

SEC/CORPORATE

SEC Division of Corporation Finance Issues Additional Guidance Related to Expiring Confidential Treatment Orders

On September 9, the Division of Corporation Finance (the Division) of the Securities and Exchange Commission amended CF Disclosure Guidance: Topic No. 7 providing guidance to address alternatives for handling expiring “traditional” confidential treatment requests. This guidance amends and supplements Topic No. 7 issued by the Division on December 19, 2019.

The Division notes in Topic 7 that a company that previously has obtained a confidential treatment order with respect to a particular contract have three choices of what to do when the order is about to expire.

First, if the contract is still material, a company can refile it in complete, unredacted form if none of the information needs to be protected from public disclosure.

Second, if the contract continues to be material, and the previously redacted information continues to be confidential, a company may request to extend the period of confidential treatment by filing an application under the Securities Act of 1933 Rule 406 and the Securities Exchange Act of 1934 Rule 24b-2 for Rule 406 or Rule 24b-2 to continue to protect the confidential information from public release.

Third, if it has been more than three years since the initial confidential treatment order was issued, and if the contract continues to be material, a company has the option to transition to compliance with the requirements set out in Regulation S-K Item 601(b)(10) and other parallel rules (the “redacted exhibit rules”). When applicable, the redacted exhibit rules allow for the filing of redacted exhibits without submitting an explanation or substantiation to the SEC, or providing an unredacted copy of the exhibit, except upon request of the SEC staff. The SEC staff notes in Topic 7 that it anticipates that many if not most companies will choose to transition to this process since substantiation of compliance and submission of unredacted materials to the staff is only required upon staff request.

The guidance walks companies through the procedural steps involved with each of these three alternatives.

Topic 7, as amended, is available [here](#).

BROKER-DEALER

FINRA Files Proposed Rule Change to Delete the Order Audit Trail System (OATS) Rules

On August 26, the Securities and Exchange Commission published notice in the *Federal Register* regarding proposed rule changes that the Financial Industry Regulatory Authority (FINRA) had filed with the SEC. The changes would delete the order audit trail system (OATS) rules in the FINRA Rule 7400 Series and FINRA Rule 4554 once FINRA members are reporting to the consolidated audit trail (CAT) in accordance with certain standards.

The *Federal Register* entry is available [here](#).

Additional information is available from FINRA [here](#).

DERIVATIVES

See “CFTC Subcommittee Releases Report on Managing Climate Risk in the US Financial System” and “CFTC to Hold an Open Commission Meeting on September 17” in the CFTC section and “FCA Publishes Newsletter Market Watch 65” in the UK Developments section.

CFTC

CFTC Subcommittee Releases Report on Managing Climate Risk in the US Financial System

On September 9, the Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee of the Commodity Futures Trading Commission released a comprehensive report addressing potential risks to the financial system arising from, or related to, climate change. The report is the first of its kind from a US financial regulator. Its findings and recommendations are wide-ranging, frequently extending beyond the CFTC’s remit.

Key findings of the report include:

- “financial markets will only be able to channel resources efficiently to activities that reduce greenhouse gas emissions if an economy-wide price on carbon is in place at a level that reflects the true social cost of those emissions”;
- US financial regulators possess many flexible authorities and tools under existing legislation to begin to address climate change risks without further legislative action;
- insufficient analytical tools and data, as well as the absence of common definitions and standards for data and financial products, constitute a critical constraint on financial regulators’ ability to mitigate climate risks;
- under existing disclosure regimes, corporate disclosures on measuring and managing climate-related financial risks have not been “sufficiently useful to market participants and regulators”; and
- derivatives markets can play a role in mitigating various barriers that have historically reduced the capital allocated to sustainable economic activities.

The report contains 53 recommendations intended to mitigate climate-change risks to the financial markets. Among other things, the report recommends that:

- The United States should establish a fair, economy-wide price on carbon. The report asserts that this is the “single most important step to manage climate risk and drive the appropriate allocation of capital.”
- Federal financial regulators should integrate climate risks into their mandates, develop risk-mitigation strategies that address those risks, and undertake research on the potential financial impact of those risks.
- The Financial Stability Oversight Council incorporate climate risks into its oversight activities, as part of its mandate to identify and monitor threats to financial stability.
- Financial supervisors should conduct pilot climate-risk stress testing and require the entities they regulate to account for climate risks in their existing risk management frameworks.
- Regulators should update and amend existing disclosure frameworks to ensure the availability of more consistent and useful climate-risk disclosures by market participants.

The CFTC press release, including a link to the full report, is available [here](#).

Katten plans to publish an advisory with more detailed coverage of the report.

CFTC Issues Guidance on Compliance Program Evaluations in Connection With Enforcement Matters

On September 10, the Commodity Futures Trading Commission’s Division of Enforcement (Division) issued guidance outlining factors to consider when evaluating compliance programs as part of enforcement matters.

