April 26, 2013

CFTC

NFA Amends CPO and CTA Quarterly Reporting Requirements

On April 24, the National Futures Association (NFA) issued a notice to members regarding amendments to NFA Compliance Rule 2-46. The amended rule modifies the NFA's quarterly pool reporting requirements and extends related reporting deadlines to align the NFA reporting requirements with the Commodity Futures Trading Commission Form CPO-PQR reporting requirements under CFTC Regulation 4.27. Under the revised rule, large commodity pool operators (CPOs) (*i.e.*, with assets under management (AUM) of more than $1.5 billion) will fulfill their NFA and CFTC filing obligations by submitting CFTC Form CPO-PQR within 60 days of the end of each quarter. Small CPOs (AUM of less than $150 million) and mid-size CPOs (AUM of $150 million to $1.5 billion) will satisfy their NFA filing obligations by submitting CFTC Form CPO-PQR within 90 days of the end of each calendar year and submitting NFA Form PQR (which is based substantially on Schedule A and Schedule B, Item 6, of CFTC Form CPO-PQR) within 60 days of the end of each quarter ending in March, June and September. CPOs that are dually registered as investment advisers with the Securities and Exchange Commission and file Form PF instead of CFTC Form CPO-PQR will satisfy their NFA filing obligations by submitting NFA Form PQR within 60 days of the end of each quarter ending in March, June and September and CFTC Form CPO-PQR and a Schedule of Investments within 60 or 90 days of each year end.

Under revised Compliance Rule 2-46, NFA member commodity trading advisors (CTAs) with a reporting requirement under CFTC Regulation 4.27 are required to file NFA Form PR within 45 days of the end of each calendar quarter. The NFA has not finalized a date for the first CTA filing, but noted that CTAs will not need to file quarterly reports for the quarters ended March 31 and June 30 of this year.

For more information, click here.

LITIGATION

SDNY Imposes Second Highest Penalty Under Foreign Corrupt Practices Act

The US District Court for the Southern District of New York recently ordered Uriel Sharef, a former Siemens AG board member and German citizen accused of bribing Argentine government officials, to pay a $275,000 civil penalty pursuant to a settlement agreement with the Securities and Exchange Commission. This is the second-highest civil penalty imposed on an individual under the Foreign Corrupt Practices Act (FCPA).

In December 2011, the SEC sued Sharef and six other Siemens executives for their alleged participation in a complex bribery scheme that spanned from 1996 through 2007. The case follows several years after Siemens resolved its corporate liability for bribery schemes by, among other things, paying $800 million in criminal fines and disgorgement of wrongful profits. According to the SEC's complaint, the group paid a total of $100 million to Argentine officials, including two Presidents and several Cabinet ministers, initially to secure a $1 billion government contract to produce identity cards and, thereafter, in an attempt to reauthorize the contract following its cancellation. Even after Siemens failed to get the contract reinstated, bribes allegedly continued to be paid to suppress evidence in an arbitration Siemens commenced due to the contract's cancellation. Sharef, who was the most senior executive named as a defendant, allegedly played a role in the scheme from the outset, including meeting with intermediaries in New York and devising a plan to funnel $27 million in bribes to Argentine officials through a sham arbitration and other fraudulent means. The SEC also claimed that Sharef directed his employees to help conceal the bribes from Siemens's internal accounting controls.

Sharef's consent to the penalty plus an injunction against future violations is the latest development in a complex case. The settlement in principle with Sharef was reached some months ago, but was only announced this week. Another defendant, Bernd Regendantz, also settled shortly after the SEC filed its case. He agreed to a $40,000 penalty that the SEC deemed satisfied by penalties paid in Germany. The remaining defendants have challenged the SEC's claims and one has, thus far, succeeded. As reported in *Corporate and Financial Weekly Digest* of February 22, 2013, the court dismissed claims against one defendant, Herbert Steffen, because his actions did not establish the minimum contacts necessary to exercise personal jurisdiction over him in the United States.

SEC v. Sharef et al., No. 11-cv-9073 (SAS) (S.D.N.Y. Apr. 15, 2013).

Grand Jury Indicts Swiss Lawyer and Banker in Tax Evasion Scheme

A New York federal grand jury recently indicted a Swiss lawyer and bank executive for their roles in allegedly assisting US citizens with hiding assets in Swiss bank accounts, allowing the US citizens to evade income taxes. This is one in a line of criminal actions brought by the US Attorney's Office in Manhattan (USAO) against foreign banks and tax advisors regarding use of offshore accounts to evade US tax reporting and payment obligations.

According to the indictment, Edgar Paltzer is a partner at an unnamed Swiss law firm and specializes in wealth management and tax matters; Stefan Buck held various positions at an unnamed Swiss bank (Swiss Bank 1) and is currently a member of its executive board. From 2000 to 2012, prosecutors claim that the pair opened and managed undeclared accounts at various Swiss banks on behalf of their clients, and took other measures to ensure that the Internal Revenue Service would not discover that US citizens beneficially owned the accounts. The indictment describes six unnamed clients of defendants who did not report their Swiss bank accounts on annual tax returns or foreign bank and financial account reports. The means the defendants allegedly advised their clients to employ to evade tax laws included repatriating funds from foreign accounts by (i) transferring the monies to intermediary offshore accounts held in the names of foreign corporate entities or trusts created for that purpose; (ii) structuring the sizes of transfers to avoid reporting obligations; (iii) making transfers to different individuals or entities to conceal the identity of the beneficial owner and (iv) converting the offshore funds into expensive jewelry and thereafter transferring it to the accountholder in the United States. Paltzer and Buck allegedly advised that these means would shield clients' assets from financial reporting and income tax obligations.

