Katten

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BROKER-DEALER

FINRA Revises Problem Codes for Reporting Customer Complaints and for Filing Documents Online

On June 10, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-17, which addresses changes to the Problem Codes that FINRA members are required to use for self-reporting customer complaints. These changes are designed in part to account for the new Regulation Best Interest and Form CRS requirements that take effect on June 30.

FINRA Rule 4530 (Reporting Requirements) requires member firms to report information regarding written customer complaints. As a part of the reporting process, FINRA members are required to select the appropriate Rule 4530 Problem Code when reporting quarterly statistical and summary customer complaint information and on the form that is completed when filing required documents online.

To address complaints that may arise in connection with a firm's compliance with Regulation Best Interest (such as allegations relating to recommendations made to retail customers), FINRA is adding new Problem Code 16–Reg BI to the current Rule 4530 Problem Codes. Member firms should use Problem Code 17–Form CRS when a reportable matter relates to allegations involving Form CRS. These two Problem Codes will become available on July 18.

Aside from the addition of new Problem Codes, FINRA is retiring the Problem Code relating to the Department of Labor's vacated suitability rule and making other non-substantive changes to existing Problem Codes.

Regulatory Notice 20-17 is available here.

FINRA Releases White Paper on Artificial Intelligence

According to the Financial Industry Regulatory Authority (FINRA), financial institutions are allocating significant resources to developing applications that use artificial intelligence (AI) to offer innovative products, increase revenues, cut costs and improve customer service. For example, broker-dealers are currently evaluating and implementing AI-based applications to assist with customer-facing, investment and operational activities. As a result of these developments, FINRA's Office of Financial Innovation has met with a number of market participants to learn more about the use of AI in the securities industry. Following these discussions, FINRA published a white paper addressing the following topics:

- Defining the scope of AI;
- Areas in which broker-dealers are evaluating or using AI (including communications with customers, investment processes and operational functions); and
- Regulatory considerations for AI-based tools.

FINRA has requested comments in response to the white paper, as well as comments related to AI applications and their implications for FINRA rules.

The white paper is available here.

CFTC

CFTC Extends No-Action Relief to Registrants In Response to COVID-19 Pandemic

On June 9, at the request of the Futures Industry Association, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association, the Commodity Futures Trading Commission's (CFTC) Division of Swap Dealer and Intermediary Oversight (DSIO) and Division of Market Oversight (DMO) announced that they have extended no-action relief that was set to expire on June 30. DSIO and DMO originally issued a series of CFTC Staff Letters on March 17 (Nos. 20-02, 20-03, 20-04, 20-05, 20-06, 20-07, and 20-09, collectively, COVID-19 Letters) in response to the COVID-19 pandemic, which provided no-action relief to market participants for failure to comply with certain CFTC regulations, where compliance was expected to be impracticable because of the broad-sweeping measures taken to curtail the spread of COVID-19. Specifically, the COVID-19 Letters provided relief with respect to certain recordkeeping and reporting obligations of the following market participants: (1) futures commission merchants, (2) introducing brokers, (3) swap dealers, (4) retail foreign exchange dealers, (5) floor brokers, and (6) persons that are members of designated contract markets or swap execution facilities that are not registered with the CFTC in any capacity.

The no-action relief provided by the COVID-19 Letters were set to expire on June 30. The staff has now extended this relief until September 30, subject to the terms and conditions as stated in the applicable COVID-19 Letters.

For more information, the CFTC Letter No. 20-19 is available here.

BANKING

OCC Promulgates Final Rule on "Valid When Made"

On June 2, the Office of the Comptroller of the Currency (OCC) promulgated its final rule confirming the longstanding banking principle that a loan that is valid when made is enforceable by any subsequent assignee (the Final Rule). The Final Rule applies to national banks and federal savings banks.

The Final Rule concludes that "when a national bank or savings association sells, assigns, or otherwise transfers a loan, interest permissible before the transfer continues to be permissible after the transfer." The Final Rule notes that the confirmation of this banking principle was necessary in light of the uncertainty created by the Second Circuit in 2015 with the issuance of its decision in *Madden v. Midland Funding* (786 F.3d 286, 2nd Cir. 2015), which held that a "purchaser of a loan originated by a national bank could not charge interest at the rate permissible for the bank if that rate would be impermissible under the lower usury cap applicable to the purchaser."

The OCC stated that the promulgation of the Final Rule at this time was necessary to ensure that banks' ability to serve consumers and businesses would not be hampered at a time "when access to credit is especially critical." Additionally, the OCC found that the Final Rule promotes safety and soundness considerations, finding that the legal uncertainty created by the Madden decision impairs many national banks' ability to rely on loan transfers as a funding source.

The Final Rule becomes effective on August 3. As of the date of this article, the Federal Deposit Insurance Corporation (the FDIC) has not published a final rule addressing this issue with respect to state chartered banks (the FDIC's proposed rulemaking on this issue was published on November 19, 2019).

More information is available here.

UK DEVELOPMENTS

London Weekly Fireside Chat

Katten is continuing our weekly, 15-minute fireside chat podcast series, featuring London partners Carolyn Jackson, Nathaniel Lalone and Neil Robson. In this week's edition, Carolyn Jackson tackles the challenges thrown up by the European Securities and Markets Authority's (ESMA) recent position limits opinion, and Neil Robson and Nate Lalone provide updates on a new Eurex own-account dealing exemption and post-trade transparency on non-European Union (EU) venues, respectively.

The recording from the June 10 podcast is available here.