The Division had previously issued guidance directing staff to take into consideration the effectiveness of a firm’s compliance program when recommending civil monetary penalties and non-monetary terms of a resolution. The September 10 guidance sets forth factors the Division will consider when evaluating the effectiveness of a

compliance program, including whether the program was reasonably designed to “prevent the underlying misconduct at issue,” “detect the misconduct” and “remediate the misconduct.” The guidance additionally lists specific items for consideration with respect to prevention, detection and remediation, including but not limited to the adoption of effective written policies and procedures, the adequacy of internal surveillance and monitoring efforts, and the efficacy of mitigating any financial harm to others.

The September 10 guidance is available [here](#).

CFTC to Hold an Open Commission Meeting on September 17

The Commodity Futures Trading Commission will hold an open meeting on September 17, from 10:00 a.m. to 3:00 p.m. ET, to consider adopting several final rules, including with respect to:

1. registration with alternative compliance for non-US derivative clearing organizations;
2. amendments to real-time public reporting requirements under the CFTC’s Part 43 rules;
3. amendments to swap data recordkeeping and reporting requirements under the CFTC’s Part 45 rules; and
4. amendments to the CFTC’s regulations relating to certain swap data repository and data reporting requirements.

The CFTC also will consider issuing a supplemental notice of proposed rulemaking with respect to its Part 190 bankruptcy regulations.

The meeting is open to the public via a live, audio-only feed. The meeting will take place via conference call because of the COVID-19 pandemic.

More information, including listening instructions, is available [here](#).

UK DEVELOPMENTS

FCA Publishes Newsletter *Market Watch* 65

On September 7, the UK’s Financial Conduct Authority (FCA) published the 65th edition of its *Market Watch* newsletter on market conduct and transaction reporting issues (the Newsletter). The latest issue provides market participants with guidance on (1) FCA information confidentiality requirements; (2) documents subject to legal professional privilege (LPP); and (3) highlighting certain data issues when transaction reporting under the Markets in Financial Instruments Regulation (EU) No 600/2014 (MiFIR).

In the Newsletter, the FCA stressed the requirement for firms to keep information requests sent by the FCA to the firm strictly confidential and not discussed with staff outside of the firm’s Compliance department without the FCA’s prior agreement. Firms that do not comply with the confidentiality requirements run the risk of reputational damage and regulatory action. The FCA urged firms with FCA’s consent to carefully select staff in another department of the firm and inform them not to contact other staff without informing Compliance, who should seek the FCA’s approval.

Furthermore, the FCA stated that material relating to firms’ clients that could be subject to LPP should not be submitted as an attachment to a suspicious transaction report or market observation as it may be disclosable by the FCA in the event of an enforcement action being taken. To avoid a potential breach of LPP, reports should not include material such as direct text extracts or quotes; however, firms should disclose the presence of such material to the FCA where relevant to the notification.

On transaction reporting, and in connection with its 59th and 62nd editions of *Market Watch*, the FCA has further identified issues with the quality of data being submitted within the MiFIR transaction reporting regime, including:

1. failing to report the immediate rather than the ultimate underlying instrument for transactions executed in derivatives;

2. inconsistent dissemination of trading venue transaction identification codes (TVTICs) by trading venues to investment firms and failure by investment firms to report TVTICs accurately;
3. completing the country of branch field when the buyer or seller was not a client of the firm or using such field to highlight the geographic location of the buyer or seller rather than the branch that received the client order; and
4. not having robust systems in place to detect errors in reporting; firms cannot rely upon the FCA's acceptance of a report that such report was accurate.

The FCA reminded firms to review transaction reports and check their completeness and accuracy prior to submission.

The Newsletter is available [here](#).

EU DEVELOPMENTS

EBA Publishes Response to the European Commission's Call for Advice on the EU's AML and CFT Framework

On September 10, the European Banking Authority (EBA) published its response to the European Commission's March 2020 call for advice on the EU's future anti-money laundering (AML) and countering the financing of terrorism (CFT) framework (the Response).

The EBA's key recommendations, so as to achieve a single rulebook, in its Response are to:

- harmonize the EU's legal framework (to eradicate the diverse national approaches across the EU) and adopt EU AML and CFT law into national law relating to customer due diligence and wider AML and CFT systems and controls requirements. The EBA further recommended harmonization of the rules governing key supervisory processes, including money laundering and terrorism financing (ML and TF) risk assessments, co-operation and enforcement;
- strengthen aspects of the EU's Fourth Money Laundering Directive where existing provisions lack robustness and create weaknesses in the EU's AML/CFT defences;
- examine the scope of the EU's AML/CFT legislation in relation to the list of obliged entities to ensure they are well-defined and in line with international AML/CFT standards; and
- clarify provisions in sectoral financial services legislation to ensure consistent application with the EU's AML/CFT objectives. This further includes ensuring ML and TF risk is addressed consistently throughout all sectors and supervisory process.

The Response 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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