Katten
Corporate & Financial Weekly Digest

October 2, 2020 | Volume XV, Issue 38

BROKER-DEALER

FINRA Requests Comment on Proposed Proceeding Rule for Failures to Comply With Qualification Examinations Rules of Conduct, Registration Requirements and Eligibility Proceedings Rules

On September 22, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-33 that requested comment on (1) proposed formal procedures to bring actions against non-associated persons who cheat or misbehave during a FINRA qualification examination and (2) related amendments to FINRA's registration requirements rule and eligibility proceedings rules.

Currently, FINRA cannot bring a disciplinary action against a person who engages in misconduct before associating with a firm. To help address this problem, amended FINRA Rule 1210.05 would enable FINRA to determine whether a non-associated person has cheated on the Securities Industry Essentials (SIE) examination and, if so, forfeit the examination results, prohibit retakes of the SIE examination, or both. In connection with the above, FINRA proposes the following:

- adopting a new expedited proceeding rule with new FINRA Rule 9560 (Failure to Comply with the FINRA Qualification Examinations Rules of Conduct) and make corresponding amendments to FINRA Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series);
- amending FINRA Rule 1210.05 to permit FINRA to take action against non-associated persons for a broader range of violations of the Rules of Conduct (not just cheating), prohibit them from taking any FINRA qualification examination (not just the SIE examination) and to establish a qualification requirement that applies to persons who are prohibited from taking any FINRA qualification examination; and
- amending FINRA Rule 9520 Series (Eligibility Proceedings) to address requests by associated persons and non-associated persons for relief from the proposed Rule 1210.05 qualification requirements.

FINRA encourages all interested parties to comment. Comments must be received by November 23. The Notice is available here.

SEC Staff to Host Roundtable on Regulation Best Interest and Form CRS on October 26

On September 28, the Securities and Exchange Commission announced that it will hold a roundtable on October 26 at which staff from the SEC and the Financial Industry Regulatory Authority (FINRA) will discuss initial observations on the implementation of Regulation Best Interest and Form CRS.

Regulation Best Interest and Form CRS went into effect September 10, 2019 and were designed to address the obligations of broker-dealers and investment advisers when they provide recommendations or investment advice to retail investors. Regulation Best Interest enhanced the broker-dealer standard of conduct beyond existing suitability obligations and requires broker-dealers, among other things, to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities. Form CRS is a relationship summary designed to help retail investors make informed choices regarding whether a brokerage or investment advisory relationship, as well as whether a particular broker-dealer or investment adviser, best suits their particular needs and circumstances.

The roundtable will discuss initial observations from SEC and FINRA staff for Regulation Best Interest and Form CRS. Participants will include staff from the Office of Compliance Inspections and Examinations, the Division of

Trading and Markets and the Division of Investment Management. The roundtable will be held by remote means, will be open to the public via live webcast and will take place from 1:00 p.m. to 3:00 pm (ET). Further details on the agenda and participants will be forthcoming.

A copy of the SEC's press release is available here.

CFTC

CFTC to Hold Open Commission Meeting on October 6

On September 29, the Commodity Futures Trading Commission (CFTC) announced that it will hold an open meeting on Tuesday, October 6 at 10:30 a.m. (ET). The meeting will consider amendments to compliance requirements for Commodity Pool Operators on Form CPO-PQR and the memorandum of understanding between the CFTC and the Officer of Financial Research Regarding the Sharing of Data and Information Collected on Form CPO-PQR.

The meeting can be publicly accessed via live stream at www.cftc.gov on the CFTC's YouTube channel or by phone (domestically at +1.877.951.7311; passcode: 3774262).

Additional information is available here.

CFTC Extends No-Action Relief for Certain Reporting Obligations under the OCR Final Rule

On September 25, the Commodity Futures Trading Commission's (CFTC) Division of Market Oversight (DMO) extended relief from certain reporting obligations under the ownership and control reports final rule (OCR Final Rule). The OCR Final Rule requires the electronic submission of trader identification and market participant data. The current no-action letter, CFTC Letter No. 20-30, extends the relief, which was most recently granted in CFTC Letter No. 17-45, until September 29, 2023 (unless otherwise addressed by the CFTC).

