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BROKER-DEALER

SEC Provides Notice of Fixed Income Market Structure Advisory Committee

The Securities and Exchange Commission Fixed Income Market Structure Advisory Committee recently announced that it will hold a public meeting on Thursday, January 11, 2018, at 9:30 a.m. (EST). The meeting will take place at the SEC headquarters, located at 100 F Street, NE, Washington, DC 20549. The meeting will be webcast on the SEC website, www.sec.gov.

The SEC announced the formation of its Fixed Income Market Structure Advisory Committee in November 2017. According to the SEC, the committee will initially focus on the efficiency and resiliency of the corporate bond and municipal securities markets, and on identifying opportunities for regulatory improvements.

More information about the upcoming meeting is available here.

FINRA Proposes To Extend the Expiration Date of FINRA Rule 0180

On January 3, the Financial Industry Regulatory Authority proposed a rule change to extend the expiration date of FINRA Rule 0180 (Application of Rules to Security-Based Swaps) to February 12, 2019. FINRA Rule 0180 temporarily limits the application of certain FINRA rules with regard to security-based swaps. The rule was originally designed to avoid disruptions resulting from the revised definition of "security" under the Securities Exchange Act of 1934, which was amended pursuant to the Dodd-Frank Act. The temporary rule is currently set to expire on February 12.

More information regarding the proposed rule change is available here.

DERIVATIVES

See "Filing Requirements for Swap Valuation Dispute Notices and Monthly Swap Dealer Risk Data Reporting Requirements are Effective January 2018" in the CFTC section. Also see "FINRA Proposes To Extend the Expiration Date of FINRA Rule 0180" in the Broker/Dealer section.

CFTC

CFTC Issues Proposed Interpretation on Virtual Currency "Actual Delivery" in Retail Transactions

On December 15, 2017, the Commodity Futures Trading Commission announced a proposed interpretation on what constitutes "actual delivery" of a virtual currency for purposes of Commodity Exchange Act (CEA) section 2(c)(2)(D)(ii)(III)(aa).

Pursuant to CEA Section 2(c)(2)(D), the CFTC has oversight authority over "retail commodity transactions," including any agreement, contract or transaction in any commodity that is entered into with or offered to a person that is neither an eligible contract participant nor an eligible commercial entity on a leveraged or margined basis, or financed by the offeror, the counterparty or a person acting in concert with the offeror or counterparty on a similar basis. Any such agreement, contract or transaction covered under CEA Section 2(c)(2)(D) is also subject to CEA sections 4(a), 4(b) and 4b, which, respectively, (1) require that futures contracts be traded on a designated contract market, (2) require any foreign board of trade that permits direct electronic access from the US to be registered with the CFTC as a foreign board of trade, and (3) prohibit fraud in connection with the offer and sale of futures contracts. However, under CEA section 2(c)(2)(D)(ii)(III)(aa), a retail commodity transaction may be excepted from CEA section 2(c)(2)(D), and thus not subject to CEA sections 4(a), 4(b) and 4b, if actual delivery occurs within 28 days of the transaction.

The CFTC's proposal establishes two primary factors necessary to demonstrate "actual delivery" of a virtual currency in a retail commodity transaction:

- A customer must have the ability to: (1) take possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement, and (2) use it freely in commerce (both within and away from any particular platform) no later than 28 days from the date of the transaction; and

- The offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) must not retain any interest in or control over any of the commodity purchased on margin, leverage or other financing arrangement at the expiration of 28 days from the date of the transaction.

The CFTC further clarifies that a cash settlement or offset mechanism, i.e., the purchase or sale is rolled, offset against, netted out, or settled in cash or a different virtual currency, will not satisfy the actual delivery exception.

The proposed interpretation is open for public comment until March 20.

CFTC's proposed interpretation is available here.

Filing Requirements for Swap Valuation Dispute Notices and Monthly Swap Dealer Risk Data Reporting Requirements are Effective January 2018

On December 19, 2017, the National Futures Association (NFA) issued a reminder notice to its members regarding the upcoming effective dates for the submission of standardized data for swap valuation dispute notices (see Notice I-17-13) and monthly risk data reports (see notice I-17-10, as reported in the June 2, 2017, edition of *Corporate and Financial Weekly Digest*).

