mere possibility that the plaintiff may use the information obtained to harm the corporation is not grounds for withholding or restricting the right of inspection.” As long as shareholders offer primary proper purposes for their requests, a secondary ulterior motive will not defeat their right to inspect. However, to check the possibility that plaintiffs may gain access to records by providing pretextual justifications, the court held that it will compel production only of what is “essential and sufficient” for shareholders to effectuate the purposes of their requests.

Doerler, et al. v. American Cash Exchange, Inc., Civil Action No. 7640-VCG (Del. Ch. Feb. 19, 2013).



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