FCA Publishes Insight Article on Conduct and Culture during the COVID-19 Pandemic

On June 10, the UK Financial Conduct Authority (FCA) published an "insight article" on individual conduct and firm workplace culture during the COVID-19 pandemic (the Article). Such "insight articles" are not FCA guidance and do not necessarily represent the FCA's official view on a topic — they are intended merely to stimulate public debate on key regulatory topics.

In the Article, the FCA staff note that the COVID-19 pandemic has changed the way in which financial services firms operate. These changes have introduced both new challenges to corporate culture and conduct, as well as new opportunities for further development.

The Article states that firms should seek to encourage healthy cultures to benefit their employees, clients and the long-term future of their businesses but recognizes that the type of approach taken to achieve such objectives may vary across different firms.

The Article is available here.

EU DEVELOPMENTS

Germany Introduces Limited-Scope Exemption for Non-European Proprietary Trading Firms Trading on German Trading Venues

On May 28, the German government introduced an amendment to the German Banking Act regarding the license requirements for "third-country" (i.e., non-European) proprietary trading firms seeking access to, or membership of, German trading venues (the Amendment).

Under the Amendments, third-country firms exclusively conducting proprietary trading as an exchange participant on a German trading venue or exchange do not require a license from the German Federal Financial Supervisory Authority (BaFin). However, significantly, this exemption does not cover any such firms that are performing the following activities:

- market making;
- acting as a systematic internalizer;
- principal trading as a service to clients; or
- high frequency trading.

Eligible third-country proprietary trading firms applying to become exchange participants will benefit from the exemption by operation of law and are not required to submit an application to BaFin.

The Amendment has been noted by the Eurex Exchange and Frankfurt Stock Exchange in their circular notices available here and here respectively.

European Commission Publishes Report on AIFMD Review

On June 10, the European Commission (the Commission) published a report to the European Parliament and Council of the European Union (EU) assessing the application and scope of the Alternative Investment Fund Managers Directive (AIFMD) (the Report).

The recitals to the AIFMD state that it seeks to achieve a coherent supervisory approach to the risks of the financial system to provide high-level investor protection and to facilitate EU alternative investment fund (AIF) market integration. The AIFMD itself also requires that on a periodic basis, the Commission should review the application and the scope of the AIFMD. The Commission also assessed the AIFMD's impact on investors, AIFs, Alternative Investment Fund Managers (AIFMs) in the EU and in third countries in order to establish the degree to which the objectives pursued by the AIFMD have been achieved.

In the Report, the Commission states that:

- the AIFMD has improved the monitoring of risks to the financial system and the cross-border raising of capital for investments in alternative assets;
- the AIFMD has helped create an internal market for AIFs and reinforces the regulatory and supervisory framework for AIFMs in the EU; and
- AIFMs are operating with more transparency for investors and supervisors.

The Commission is currently considering whether to propose amendments to the AIFMD as a result of the findings set out in the Report.

The Report is available here.

ESMA Renews its Decision on Short Selling in Light of the Ongoing COVID-19 Pandemic

On June 10, the European Securities and Markets Authority (ESMA) renewed its decision requiring net short position holders of shares traded on an European Union (EU) regulated market to temporarily report positions to their EU financial regulator that equal or exceed 0.1 percent of the relevant company's entire issued share capital (the Decision).

ESMA first introduced this measure in a decision published on March 16 and was required to review the effect of such measure at least every three months (for more information on the initial decision by ESMA, please see the advisory prepared by Katten, available here). Consequently, ESMA carried out a review of this measure by analyzing a number of performance indicators in the EU. ESMA explains that it then reached the Decision to help maintain the ability of EU financial regulators to deal with any threats to market integrity, orderly functioning of markets and financial stability of the EU at an early stage.

The Decision becomes effective on June 17 and applies for a further period of three months until September 17.

The Decision is available here.

European Commission Publishes Consultation on Delegated Acts under EMIR

On June 11, the European Commission (the Commission) published two consultations in relation to the proposed delegated acts (Delegated Acts) on tiering and comparable compliance (the Tiering Consultation and the Comparable Compliance Consultation, together the Consultations) for third-country central counterparties (TC CCPs) as part of its review of the European Market Infrastructure Regulation (EMIR). According to the Commission, the proposed Delegated Acts aim to:

- improve the European Union's (EU) capacity to manage and address external risks to the financial system; and
- contribute to the resilience of financial market infrastructure by promoting the international role of the euro and strengthening Europe's economic and financial sovereignty.

The proposed Delegated Acts introduce a new system under EMIR known as comparable compliance, whereby TC CCPs that are deemed systemically important can ask the European Securities and Markets Authority (ESMA) to assess whether compliance with their own national rules equates to compliance with EU requirements. The Delegated Acts also consider the requirements for so-called 'tiering' TC CCPs under EMIR. 'Tier 2' TC CCPs are, or are likely to become, systemically important to the EU's financial stability, and are subject to more detailed oversight and supervision by ESMA, whereas 'Tier 1' TC CCPs are considered non-systemic and therefore are subject to more deferential oversight by ESMA.

A key takeaway from the current drafting of the proposed delegated acts is that the Commission confirms that United States (US) derivatives clearing organizations will not be deemed to be Tier 2 TC CCPs under the Delegated Acts and, therefore, not classified as "systemically important" or subjected to additional regulation by the EU.

The deadline for responses to the Consultations is July 9.

The Tiering Consultation is available here.

The Comparable Compliance Consultation 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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FINANCIAL MARKETS AND FUNDS

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BANKING

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UK/EU DEVELOPMENTS

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