In January 2016, the Commodity Futures Trading Commission issued an order authorizing NFA to receive, review, maintain and serve as official custodian of swap valuation dispute notices that swap dealers (SDs) are required to file pursuant to CFTC Rule 23.502(c). The CFTC later approved NFA Interpretive Notice I-17-13 to NFA Compliance Rule 2-49 which, among other things, standardized the information that SDs are required to report electronically to NFA and specifies that SDs must file notices of swap valuation disputes that have not been resolved within the time frames set forth in CFTC Rule 23.502(c) for the following:

- Disputes involving the amount of initial margin to be posted or collected pursuant to a Collateralized Eligible Master Netting Agreement if the amount of the dispute exceeds the $20 million reporting threshold;

- Disputes involving the amount of variation margin that is to be exchanged pursuant to a Collateralized Eligible Master Netting Agreement if the amount of the dispute exceeds the $20 million reporting threshold; or

- Disputes involving transaction or portfolio valuations, if the SD does not exchange collateral with the counterparty, and the counterparty notifies the SD that it is disputing any valuation provided by the SD if the dispute exceeds the $20 million reporting threshold.

The interpretive notice is effective for dispute notices required to be filed on or after January 2.

Additionally, as a key component of NFA's regulatory oversight program for SDs, NFA can identify firms that may pose heightened risk and allocate NFA's regulatory oversight resources accordingly. NFA's board of directors determined that this risk monitoring function will be more effective if it includes the ability to monitor SD risk exposures on a regular basis. To achieve this, NFA's board approved a list of 10 metrics that SDs will be required to report electronically to NFA on a monthly basis. These metrics include: (1) Value at Risk (VaR) for interest rates, credit, FX, equities, commodities and total VaR; (2) total stressed VaR; (3) interest rate sensitivity; (4) credit spread sensitivity; (5) FX market sensitivity; (6) commodity market sensitivities; (7) total swaps current exposure before collateral; (8) total swaps current exposure net of collateral; (9) total credit valuation adjustment or expected credit loss; and (10) a list of the 15 largest swaps counterparty current exposures for current exposures before collateral and for current exposures net of collateral.

The first risk data report as of December 29, 2017, is due January 31.

NFA's reminder notice is available here.

NFA's notice I-17-10 is available here.

NFA's notice I-17-13 is available here.

UK/BREXIT DEVELOPMENTS

FCA Publishes Feedback Statement on Distributed Ledger Technology

On December 15, the UK Financial Conduct Authority (FCA) published a feedback statement (Feedback Statement) on its April 2017 discussion paper (Discussion Paper) on distributed ledger technology (DLT).

The purpose of the Discussion Paper was to encourage dialogue in the UK on the regulatory implications of current and potential developments of DLT in the financial markets. The Feedback Statement summarizes and is a response to the feedback received on the FCA's Discussion Paper. It also sets out the FCA's views on recent developments in the DLT market and the FCA's next steps.

Highlights in the Feedback Statement include the following:

- Respondents to the FCA's Discussion Paper were supportive of the FCA's "technology-neutral" approach to regulation. They welcomed the FCA's open and proactive approach to new technology, including its "regulatory sandbox" (a live market environment where businesses can test innovative products, services and business models), its regulatory technology initiatives and its practical engagement with innovators. Feedback from respondents indicated that the FCA's current rules were sufficiently flexible to deal with DLT without requiring any specific rule changes.

- Although all respondents suggested numerous benefits and risks associated with using permissionless and permissioned DLT networks in financial services, some doubted the compatibility of permissionless networks with the FCA's regulatory regime because, for example, they lack governance and tend not to identify participants. However, nearly all respondents generally agreed with the FCA that there are no substantial barriers to adopting DLT under the FCA's rules.

- Respondents who commented on initial coin offerings (ICOs) agreed with the FCA's view on the risks to consumers and that the legal and regulatory position of each ICO proposition has to be considered on a case-by-case basis.

- Most respondents were interested in the use of DLT in capital markets, for example by using smart contracts. However, they pointed out that they would need greater clarity on issues such as the legal status of digital assets and the enforceability of smart contracts before they considered using such solutions at scale.