Additional information is available here.

CFTC Letter No. 20-30 is available for download here.

EU DEVELOPMENTS

COVID-19: FCA and PRA Updates on Working from Home and Key Workers

On September 24, the UK Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) updated their respective statements, originally published in March, regarding key workers and working from home during the COVID-19 pandemic. Both the FCA and PRA advised firms to follow government advice on remote working until notified otherwise.

In addition, the FCA further updated its statement in respect of work-related travel and the responsibilities of senior managers under the Senior Managers and Certification Regime (SM&CR), explaining that:

- firms should continue to discuss working arrangements with staff and support their employees in facilitating appropriate working arrangements; and
- senior managers are expected to take account of changes in the applicability of local and national lockdown restrictions and to review and update employee working arrangements on a continuing basis.

A key financial worker is one who fulfills a role that is necessary for a firm to continue to provide essential daily financial services to consumers or to ensure the continued functioning of markets. Firms should identify a key worker by determining which activities, services or operations, of which, if interrupted, are likely to lead to the disruption of essential services to the real economy or financial stability.

Individuals essential to support functions so identified are that firm's key financial workers. Firms should also identify any critical outsource partners who are essential to continued provision of services, even where these are not financial services firms.

The FCA also suggests that firms consider issuing a letter to all individuals they identify as key workers. The FCA recommends that the letter includes a notice, expressly stating "the individual has been designated as a key worker in relation to their employment by [firm name]" and is signed by someone with appropriate authority.

The FCA update on remote working is available here.

The PRA update on remote working is available here.

MiFID II: ESMA Publishes Final Report on Third-Country Firm Regime

On September 28, the European Securities and Markets Authority (ESMA) published its final report (Final Report), accompanied by draft regulatory and implementing technical standards (RTS and ITS) on the provision of investment services and activities in the European Union (EU) by third-country firms under the Markets in Financial Instruments Directive (MiFID II) (600/2014) and the associated Markets in Financial Instruments Regulation (MiFIR).

The draft RTS and ITS have been submitted to the European Commission for purposes of implementing certain changes to the MiFID II and MiFIR regimes introduced by the recently-adopted Investment Firms Regulation and the Investment Firms Directive. Such changes include an annual reporting requirement for third-country firms to ESMA, the discretion for ESMA to request third-party country firms to provide data relating to all orders and transactions in the EU and annual reporting requirements for branches of third-country firms.

ESMA consulted on the technical standards in January. Annex III of the Final Report provides a summary of feedback to the consultation paper, in addition to ESMA's response.

The Final Report is available here.

ESMA's prior consultation on the MiFID II third-country firm regime is available here.

MiFID II: FCA Publishes Regulatory Forbearance on the 10 Percent Depreciation Rule

On September 30, the UK Financial Conduct Authority (FCA) published a statement outlining an additional six month extension and amendments to a temporary coronavirus (COVID-19) measure regarding a requirement to notify investors of depreciations in the value of their account. The measure originally issued on March 31 and would have expired on September 30, but for the extension provided by the FCA.

Ordinarily, firms providing portfolio management services or holding retail client accounts with positions in leveraged financial instruments or contingent liability transactions are required under COBS 16A. 4.3 EU to inform investors where the value of the portfolio or leveraged position decreases by 10 percent or more compared to the value of the most recent prior statement. The FCA announced its intention not to take enforcement action against firms failing to comply with this notification requirement, provided certain conditions are met.

The FCA has extended this forbearance with several amendments. Accordingly, from October 1, the FCA will defer taking action against a firm for breach of COBS 16A.4.3 EU when offering services to retail investors, provided that the firm has:

- issued a minimum of one notification in the current reporting period indicating to retail clients that their portfolio or position has decreased in value by at least 10 percent;
- informed relative clients that they may not receive similar notifications should their portfolio or position values further decrease by 10 percent in the current reporting period;
- referred clients to non-personalized communications, perhaps made available on public channels, that outline general updates on market conditions (these could contextualize potential drops in portfolio or position value to help consumers meet their objectives, rather than making impulse decisions about their investments); and
- reminded clients how to check their portfolio value and how to get in touch with the firm.

