

## SEC/CORPORATE

### **Register for Our 2020 Proxy Season Update Webinar**

Please join Katten, Ernst & Young and Meridian Compensation Partners on Thursday, December 12 at 12:00 p.m. (CT) for a webinar discussion of key developments and trends impacting public companies in the 2020 annual reporting and proxy season.

Further details are available [here](#); click [here](#) to register.

## BROKER-DEALER

### **FINRA Expands Transparency Initiative Related to OTC Equity Trading Volume**

The Financial Industry Regulatory Authority (FINRA) previously announced an expansion to its ongoing transparency initiative for the over-the-counter (OTC) equity market. This expansion entails FINRA publishing new data about OTC trading volume occurring outside of alternative trading systems (ATSs).

As of December 2, FINRA began publishing the following types of data: 1) monthly aggregate block-size trading data for OTC trades in National Market System (NMS) stocks executed outside an ATS, on a one-month delayed basis; and 2) aggregate non-ATS volume for each member firm (by eliminating the *de minimis* exception for member firms executing fewer than, on average, 200 non-ATS transactions per day during an applicable reporting period).

Additional details about the initiative are available in Regulatory Notice 19-29 and in a Technical Notice outlining the new data that will be published.

The press release announcing the expansion of the initiative is available [here](#).

A copy of Regulatory Notice 19-29 is available [here](#).

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

## DERIVATIVES

*See “CFTC Issues Guidance on Chief Compliance Officer Annual Report Preparation,” “CFTC to Hold an Open Commission Meeting on December 10,” “CFTC’s Market Risk Advisory Committee to Hold Open Meeting December 11” and “NFA Proposes Amendments to Several NFA Rules and Interpretative Notices to Apply to Cleared Swaps” in the CFTC section.*

## CFTC

### **CFTC Issues Guidance on Chief Compliance Officer Annual Report Preparation**

On December 4, the Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission (CFTC) issued an advisory addressing the preparation of the Chief Compliance Officer (CCO) Annual Report for futures commission merchants, swap dealers and major swap participants. The CFTC advisory discusses a number of common deficiencies that the staff has identified in its review of the 2019 CCO Annual Reports and provides additional guidance to Registrants regarding the requirements of the CCO Annual Report in light of the deficiencies found.

In the advisory, DSIO staff address a number of sections of the CCO Annual Report, including: (1) areas for improvement; (2) financial, managerial, operational and staffing resources; (3) material non-compliance issues; (4) furnishing the annual report and related matters; and (5) the certification requirement. As a general matter, the staff found that firms failed to provide sufficient detail to allow staff to form a complete view of the firm's compliance with applicable requirements. The staff encouraged firms to assure that their CCO Annual Reports align with the requirements and recommendations set out in the advisory as well as prior CFTC guidance.

More information, including access to the advisory, is available [here](#).

### **CFTC to Hold an Open Commission Meeting on December 10**

The Commodity Futures Trading Commission (CFTC) will hold an open meeting on December 10 at 9:00 a.m. Eastern to cover the following topics:

- Proposed Rule: Capital Requirements for Swap Dealers and Major Swap Participants – Reopening the Comment Period and Requesting Additional Comment
- Proposed Rule: Amendments to the Swap Clearing Requirement Exemption for Inter-Affiliate Swaps
- Proposed Rule: Settlements in Administrative and Civil Proceedings
- Final Rule: Amendments to Part 13 of the Commission's Regulations (Public Rulemaking Procedures)

The meeting will take place at the CFTC headquarters in Washington, DC, and a live webcast will be offered. More information is available [here](#).

### **CFTC's Market Risk Advisory Committee to Hold Open Meeting December 11**

On December 2, the Commodity Futures Trading Commission's (CFTC) Market Risk Advisory Committee (MRAC) announced that it will hold a public meeting at the CFTC headquarters in Washington, DC on December 11 at 9:30 a.m. Eastern. At the meeting, MRAC will receive status reports from its Climate-Related Market Risk, Central Counterparty Risk and Governance, Market Structure, and Interest Rate Benchmark Reform committees. There also will be a discussion regarding the transition from the London Inter-Bank Offered Rate (LIBOR) to alternative risk-free reference rates (RFRs), including the International Swaps and Derivatives Association's (ISDA) recent consultation on the final parameters for the spread and term adjustments that will apply to RFRs if derivatives fallbacks are triggered. Comments in connection with the meeting must be submitted by December 18.

For details as to how to attend or listen to the meeting, please see the CFTC's press release [here](#).

### **NFA Issues Notice to Members on Annual Affirmation Requirement for CPO and CTA Exemptions**

On December 2, the National Futures Association (NFA) issued Notice I-19-29 reminding NFA members that any person claiming an exemption from commodity pool operator (CPO) registration under CFTC Regulation 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5), an exclusion from CPO registration under CFTC Regulation 4.5 or an exemption from commodity trading advisors (CTA) registration under 4.14(a)(8) must annually affirm the

applicable notice of exemption within 60 days of the calendar year end, which is February 29, 2020 for this affirmation cycle. Failure to affirm will result in the exemption being withdrawn on March 1, 2020. The affirmation process can be completed through NFA's online Exemption System.

The notice and more information on how to complete the affirmation process is available [here](#).