- All respondents highlighted the global nature of DLT and urged the FCA to collaborate even more proactively with other national and international regulatory bodies and industry associations to make a globally harmonized approach to DLT possible.

Next steps proposed or actioned by the FCA include:

- Gathering further evidence on the ICO market and conducting a deeper examination of its developments to determine whether there is a need for further regulatory action in this area, beyond the consumer warning it issued in September 2017 (Consumer Warning on ICOs). The FCA has also already highlighted how an ICO-related business proposition needs to be designed so that it would satisfy the “consumer benefit” criterion when gaining access to the FCA’s Innovation Hub (Innovation Hub), where new and innovative businesses are supported by the FCA when trying to launch new products on the market.

- Continuing to monitor DLT-related market developments and reviewing the FCA’s rules and guidance in light of those developments.

- Working closely with national and international regulatory bodies to shape regulatory developments and standards.

- Engaging further with other regulatory authorities at a UK level, to ensure a coordinated approach in the UK.

- Continuing its close engagement with DLT use cases and industry stakeholders through its Innovation Hub.

The FCA’s Feedback Statement is available here.

The FCA’s Discussion Paper is available here.

The FCA’s Consumer Warning on ICOs is available here.

FCA Publishes Updating Documents on Reporting Transparency Information Under AIFMD

On December 20, 2017, the UK Financial Conduct Authority (FCA) published:

- An updated version of its questions and answers paper (Q&A) with guidance for alternative investment fund managers on reporting transparency information to the FCA;

- A document setting out the transparency reporting obligations () under Annex IV of the Alternative Investment Fund Managers Directive (AIFMD);

- An updated data reference guide to assist firms that make submissions within the FCA’s online system, “Gabriel,” for collecting and storing regulatory data from firms with a revised version of submissions AIF001 and AIF002.

The Q&A on reporting transparency information is available here.

The document on transparency reporting obligations is available here.

The Updated Data Reference Guide is available here.

FCA Publishes Additional Proposed Position Limits

On December 7, 2017, the UK Financial Conduct Authority (FCA) updated its database of position limits for bespoke and *de minimis* contracts to include the following contracts:

- Swiss Baseload Power traded on GFI Brokers Ltd’s Organised Trading Facility—this contract has been added to the database, but the actual limit has not yet been published; and

- Iron Ore 62% FE (TSI), CFR Tianjin Future traded on ICE FUTURES EUROPE has been added to the list of *de minimis* contracts, with a spot limit of 2,500 and another month limit of 2,500.

All published position limits apply as from January 3.

The FCA's webpage on position limits for commodity derivate contracts is available here.

The FCA's full database is available here.

FCA Publishes Statement on Brexit

On December 20, 2017, the UK Financial Conduct Authority (FCA) published a statement on the UK's withdrawal from the European Union (EU).

Referencing the announcement made by the European Council that enough progress had been made in negotiations to begin discussions on future trading relations (for further information please see the *Corporate & Financial Weekly Digest* of December 8, 2017), the FCA states that it welcomes the progress that has been made and is supportive of open markets and free trade in financial services, underpinned by strong regulatory standards.

The FCA goes on to state that while the final nature of any implementation period is yet to be agreed upon, it is anticipated that firms will be able to continue to benefit from passporting between the United Kingdom and the European Economic Area (EEA) after the point of exit and during an implementation period. The FCA will monitor the negotiations and provide further information to firms as appropriate.

The FCA also refers to HM Treasury's announcement (also covered in this week's *Corporate & Financial Weekly Digest* ["UK Government Plans To Ensure Continuity in Financial Services in the Event of No Deal With the EU"]) that, if necessary, it will legislate for a temporary permissions regime. This regime would enable relevant firms and funds to undertake new business within the scope of their permissions, continue performing their contractual rights and obligations, manage existing business, and mitigate risks associated with a sudden loss of permission. Firms and funds that are solely regulated in the United Kingdom by the FCA would need to notify the FCA of their wish to benefit from the regime before the day that the United Kingdom leaves the EU. However, the FCA states that this notification for temporary permission will not require submission of an application for authorization.

