

Financial Regulatory Developments Focus



In this issue:

Derivatives

Regulatory Capital

Financial Services

Enforcement

Events

People

In this newsletter, we provide a snapshot of the principal European, US and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructures, asset managers and corporates.

Derivatives

ESMA Requests Clarification on Definition of Derivatives under EMIR

On 17 February 2014, the European Securities and Markets Authority (“ESMA”) published a letter it had sent to Michel Barnier, the Commissioner for Internal Market and Services of the European Commission. The letter raises the issue of the definition of derivatives or derivatives contract in the European Market Infrastructure Regulation (“EMIR”) which refers to the list of financial instruments in the Markets in Financial Instruments Directive (“MiFID”). MiFID has been transposed into the national laws of Member States with the result that there is no common definition of derivative or derivative contract in the EU. The result is that it will be very difficult to achieve consistent application of EMIR across the EU. In particular, the definition should be clarified in relation to FX forwards, spot FX and physically settled commodity forwards. Until such clarification, ESMA understands that national regulators will not implement EMIR for contracts that are not clearly identified as derivatives contracts across the EU. ESMA suggests that the Commission uses its powers under MiFID to adopt an implementing act providing for such clarification.

A copy of the letter is available at: <http://www.esma.europa.eu/content/Letter-Commissioner-Barnier-classification-financial-instruments-derivatives>.

Joint statement: CFTC Proposes to Exempt MTFs from US Regulation and EU to Progress Equivalence for SEFs

On 12 February 2014, the European Commission and the Commodity Futures Trading Commission (“CFTC”) published a joint statement on progress relating to the implementation of the 2013 Path Forward Statement. As a result of continued discussions between the European Commission and the CFTC, the CFTC issued two no-action letters which: (i) exempt certain EU-regulated multilateral trading facilities (“MTFs”) from registering as Swap Execution Facilities (“SEFs”);

- (ii) exempt parties executing swaps on MTFs from the trade execution requirement; and
- (iii) provides relief to swap dealers and major swap participants executing swap transactions on qualifying MTFs from certain requirements under the CFTC's business conduct rules.

The announcement is available at:

<http://www.cftc.gov/PressRoom/PressReleases/pr6857-14>.

Commission Publishes RTS on Extraterritorial Effect of EMIR

On 13 February 2014, the European Commission adopted regulatory technical standards ("RTS") specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or to prevent the evasion of rules and obligations. The RTS will apply across the EU and come into force twenty days after publication in the Official Journal of the European Union (except for the provisions on contracts that are considered to have a direct, substantial and foreseeable effect within the Union, which come into effect six months after the date of entry into force of the RTS). The Commission confirms that the adopted RTS have not been modified from the draft RTS provided by ESMA.

The RTS are available at: http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/140213-otc-derivatives-technical-standards_en.pdf.

Our client note on ESMA's consultation on extraterritoriality is available at: <http://www.shearman.com/en/newsinsights/publications/2013/08/alert-esma-consults-on-extraterritoriality>.

Regulatory Capital

Federal Reserve Board Consults on Repealing and Amending Consumer Financial Protection Legislation

On 12 February 2014, the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") announced that it is requesting comment on proposals to repeal Regulation DD (Truth in Savings) and Regulation P (Privacy of Consumer Financial Information) and to make amendments to the Identity Theft Red Flags rule in Regulation V (Fair Credit Reporting).

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") transferred rulemaking authority for a number of consumer financial protection laws from the Federal Reserve Board to the Bureau of Consumer Financial Protection ("CFPB"), except with respect to certain motor vehicle dealers. Because the CFPB has already issued interim final rules that are substantially identical to the Federal Reserve Board's Regulation DD and Regulation P, the Federal Reserve Board is proposing to repeal its versions of those regulations.

The Federal Reserve Board is also seeking comment on a proposed amendment to provisions of the Federal Reserve Board's Regulation V that require financial institutions and creditors to implement identity theft prevention programs. The proposal would revise the rule to reflect legislation that amended the Fair Credit Reporting Act ("FCRA") to clarify that these provisions apply only to creditors that regularly extend credit or obtain consumer reports in the ordinary course of their business. The amendments to the FCRA were intended to narrow the scope of the law so that it would not be applied to professionals, such as doctors or lawyers, who sometimes allow consumers to delay payment.

Comments on the proposals must be submitted by 12 April 2014.

The full text of the proposed repeal of Regulation DD (Truth in Savings) can be found at:

<http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140212a1.pdf>.

The full text of the proposed repeal of Regulation P (Privacy of Consumer Financial Information) can be found at:

<http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140212a2.pdf>.

The full text of the proposed amendments to Regulation V can be found at:

<http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140212a3.pdf>.

OCC Issues Guidance to Clarify Supervisory Expectations Regarding Secured Consumer Debt Discharged in Chapter 7 Bankruptcy Proceedings

On 14 February 2014, the Office of the Comptroller of the Currency ("OCC") issued guidance to clarify the OCC's supervisory expectations for national banks and federal savings associations (collectively, "banks") regarding secured consumer debt discharged in Chapter 7 bankruptcy proceedings.

The guidance describes the analysis necessary to "clearly demonstrate and document that repayment is likely to occur," which would preclude any charge-off as required by the Uniform Retail Credit Classification and Account Management Policy. The guidance also addresses when banks may consider post-discharge payment performance as evidence of collectability and when this performance demonstrates both capacity and willingness to repay the full amounts due.

The full text of the OCC guidance can be found at: <http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-4.html>.

Financial Services

ESMA Consults on Implementing Credit Rating Agencies Regulation

On 11 February 2014, ESMA published a consultation paper on implementation of the Credit Rating Agencies Regulation as amended. Under the Regulation, ESMA is tasked with preparing draft RTS on information on structured finance transactions, on the European Rating Platform and on the fees charged by rating agencies to their clients. Responses are due by 14 April 2014.

