

BROKER-DEALER

SEC Modifies and Extends Pilot Program for NMS Plan to Address Extraordinary Market Volatility

The Securities and Exchange Commission has issued an order that modifies and extends the National Market System (NMS) Plan to Address Extraordinary Market Volatility. Specifically, the SEC has approved the modification of the definition of “opening price” in instances in which the primary listing exchange opens with quotations. In these instances, the opening price will be the closing price of the NMS stock on the primary listing exchange on the previous trading day, or if no such closing price exists, the last sale on the primary listing exchange reported by the securities information processor.

The SEC also has approved the extension of the pilot period of the plan from April 22, 2016 to April 21, 2017.

The SEC’s order is available [here](#).

SEC Seeks Public Comment on Consolidated Audit Trail Proposal

The Securities and Exchange Commission plans to publish for public comment a National Market System (NMS) plan to create a consolidated audit trail (CAT) to better enable regulators to track trading in equity and option securities. The CAT plan was submitted jointly by the national securities exchanges and the Financial Industry Regulatory Authority to the SEC.

The CAT NMS plan includes a plan processor who will build a central repository that would receive, consolidate and retain consolidated trade and order data. Among other things, the plan processor would be responsible for operating the central repository, ensuring the security and confidentiality of the data, and publishing technical specifications for data submission by the self-regulatory organizations (SROs) and broker-dealers to the central repository.

The CAT plan would apply to NMS securities and over-the-counter equity securities. At the various stages in the lifecycle of an order, SROs and broker-dealers would be required to submit certain information about the order to the central repository, including the following:

- a unique identifier, provided by the broker-dealer, for the customer submitting the order;
- an identifier, provided by the SRO, for the broker-dealer receiving, originating, routing or executing the order;
- the date and time of the order event; and
- the security symbol, price, size, order type and other material terms of the order.

The CAT plan would generally require this data to be recorded contemporaneously with the order event and reported to the central repository by 8:00 a.m. the following day. The CAT plan also would require the data to be timestamped with a minimum granularity of one millisecond for electronic order events, and with a minimum granularity of one second for manual order events.

Public comments on the CAT plan should be submitted to the SEC within 60 days of the plan's publication in the *Federal Register*.

More information is available [here](#).

FINRA Permits ATs to Apply for Exemptions From TRACE Reporting

The Financial Industry Regulatory Authority has adopted new Rule 6732, which allows an alternative trading system (ATS) to apply for an exemption from the Trade Reporting and Compliance Engine (TRACE) trade reporting obligations under Rule 6730. FINRA staff will review each application and grant an exemption so long as the following criteria are satisfied:

- the exemption is consistent with the protection of investors and the public interest;
- each exempted trade is between FINRA members;
- each exempted trade does not pass through any ATS account, and the ATS does not exchange TRACE-eligible securities or funds on behalf of the subscribers, take either side of the trade for clearing or settlement purposes, or in any other way insert itself into the trade;
- the ATS agrees to provide to FINRA on a monthly basis data relating to each exempted trade occurring on the ATS's system;
- the ATS pays a transaction reporting fee to FINRA; and
- the ATS has entered into an affirmative written agreement with each party to the exempted trade specifying that such trade must be reported by one of the parties.

With respect to the last requirement, subscribers trading on an exempt ATS must report the ATS's Market Participant Identifier (MPID) to TRACE. New FINRA Rule 6732 becomes effective on July 18, 2016.

More information is available [here](#).

FINRA to Publish ATS Block-Size Trade Data

On October 3, the Financial Industry Regulatory Authority will begin publishing monthly statistics on block-size trades occurring on alternative trading systems (ATSs). The statistics regarding ATS block-size trades will be aggregated across all National Market System (NMS) stocks (i.e., there will be no security-by-security block data), will be for a time period of one month of trading, and will be published no earlier than one month following the end of the month for which trading was aggregated.

FINRA will provide information on trades using share-based thresholds, dollar-based thresholds, and thresholds that include both shares and dollar amount. Initially, FINRA will publish data with thresholds for ATS block-size trades in the following categories:¹

- 10,000 or more shares;
- \$200,000 or more in dollar value;
- 10,000 or more shares and \$200,000 or more in dollar value;
- 2,000 to 9,999 shares;
- \$100,000 to \$199,999 in dollar value; and
- 2,000 to 9,999 shares and \$100,000 to \$199,999 in dollar value.