The FCA adds that UK-based firms servicing EEA clients should continue to prepare for a range of scenarios, and should discuss these arrangements and the implications of an implementation period with the relevant EU regulators. The FCA will keep its expectations under review as implementation period negotiations progress, and communicate to firms accordingly.

Finally, the FCA reminds firms that the United Kingdom remains an EU Member State until its formal withdrawal, and therefore all rights and obligations derived from EU law continue to apply. Firms must therefore abide by their obligations and continue with implementation plans for legislation that is still to come into effect.

The statement is available here.

EU DEVELOPMENTS

UK Government Plans To Ensure Continuity in Financial Services in the Event of No Deal With the EU

On December 20, 2017, Philip Hammond, the UK Chancellor of the Exchequer, made a written statement in the UK House of Commons on behalf of Her Majesty's Treasury (HM Treasury) announcing the Bank of England's (BoE) plans to ensure continuity in financial services in the unlikely event of an agreement not being reached with the European Union (EU) leading up to the UK's exit from the EU.

The BoE offered its approach to ensure that there is continuity in financial services in a series of documents that were also published on the same date.

The UK government's plans include:

- Bringing forward legislation, if necessary, that will enable EEA firms and funds operating in the UK to obtain a so-called "temporary permission" to continue their activities in the UK for a limited period after the UK exits the EU.

- Legislating to ensure that contractual obligations, such as insurance contracts not be covered by the temporary permissions regime mentioned above, can continue to be met.

- Bringing forward secondary legislation to ensure that UK authorities can carry out functions currently undertaken by EU authorities. The government proposes to give the BoE functions and powers in relation to non-UK central counterparties and non-UK central securities depositories. If necessary, the government will also provide for a temporary regime to enable the BoE to permit these firms to continue to operate in the UK for a limited period after the UK's exit from the EU.

- Providing the UK Financial Conduct Authority (FCA) with functions and powers in relation to UK and non-UK credit rating agencies and trade repositories, and any powers necessary to manage the transition post-exit. HM Treasury will work with the BoE and the FCA to determine how they will use these powers, consistent with their statutory objectives.

The written statement emphasized the importance of putting the technical arrangements in place to avoid market disruption. The government's plans aim to ensure that the UK's position as the world's leading financial center is maintained and that UK customers are protected.

A copy of the written statement is available here.

ESMA Publishes Consultation Papers on Draft Technical Standards Implementing the Securitisation Regulation

On December 19, 2017, the European Securities and Markets Authority (ESMA) published three consultation papers on draft technical standards implementing the Securitisation Regulation (SR). The SR lays down common rules on securitization and creates a European framework for simple, transparent and standardized (STS) securitization.

The consultation papers seek stakeholder views on:

- The contents and format of underlying exposures and investor report templates, which aim to meet the SR's reporting requirements;

- The operational standards for providing these reports to, and accessing the information from, securitization repositories, and the specific conditions for the entities specified in the SR to access information from securitization repositories;

- The contents and format of the notification to ESMA of a securitization's STS status;

- The application requirements for third-party entities seeking to be authorized as providers of STS verification services.

ESMA's consultation is open for feedback until March 19, which will then be used to help finalize the draft technical standards. A final report for the STS notification and third-party application requirements is expected to be published in July 2018. The final report for the reporting requirements and operational standards/ access conditions is expected to be published by the end of 2018.

A copy of ESMA's press release is available here.

ESMA's consultation paper on draft technical standards on content and format of the STS notification under the Securitisation Regulation is available here.

ESMA's consultation paper on draft technical standards on disclosure requirements, operational standards and access conditions under the Securitisation Regulation is available here.

ESMA's consultation paper on draft technical standards on third-party firms providing STS verification services under the Securitisation Regulation is available here.

European Commission Adopts Implementing Decision on the Equivalence of Swiss Stock Exchanges Under MiFID II

On December 21, 2017, the European Commission (EC) adopted an Implementing Decision on the equivalence of the legal and supervisory framework applicable to Swiss stock exchanges in accordance with the revised Markets in Financial Instruments Directive (MiFID II). The Implementing Decision together with an Annex was then published in the *Official Journal of the EU* on December 23, 2017.