The consultation paper is available at:

<http://www.esma.europa.eu/consultation/Consultation-Paper-CRA3-Implementation>.

UK Banking Standards Review Consultation Launched

The Sir Richard Lambert launched a consultation on the proposed banking standards body that is intended to raise standards in banking in the UK. The consultation paper sets out the tasks, scope, objectives, membership, governance and relationship with other professional bodies of the proposed body. Responses are due by 7 March 2014 and Sir Richard's final recommendations will be published at the end of March 2014. The aim is for the new organization to be operational by the end of 2014.

The consultation paper is available at:

<http://www.bankingstandardsreview.org.uk/assets/docs/consultation-paper.pdf>.

FSB to Review FX Benchmarks

On 14 February 2014, the Financial Stability Board ("FSB") announced that an assessment of FX benchmarks will be incorporated into its review of short-term interest rate benchmarks which was requested by the G20 in 2013. The FSB has taken this decision because of the number of concerns raised about the integrity of FX rate benchmarks recently. The FSB will analyze market practices in relation to the use of FX benchmarks and the functioning of the FX market as well. The results will be provided to the G20 Brisbane Summit in November 2014.

The FSB press release is available at:

http://www.financialstabilityboard.org/press/pr_140213.pdf.

Enforcement

FCA Announces Success Prosecution of Fraudster

On 14 February 2014, the Financial Conduct Authority ("FCA") announced that, following an FCA prosecution, Benjamin Wilson had been sentenced to seven years at Southwark Crown Court for fraud, forgery and operating a collective investment scheme without authorization.

The FCA press release is available at: <http://www.fca.org.uk/news/fraudster-benjamin-wilson-sentenced-to-seven-years-imprisonment>.

SFO Announces Further Criminal Proceedings for LIBOR Manipulation

On 17 February 2014, the Serious Fraud Office (the "SFO") announced that it had commenced criminal proceedings against three former employees of Barclays Bank plc for manipulation of LIBOR between 1 June 2005 and 31 August 2007. In 2013, the SFO brought criminal proceedings for LIBOR manipulation against former employees of UBS, Citigroup and RP Martin Holdings Limited.

The SFO press release is available at: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/further-charges-in-libor-investigation.aspx>.

CFTC Announces Successful Prosecution of Ponzi Scheme

On 11 February 2014, the CFTC announced that the US District Court for the Eastern District of North Carolina entered an order for a permanent injunction against Harbor Light Asset Management, LLC (“HLAM”) and its President and owner, Michael Anthony Jenkins based on a CFTC complaint charging HLAM and Jenkins with operating a Ponzi scheme and fraudulently soliciting at least \$1.79 million from approximately 377 persons, primarily in North Carolina, in connection with the scheme. HLAM and Jenkins were required by the court to jointly pay restitution totaling \$1,301,406.60 and a civil monetary penalty of \$3,904,219.80. The court order also imposed permanent trading and registration bans against the HLAM and Jenkins.

The full text of the CFTC press release is available at:

<http://www.cftc.gov/PressRoom/PressReleases/pr6855-14>.

CFTC Announces Successful Prosecution of Commodity Pool Fraud

On 11 February 2014, the CFTC announced that the US District Court for the District of Nebraska entered a summary judgment order against Defendant Michael B. Kratville, a licensed attorney, and a default judgment order against Defendants Jonathan W. Arrington, Elite Management Holdings Corp. (“Elite”), and MJM Enterprises LLC (“MJM”), all of Omaha, Nebraska, in a CFTC enforcement action charging the Defendants with commodity pool fraud in violation of the Commodity Exchange Act (“CEA”) and certain CFTC regulations.

The court’s orders impose \$4,368,368.71 in restitution and require that Kratville, Arrington, Elite, and MJM pay a total of \$5,729,142.87 in civil monetary penalties. The orders further impose permanent trading and registration bans on Kratville, Arrington, Elite, and MJM and prohibit them from violating the anti-fraud and disclosure provisions of the CEA and CFTC regulations, as charged.

The full text of the CFTC press release is available at:

<http://www.cftc.gov/PressRoom/PressReleases/pr6045-11>.

Events

SEC to Hold Cybersecurity Roundtable

On 14 February 2014, the Securities and Exchange Commission (“SEC”) announced that it will host a roundtable next month to discuss cybersecurity and the issues and challenges it raises for market participants and public companies, and how the SEC is addressing those concerns.

The roundtable will be held at the SEC’s Washington, D.C. headquarters on 26 March 2014 and will be open to the public and webcast live on the SEC’s

website. Information on the agenda and participants will be published in the coming weeks.

People

Elizabeth Murphy Named as Associate Director in the SEC's Division of Corporation Finance

On 14 February 2014, the SEC announced that Elizabeth Murphy has been named an associate director in the SEC Division of Corporation Finance.

David Fredrickson Named Chief Counsel in the SEC's Division of Corporation Finance

On 12 February 2014, the SEC announced that David Fredrickson has been named associate director and chief counsel in the SEC's Division of Corporation Finance.

Paul A. Leder Named as Director of the SEC's Office of International Affairs

On 12 February 2014, the SEC announced that Paul A. Leder has been named director of its Office of International Affairs.

Rick A. Fleming Named as the First Head of the SEC's Office of the Investor Advocate

On 12 February 2014, the SEC announced that Rick A. Fleming has been named as the first head of the SEC's Office of the Investor Advocate.

Michael Maloney Named New Chief Accountant in the SEC's Enforcement Division

On 11 February 2014, the SEC announced that Michael F. Maloney has been named the new chief accountant in the SEC's Division of Enforcement.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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