For each of these categories, FINRA will publish monthly trade count and volume information for each ATS aggregated across all NMS stocks. As a convenience for users, FINRA will also calculate and display the average trade size and each ATS's rank as well as "ATS Block Market Share" (i.e., the proportion of each ATS's block-size trading volume in relation to total block-size trading by all ATSs) and "ATS Block Business Share" (i.e., the proportion of a particular ATS's overall trading volume that was done as block-size trades) and rankings of those metrics for each of the above categories.

More information is available [here](#).

¹ Any future changes to these thresholds will be announced in advance in a *Regulatory Notice* or similar publication. See Rule 6110(c)(2).

UK DEVELOPMENTS

FCA Trade Association Roundtable on MiFID II Implementation

On March 17, the Financial Conduct Authority (FCA) held a roundtable (Roundtable) with trade associations to discuss the application and implementation of the revised and recast Markets in Financial Instruments Directive and the associated Markets in Financial Instruments Regulation (jointly referred to as MiFID II). The following four topics were discussed at the Roundtable:

1. **Application Date and Transposition Deadlines**

The FCA reported that negotiations on the proposals and legislation to delay MiFID II were ongoing; however, they were aiming to conclude in April 2016 in order to allow the legislation to go into effect ahead of the July 3 transposition deadline.

2. **MiFID II Transposition**

A question was raised as to whether systematic internalizers could trade on a matched principal basis, and the FCA responded that MiFID II delegated acts and/or Level 3 questions and answers (Q&A) published by the European Securities and Markets Authority (ESMA) may provide further clarity. The FCA noted that it is considering publishing a second consultation in July 2016 on the implementation of MiFID II (in relation to the SYSC, EG, DEPP, COMM and CASS areas of the *FCA Handbook*), and a further consultation in September 2016 in relation to COBS part of the *FCA Handbook*. The FCA confirmed that it aims to complete transposing MiFID II by April 2017.

3. **Authorizations**

The FCA confirmed that for existing regulated activities and investment types, it is aiming to open the authorizations gateway by the end of 2016. According to the FCA's current plans, firms will submit applications for new regulated activities and investment types at the beginning of 2017. The FCA strongly encourages firms to submit applications as early as possible, ahead of January 2018.

4. **FCA Guide to MiFID II Applications and Notifications**

The FCA confirmed that it is planning to publish a MiFID II applications and notifications guide, once Level 2 measures are finalized in Brussels. The guide will include chapters on firm types, including trading venues, broker-dealers, commodity market participants, investment advisers, Alternative Investment Fund Managers Directive / Undertakings for Collective Investments in Transferable Securities, incoming EEA investment firms and third-country firms, as well as guidance on authorization, passporting for UK firms, corporate governance, exemptions and waivers.

The FCA's MiFID II Roundtable minutes are available [here](#).

EU DEVELOPMENTS

Speech by Commissioner Jonathan Hill Highlights Need for Proportionate Rulemaking

On April 21, the European Commission (EC) published a keynote speech delivered by Commissioner Jonathan Hill in which he reported on progress towards the EU's proposed Capital Markets Union (CMU) and responses received as part of the EC's call for evidence (Call for Evidence) on the European Union's (EU) regulatory framework for financial services.

The Call for Evidence sought feedback in the form of empirical evidence on the cumulative functioning of financial services rules and whether there are unnecessary regulatory burdens, overlaps, inconsistencies or gaps under the framework. Notably, Commissioner Hill reported that responses received to the Call for Evidence have highlighted that (1) legislation is not always proportionate, (2) in certain areas, legislation is impeding financing available to the economy, and (3) that the compliance burden on businesses is too high.

Commissioner Hill expressed his concerns with these findings, and set out initiatives he would like to pursue in response. Notably, he wants to simplify reporting and disclosure requirements for smaller banks under the Capital Requirements Regulation. He discussed calls for more proportionality under the European Markets Infrastructure

Regulation (EMIR) and claims by smaller companies that capital requirements are preventing banks from providing clearing services to them. He noted concerns raised by asset managers that the EU passporting system is not working, due to challenges of national gold-plating, fees and differing requirements for marketing materials. Commissioner Hill announced that the EC plans to launch a consultation in May 2016 to identify barriers to EU cross-border distribution of investment funds. He concluded by noting concerns raised by businesses that they face duplicative reporting requirements. He conceded that it was unclear whether all of the reporting data is essential, and that efforts would be made to see how reporting could be simplified and streamlined.