The equivalence procedure set out under MiFID II aims to allow investment firms to undertake, on third-country trading venues recognized as equivalent, trades in shares subject to the trading obligation under MiFID II and the Markets in Financial Instruments Regulation (MiFIR). The EC has to assess whether the legal and supervisory framework of a third country ensures that a trading venue authorized in that third country complies with requirements that are equivalent to provisions under the Market Abuse Regulation, MiFID II, MiFIR and the Transparency Directive, and also subject to effective supervision and enforcements in that third country.

The recitals to the Implementing Decision explain that the EC has assessed the equivalence of the requirements that are applicable to Swiss stock exchanges established and authorized in Switzerland, and under the supervision of the Swiss Financial Market Supervisory Authority (FINMA).

Under the Implementation Decision, the EC recognizes the following share trading venues in Switzerland as eligible for compliance with the trading obligation for shares in MiFID II and MIFIR: SIX Swiss Exchange AG and BX Swiss AG.

In a related press release, the EC states that the Implementing Decision ensures that businesses and markets can continue to operate smoothly, without any market disruptions after MiFIR and MiFID II become applicable from January 3. The EC also explains that for Switzerland, unlike for other jurisdictions that have been granted equivalence such as the United States, the scope of the Implementing Decision is much greater, given that the trading of Swiss shares in the EU and vice versa is more widespread than in other jurisdictions that have recently been granted equivalence. There are also far closer commercial ties that bind the EU and Switzerland, and therefore require a special framework, according to the press release.

The Implementing Decision is limited to one year, expiring on December 31, and became effective on December 24, 2017. The EC will monitor closely the impact of the Implementing Decision and consider the broader political context, namely the progress made in negotiating an institutional agreement with Switzerland.

A copy of the Implementing Decision is available here.

A copy of the press release is available here.

ESMA Publishes Final Report and Technical Advice on the Evaluation of Certain Elements of the Short Selling Regulation

On December 21, 2017, the European Securities and Markets Authority (ESMA) published a final report containing technical advice to the European Commission (EC) on the evaluation of certain elements of the Short Selling Regulation (SSR) that became effective on November 1, 2012.

This follows the formal mandate from the EC to ESMA on January 19, 2017, seeking the latter's technical advice on the evaluation of certain elements of the SSR, and ESMA's consultation (published on July 7, 2017) (consultation paper) on the evaluation of the SSR. In its final report, ESMA proposes a number of key amendments to what it describes as the SSR's "controversial areas," with the aim of improving the SSR's relevance, effectiveness, coherence and efficiency. ESMA also notes that it received limited feedback to its consultation paper, to which only 20 public responses and four confidential responses were submitted.

ESMA has relied in part on the analysis of concepts derived from the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR), in developing its final report of technical advice.

Annex II of the final report sets out ESMA's technical advice and includes proposals concerning the three main elements of the mandate received from the EC:

- Exemption for market-making activities;
- Short-term restrictions on short-selling in case of a significant decline in prices; and
- Transparency of net short positions and reporting requirements.

ESMA states that the technical advice in its final report will contribute to the actions listed in the EC's communication published in November 2016 on the follow-up to its call for evidence on the European Union regulatory framework for financial service.

A copy of the final report is available here.

A copy of the communication is available here.

Three of Europe's Biggest Exchange Groups are Granted Last-Minute Reprieve From MiFIR "Open Access" Rules for Exchange-Traded Derivatives

On January 2 and 3, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin) and the UK Financial Conduct Authority (FCA) granted, respectively, last-minute delays to Europe's largest futures exchanges in implementing part of the Markets in Financial Instruments Regulation (MiFIR).

Under the "open access" requirements of MiFIR, a trading venue has the right to non-discriminatory access to a central counterparty (CCP) in the European Union (EU), and vice versa. However, a CCP or trading venue may apply to its national competent authority for a transitional arrangement to be agreed in relation to exchange-traded derivatives so that the open access rules of MiFIR would not apply to it until July 3, 2020 (Transitional Arrangement).