The FCA has also amended the extension of flexibility regarding services offered to professional investors. From October 1, the FCA will not take any actions for breach of COBS 16A.4.3 EU against firms that have permitted professional clients to opt-in to receiving notifications.

The FCA's statement is available here.

MiFID II: FCA Publishes Regulatory Forbearance on the 10 Percent Depreciation Rule

On October 1, The European Securities and Markets Authority (ESMA) issued a statement relative to its approach to the application of the Markets in Financial Instruments Directive (MiFID) and Markets in Financial Instruments Regulation (MiFIR) following the end of the Transition Period on December 31 provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (EU) and the European Atomic Energy Community (Withdrawal Agreement).

The following aspects of MiFID II are covered in the statement:

- The MiFID II "C(6) carve-out": The derivative contracts eligible to the exemption include those relating to electricity or natural gas produced, traded or delivered in the EU and relating to the transportation of electricity or natural gas in the EU, irrespective of where those derivatives are traded. Derivatives must also be traded on an Organized Trading Facility (OTF) and physically settled. A wholesale energy product would not be traded on an EU OTF after the end of the transition period may become a financial instrument under Section C(6) if traded on an EU-regulated market or multilateral trading facility or traded on an EU, or may also become a financial instrument under Section C(7) if, among other things, it has the "characteristics of other derivative financial instruments" as further defined in Article 7 of Commission Delegated Regulation 2017/565.

- ESMA opinions on post-trade transparency and position limits: In effect from January 1, 2021, trading venues established in the UK will no longer be considered EU trading venues and concluded on UK trading venues would be considered OTC-transactions and subject to post-trade transparency requirements. UK commodity derivatives traded on trading venues could be considered as Economically Equivalent OTC (EEOTC) Contracts for the EU position limit regime. ESMA intends to perform assessments of UK venues and identified venues would be added to the respective lists of positively assessed third-country venues, provided that they meet all the relevant criteria, and EU investment firms would not be required to make transactions public in the EU via an EU APA if they are executed on a UK trading venue that has been positively assessed. Commodity derivative contracts traded on those trading venues would not be considered as EEOTC contracts for the EU position limit regime. ESMA reiterates the technical nature of the assessment, which is independent from and not related to the European Commission's decisions on equivalence.

- Post-trade transparency for OTC transactions between EU investment firms and UK counterparties: The obligations under Articles 20 and 21 of MiFIR for EU investment firms to publish transactions in instruments that are traded on a trading venue (TOTV) via an APA apply also to OTC-transactions involving an EU investment firm and a counterparty established in a third-country. Following the end of the transition period, UK investment firms will no longer be considered EU investment firms but will fall into the category of counterparties established in a third country. EU investment firms are required to make public transactions concluded OTC with UK counterparties via an APA established in the EU, ensuring all transactions, where at least one counterparty is an EU investment firm, will be made post-trade transparent in the EU.

- The Capital Requirements Regulation (CRR): Implementing technical standards (ITS) on main indices and recognized exchanges: CRR tasks ESMA with defining the concepts of "main indices" and "recognized exchanges" in the specification of eligible collateral. These concepts are key for the calculation of credit risk by credit institutions and investment firms for which the CRR applies. ESMA recently consulted on a potential amendment of the CRR ITS to reflect market changes over the past years and Brexit. A recent amendment to the CRR provides for the possibility to include third-country trading venues in the list of recognized exchanges subject to an equivalence decision of the Commission. However, following the end of the transition period and in the absence of such an equivalence decision, UK exchanges would no longer be included in the list of recognized exchanges. The Final Report on the amendment to the CRR ITS was submitted to the Commission on December 11, 2019, which detailed two scenarios depending on the Brexit

outcome. The first version of the ITS included UK exchanges and covers the scenario of the Commission adopting.

ESMA's statement on MiFID II/MiFIR Brexit dated March 7, 2019 is available here.

ESMA's update on the UK's withdrawal from the EU October 7, 2019 is available here.

ESMA's lists of third-country venues 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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EU DEVELOPMENTS

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