Katten

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CFTC

CFTC Warns Customers About Precious Metal Schemes

On August 4, the Commodity Futures Trading Commission's Office of Customer Education and Outreach (the OCEO) issued a Customer Advisory regarding suspicious precious metal recommendations. Due to the relaxed rules under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), unregistered gold and silver dealers have increasingly been encouraging investors (1) to convert their retirement savings into investments of gold or silver coins or into self-directed gold individual retirement accounts, and (2) to make leveraged purchases of physical metals. These schemes often involve expensive premiums and hidden one-time or monthly fees. Further, physical metals such as collectible coins may be difficult to value objectively, and they do not have a liquid market.

The OCEO advises that customers should consult with registered or legitimately qualified advisors, such as commodity trading advisors, investment advisors, financial planners and certified public accountants, before investing in precious metals. Customers should not purchase precious metals based on a cold call, unsolicited email, social media post or infomercial. In addition, customers should compare costs, assess spot prices and confirm all fees in writing before making a precious metals investment.

For more information, please see the Customer Advisory, which is available here.

BANKING

California, Illinois and New York File Suit Against OCC's "Valid When Made" Final Rule

On July 29, the Attorneys General for the States of California, Illinois and New York (State AGs) filed suit seeking declaratory and injunctive relief in the US District Court for the Northern District of California (Complaint) against the Office of the Comptroller of the Currency (OCC), the primary federal regulator for national banks and federal savings banks (each, a Bank), in connection with the OCC's issuance of its final "valid when made" rule that was effective on August 3 (VWM Rule). The VWM Rule provides 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 OCC issued the VWM Rule because it believed that it 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) (holding 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 Complaint alleges that the VWM Rule would "dramatically expand preemption of state interest-rate caps, allowing not just [national banks and federal savings banks] but any entity that buys their loans to charge interest at rates in excess of rates permitted by state law." The Complaint also alleges that the VWM Rule is "beyond the OCC's power to issue, is contrary to statute, and would facilitate predatory lending through sham 'rent-a-bank' partnerships designed to evade state law." In support of its action, the Complaint also states that the VWM Rule "drastically alters the statutory scheme and regulatory regime that Congress established by unlawfully extending federal law in order to preempt state rate caps that would otherwise apply to those non-bank entities."

Notably, the Complaint does not address the Federal Deposit Insurance Corporation's "valid when made rule" that is effective for state-chartered banks that becomes effective on August 21.

A copy of the Complaint is available here.

UK DEVELOPMENTS

London Weekly Fireside Chat

Katten hosts a weekly 15-minute fireside chat podcast series on notable UK and European developments from the prior week's *Corporate and Financial Weekly Digest*. In this week's edition, Nathaniel Lalone speaks on the most recent fiasco around revising the European Union's (EU) Packaged Retail Investment and Insurance-based Products (PRIIPs) Regulation, Neil Robson provides an update on the Financial Conduct Authority's (FCA) recent announcement about complaints-handling at FCA-regulated firms and the end of COVID-related regulatory forbearance, and Carolyn Jackson speaks on the FCA's encouragement for all market participants to prepare for the end of the London Inter-bank Offered Rate (LIBOR) and the need for action over the next four to six months, including adhering to the International Swaps and Derivatives Association (ISDA) Protocol for legacy contracts.

Please note also that the Katten UK team's next CFWD podcast will be in early September. Until then, enjoy the summer!

To watch the podcast recording, click here.

COVID-19: FCA Statement on Handling Complaints

On July 31, the UK's Financial Conduct Authority (FCA) updated its statement on how firms should handle complaints during the COVID-19 pandemic — indicating to the market in the process that the time for regulatory forbearance as a result of the pandemic is effectively over. The FCA states: "We consider that firms have now had enough time to embed new ways of working, and, accordingly, a failure to comply with [FCA complaints rules], or other complaint handling requirements, should only arise in exceptional circumstances connected to the impact of Covid-19."

The FCA maintains that handling complaints is an important function and firms should therefore take all reasonable steps to handle complaints fairly and effectively, including where staff are working from home. The FCA continues to expect senior managers to be accountable for effectively overseeing how their firms handle complaints. Where firms are experiencing reduced complaint handling capacity as a result of coronavirus, the FCA expects firms to prioritize:

1. promptly paying complainants who have been offered redress and accepted that offer (this includes compensation awarded by the Financial Ombudsman Service);
2. the prompt and fair resolution of complaints from:
   a) consumers who are likely to be vulnerable to harm if their complaint is not resolved promptly and fairly, and
   b) micro-enterprises and small businesses who are likely to face serious financial difficulties if their complaint is not resolved promptly and fairly; and
3. sending timely holding responses to those complainants in point two above where their complaints cannot be resolved promptly.

The statement is available here.

EU DEVELOPMENTS

ESMA Publishes Data for Systematic Internaliser Calculations for Equity, Equity-Like Instruments, Bonds and Other Non-Equity Instruments

On July 31, the European Securities and Markets Authority (ESMA) published data for the systematic internaliser (SI) quarterly calculations for equity, equity-like instruments, bonds and, for the first time, other non-equity instruments under the revised Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation.

ESMA published the total number of trades and total volume between January and June 2020 for the purpose of the SI calculations under MiFID II for:

- 20,204 equity and equity-like instruments;
- 121,040 bonds; and
- 5,896 sub-classes of derivatives (including equity derivatives, interest rate derivatives, commodity derivatives, C10 derivatives, emission allowance and derivatives thereof and contracts for difference);
- ESMA states that SI test should be performed by:
- August 15 for equity and equity-like instruments;
- August 15 for bonds; and
- September 15 for all other non-equity instruments, including those for which ESMA has not published the SI data due to data-related issues.

The new SI data is available here.

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

For more information, contact:

FINANCIAL MARKETS AND FUNDS

Name	Phone	Email
Henry Bregstein	+1.212.940.6615	henry.bregstein@katten.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@katten.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@katten.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@katten.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@katten.com
Mark D. Goldstein	+1.212.940.8507	mark.goldstein@katten.com
Jack P. Governale	+1.212.940.8525	jack.governale@katten.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@katten.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Susan Light	+1.212.940.8599	susan.light@katten.com
Richard D. Marshall	+1.212.940.8765	richard.marshall@katten.com
Fred M. Santo	+1.212.940.8720	fred.santo@katten.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@katten.com
Robert Weiss	+1.212.940.8584	robert.weiss@katten.com
Allison C. Yacker	+1.212.940.6328	allison.yacker@katten.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com

BANKING

Name	Phone	Email
Christina J. Grigorian	+1.202.625.3541	christina.grigorian@katten.com

UK/EU DEVELOPMENTS

Name	Phone	Email
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@katten.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@katten.co.uk

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