BaFin received an application from Eurex Clearing AG (Eurex), and the FCA received applications from ICE Futures Europe and the London Metal Exchange (LME), requesting that Transitional Arrangements be approved by both respective national competent authorities.

In both of the statements by BaFin and by the FCA, it was confirmed that BaFin and the FCA have assessed the open access requirements and subsequently approved the applications they received from the respective trading venues. Consequently, ICE Futures Europe, LME and Eurex will not be required to consider "open access" requests made under MiFIR, insofar as they relate to exchange-traded derivatives, until the expiry of their respective Transitional Arrangements on July 3, 2020.

A copy of BaFin's statement in English is available here and in German here.

A copy of the FCA's statement is available here.

Norwegian FSA Publishes Position Limits for Derivative Contracts

On December 20, 2017, the Norwegian Financial Supervisory Authority (Finanstilsynet or FSA) published a press release on a webpage with position limits for commodity derivatives trading on a trading venue in Norway and economically equivalent over-the-counter contracts.

Under the revised Markets in Financial Instruments Directive (MiFID II), and as reported in the ***Corporate and Financial Weekly Digest*** edition of December 8, 2017, limits are required to be established on the size of a net position a person can hold (at all times) in commodity derivatives traded on European Union (EU)/ European Economic Area (EEA) trading venues and economically equivalent over-the-counter contracts.

The position limits published by the FSA will be subject to changes and updates from time to time, and firms are encouraged to check them regularly.

The FSA webpage is available here.

ESMA Publishes Statement on LEIs under MiFIR

On December 20, 2017, the European Securities and Markets Authority (ESMA) published a statement intended to support a smooth introduction to the legal entity identifier (LEI) requirements of the Markets in Financial Instruments Regulation (MiFIR).

MiFIR's transaction reporting regime requires EU investment firms to identify that their clients are legal persons with LEIs. Trading venues are also required to identify each issuer of a financial instrument traded on their systems with an LEI when making daily data submissions to ESMA's Financial Instruments Reference Data System (FIRDS).

ESMA became aware, however, that not all investment firms would succeed in obtaining LEI codes from all of their clients ahead of MiFIR coming into force on January 3. ESMA stated that this may also may have been the case for non-EU issuers, whose financial instruments are traded on European trading venues.

Consequently, for six months after January 3, ESMA will allow:

- An investment firm to provide a client service triggering the obligation to submit a transaction report, where the investment firm did not previously obtain an LEI code from its client, under the condition that before providing such service the investment firm obtains the necessary documentation from this client to apply for an LEI code on their behalf; and

- Trading venues to report their own LEI codes instead of the LEI codes of non-EU issuers that do not currently have their own LEI codes.

The statement is available here.

ESMA Amends Opinions on Post-Trade Transparency and Position Limits for Third-Country Trading Venues

On December 15, 2017, the European Securities and Markets Authority (ESMA) revised two opinions providing guidance to investment firms on their post-trade transparency (Transparency Opinion) and position limits (Limits Opinion) obligations under the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) when they transact on third-country trading venues.

The Opinions were initially published on May 31, 2017 (for further information on the Transparency Opinion, please see the *Corporate & Financial Weekly Digest* of June 2, 2017). The previous version of the Transparency Opinion specified that, subject to third-country trading venues meeting a set of criteria, investment firms trading on those trading venues would not be required to make transactions public in the EU. Equally, under the Limits Opinion, commodity derivatives contracts traded on qualifying third-country trading venues would not be considered economically equivalent over-the-counter (EEOTC) contracts for the purposes of the position limit regime. The original Opinions required ESMA to establish a list of such third-country trading venues benefitting from the relief.

The revised Opinions state that, pending an assessment by ESMA of more than 200 third-country trading venues under the criteria in the Opinions, transactions on third-country trading venues are not subject to post-trade transparency requirements nor will positions in commodity derivatives traded on those third-country venues be treated as potentially EEOTC contracts. ESMA has stated that it will carry out the determination of third-country trading venues and publish the results in the course of 2018.

The Transparency Opinion is available here and the Limits Opinion is available here.

For additional coverage on financial and regulatory news, visit ***Bridging the Week***, authored by Katten's Gary DeWaal.

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