Commissioner Hill reported that the EC expects to publish a summary of its responses to the Call for Evidence in April 2016, and plans to hold a public hearing on issues raised in May 2016.

A copy of Commissioner Hill's speech is available [here](#).

European Commission Publishes First Capital Markets Union Status Report

On April 25, the European Commission (EC) published its first status report (Report) on work undertaken as part of the Action Plan on Building a Capital Markets Union (Action Plan), adopted and published by the EC in September 2015.

The Report is divided into three sections, and sets out actions achieved under the Action Plan since September 2015, work planned for the remainder of 2016, and initiatives scheduled for 2017 and 2018. In the funds context, it is worth highlighting the EC's list of delivered initiatives including introducing a Proposal for a Regulation laying down common rules on securitization, work on supervisory convergence and the EC's Call for Evidence for empirical data on the impacts and regulatory burdens of the European Union (EU) framework for financial services. Other key initiatives planned for completion by the end of 2016 include preparations for a public consultation to identify barriers to EU cross-border distribution of investment funds and further work to build on the Opinion issued by the European Securities and Markets Authority (ESMA) in relation to loan origination by funds in April 2016.

For further information on the CMU programme and initiatives, see the [Corporate & Financial Weekly Digest edition of October 9, 2015](#).

The Report is available [here](#).

The EC's accompanying press release is available [here](#).

ECON Adopts Draft Report on Virtual Currencies

On April 26, the European Parliament's Committee on Economic and Monetary Affairs (ECON) confirmed it voted in favor of a proposal contained in a draft report (Report) to create a virtual currencies taskforce. The taskforce would be created to (1) build expertise in the technology of virtual currencies (such as Bitcoin), and (2) where appropriate, propose regulatory measures necessary to regulate those currencies, particularly in the context of preventing money laundering and terrorist financing.

The Report was published by ECON in February 2016 and will be considered by the European Parliament as a whole and then sent to the European Commission for further consideration.

A copy of ECON's press release is available [here](#).

A copy of the Report is available [here](#).

European Commission Adopts Second MiFID II Delegated Act

On April 25, the European Commission (EC) adopted its second delegated act to supplement the amended and restated Markets in Financial Instruments Directive (MiFID II). The delegated act is in the form of a regulation (Delegated Regulation) and sets out organizational requirements and operating conditions for investment firms under MiFID II.

Chapter I of the Delegated Regulation

- **Exemptions**
Confirms in what circumstances an investment service will be provided in an “incidental manner”, for the purposes of exemptions from MiFID II;
- **Algorithmic trading**
Clarifies that for the purposes of the algorithmic trading, a system will be considered as having no- or limited-human intervention where for any order or quote, “an automated system makes decisions at any of the stages of initiating, generating, routing or executing orders or quotes according to pre-determined parameters”;
- **High-frequency trading**
Defines “high message intraday rate” as consisting of the submission on average of either (1) at least two messages-per-second with respect to any single financial instrument traded on a trading venue, or (2) at least four messages-per-second with respect to all financial instruments traded on a trading venue; and
- **Direct electronic access**
Clarifies that a person shall be considered not capable of electronically transmitting orders directly to a trading venue where that person cannot exercise discretion as to the exact fraction of a second of order entry and the lifetime of the order within that timeframe.

Chapter II of the Delegated Regulation sets out detailed organizational requirements, including systems and procedures to maintain confidential information, business continuity and accounting policies, risk management policies, remuneration policies, personal transactions, and a requirement to establish a permanent and independent compliance function (among others).

As mentioned in our previous update, the European Council and European Parliament will consider the Delegated Regulation, and once formally approved, the Delegated Regulation will go into effect 20 days following its publication in the Official Journal of the European Union. We will include an update in the *Corporate & Financial Weekly Digest* once it goes into effect.

For more information, see the [Corporate & Financial Weekly Digest Edition of April 15, 2016](#).

A copy of the Delegated Regulation (and accompanying Annexes) 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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UK DEVELOPMENTS

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