The indictment further describes that in March 2009, the Department of Justice (DOJ) reached a deferred prosecution agreement with a different Swiss bank for substantially similar conduct. In February 2012, another Swiss bank was indicted and pled guilty to virtually identical charges. During the intervening period from 2009 to 2012, prosecutors allege that Paltzer and Buck actively courted clients from those banks, such that Swiss Bank 1 saw a 300% increase in customers who were US taxpayers.

Paltzer and Buck have each been charged with one count of conspiring with US citizens to evade taxes. The defendants reside in Switzerland and, at the time the indictment was made public, neither had been arrested. If convicted, they each face a maximum sentence of five years in prison, a maximum term of three years of supervised release, and a fine, which would be the greatest of (i) $250,000; (ii) twice the gross pecuniary gain derived from the offense or (iii) twice the gross pecuniary loss to the victims.

US v. Paltzer et al., No. 13-cr-282 (S.D.N.Y. Apr. 16, 2013).

BANKING

FDIC and OCC Propose Limits on Deposit Advance Loans

On April 25 the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) proposed for public comment supervisory guidance to institutions subject to their jurisdictions (*i.e.*, state-chartered, non-member FDIC-insured institutions, as well as national banks and federal thrifts, respectively) that offer or may consider offering deposit advance products. The proposal is intended "to ensure that banks are aware of a variety of safety and soundness, compliance, and consumer protection risks posed by deposit advance loans," according to the FDIC.

The proposal "details the principles that the FDIC expects financial institutions to follow in connection with deposit advance products in order to effectively mitigate potential legal, reputational, consumer protection, compliance, and credit risks. The proposal discusses supervisory expectations for the use of deposit advance products, including underwriting and credit administration policies and practices. The proposal supplements existing FDIC guidance on payday loans and subprime lending." While "encouraging" institutions that offer such loans to continue to do so, the FDIC made it clear that "deposit advance products pose supervisory risks. These products share a number of characteristics seen in traditional payday loans, including: high fees; very short, lump-sum repayment terms; and inadequate attention to the consumer's ability to repay. As such, banks need to be aware of these products' potential to harm consumers, as well as elevated safety and soundness, compliance, and consumer protection risks." In a similar vein, the OCC stated that it "will closely review the activities of banks that offer or propose to offer deposit advance products, through direct examination of the bank, examination of any third party participating in such transactions under an arrangement with the bank, and, where applicable, review of any licensing proposals involving this activity. These examinations will focus not only on safety and soundness risks, but also on compliance with applicable consumer protection laws."

Among other things, the proposal sets forth certain underwriting criteria that institutions will be expected to follow:

- The Length of a Customer's Deposit Relationship with the Bank: A bank should ensure that the customer relationship is of sufficient duration to provide the bank with adequate information regarding the customer's recurring deposits and expenses in order to prudently underwrite deposit advance loans. The FDIC will consider sufficient duration to evaluate a customer's deposit advance eligibility to be no less than six months.

- Classified Credits: Customers with any delinquent or adversely classified credits should be ineligible.

- Financial Capacity: In addition to any eligibility requirements, the bank should conduct an analysis of the customer's financial capacity including income levels. Underwriting assessments should consider the customer's ability to repay a loan without needing to borrow repeatedly from any source, including re-borrowing, to meet necessary expenses. The financial capacity assessment should include:

    - An analysis of the customer's account for recurring deposits (inflows) and checks/credit/customer withdrawals (outflows) over at least six consecutive months. Lines of credit of any sort, including overdrafts, and drafts from savings should not be considered inflows. In reviewing a customer's transactions to determine deposit advance eligibility, the bank should consider the customer's net surplus or deficit at the end of each of the preceding six months, and not rely on a six-month transaction average.

    - After conducting the above-described analysis, determine whether an installment repayment is more appropriate.

- Cooling-Off Period: Each deposit advance loan should be repaid in full before the extension of a subsequent deposit advance loan, and a bank should not offer more than one loan per monthly statement cycle. A cooling-off period of at least one monthly statement cycle after the repayment of a deposit advance loan should be completed before another advance may be extended in order to avoid repeated use of the short-term product.

- Increasing Deposit Advance Credit Limits: The amount of credit available to a borrower should not be increased without a full underwriting reassessment in compliance with the bank's underwriting policies and in accordance with the factors discussed in this guidance. Additionally, any increase in the credit limit should not be automatic and should be initiated by a request from the borrower.

- Ongoing Customer Eligibility: As part of the underwriting for this product, a bank should, no less than every six months, reevaluate the customer's eligibility and capacity for this product. Additionally, the bank should identify risks that could negatively affect a customer's eligibility to receive additional deposit advances. For example:

    - Repeated overdrafts (establish/set a certain number during a specified number of months).

    - Evidence that the borrower is overextended with respect to total credit obligations.

Although it issued a statement in support of heavier regulation for deposit advance loans, it is unclear at this time whether the Federal Reserve will follow the FDIC and OCC proposed guidelines. The proposed guidance is expected to be published soon in the *Federal Register*, with a 30-day comment period.

Read more.

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BANKING

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