### **NFA Proposes Amendments to Several NFA Rules and Interpretative Notices to Apply to Cleared Swaps**

On December 3, the National Futures Association (NFA) proposed amendments to various NFA Compliance Rules and Interpretive Notices related to discretionary customer accounts, customer information, risk disclosures and bunched orders to apply to cleared swaps, in addition to other minor amendments. Most notably, NFA proposal would amend the following:

- NFA Compliance Rule 2-8 to specify that NFA's requirements for discretionary accounts apply to cleared swaps customer accounts;
- NFA Compliance Rule 2-30 to expand existing customer information and risk disclosure requirements to apply to cleared swaps; and
- Interpretive Notice 9029 to expand the scope of the Interpretative Notice to bunched orders involving cleared swaps.

NFA also proposed amendments to other applicable Interpretive Notices to integrate the proposal.

Absent additional review by the Commodity Futures Trading Commission (CFTC), NFA may establish an effective date for the amendments as early as 10 days after receipt of the submission by the CFTC.

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

### **NFA Proposes Reduction in Forex Dealer Member Assessment on Order Segments**

On November 29, the National Futures Association (NFA) proposed an amendment to NFA Bylaw 1301(e) to reduce assessments for each order segment fee a Forex Dealer Member (FDM) submits to NFA's Forex Transaction Reporting Execution Surveillance System (FORTRESS). Currently, each FDM is required to pay an assessment of \$.004 on each order segment submitted to FORTRESS. NFA has proposed lowering the assessment to \$.003, and such proposal may become effective as early as 10 days after receipt of the submission by the Commodity Futures Trading Commission (CFTC).

The NFA rule submission is available [here](#).

## **BANKING**

### **US Banking Agencies Issue Statement on Alternative Date in Credit Underwriting**

On December 3, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Consumer Financial Protection Bureau (CFPB) and the National Credit Union Administration (the Banking Agencies) released interagency guidance related to the use of alternative data for purposes of underwriting credit (the Guidance).

The Guidance acknowledges that alternative data may "improve the speed and accuracy of credit decisions," especially in cases where consumer credit applicants have "thin files" because they are generally outside the mainstream credit system. In order to comply with applicable federal laws and regulations when using such alternative data, including those related to unfair, deceptive, or abusive acts or practices, the Banking Agencies advise that lenders should responsibly use such information. Furthermore, the Guidance reminds lenders of the importance of an appropriate compliance management program that comports with the requirements of applicable consumer protection laws and regulations.

As a final recommendation, the Banking Agencies suggest that lenders consult with appropriate regulators when planning to use alternative data to underwrite credit.

The Guidance is available [here](#).

## UK DEVELOPMENTS

### SM&CR to Apply to Benchmark Administrators

On November 29, the UK's Financial Conduct Authority (FCA) published a consultation paper on applying the Senior Managers Regime (SMR) to benchmark administrators. (For more information on the Senior Managers and Certification Regime, or SM&CR, please see the [July 28, 2017](#) edition of the *Corporate & Financial Weekly Digest*.)

SM&CR already applies to banks and insurers, and will apply to most other UK financial services firms as of December 9. Because benchmark administrators only began to be supervised by the FCA in January 2018, the SMR will apply to them starting December 7, 2020. This gives these firms one extra year to prepare for the regime.

The regime for benchmark administrators will be less onerous than the regime for other FCA-authorized firms in a number of ways:

- the Certification Regime will not apply to benchmark administrators, on the basis that the Article 4(7) of the Benchmark Regulation (BMR) already requires these firms to ensure that employees have the necessary skills, knowledge and experience;
- benchmark administrators will not need to allocate Senior Management Functions (SMFs) 16 and 17 (Compliance Oversight and Money Laundering Reporting Officer, respectively), again due to overlap with the BMR;
- benchmark administrators will have to allocate only three Prescribed Responsibilities, rather than the five that must be allocated in other Core firms; and
- the Conduct Rules will apply, but only to employees involved in the regulated financial services activities at the firm. This is because only a specific part of the business at these firms is regulated activity, and the FCA considers that it would not be proportionate to apply the Conduct Rules to the other parts of the business. This approach is in line with the application of the FCA's Principles of Business to these firms.

The FCA anticipates that all benchmark administrators will be classified as "Core" firms, with access to the existing waiver process to apply to be categorized as "Limited Scope" and the option to "opt up" to "Enhanced" status. In the consultation paper the FCA suggests that, in particular, it expects administrators of commodity benchmarks (known as "Annex II firms") to apply to be Limited Scope.

Until the SMR applies to these firms, they will fall under the Approved Persons Regime (APR). After December 7, 2020, the only entities that still fall under the APR will be appointed representatives, and the FCA plans to update its rules to make this clear.

The consultation paper is available [here](#) and closes for comment on February 28, 2020.

## EU DEVELOPMENTS

### ESMA Updates AIFMD Q&A

On December 4, the European Securities and Markets Authority (ESMA) updated its Questions and Answers (Q&A) on the application of the Alternative Investment Fund Managers Directive (AIFMD).

The new question concerns the apparent conflict between Article 24(2) AIFMD, which requires managers of alternative investment funds (AIFMs) to report results of liquidity stress tests for all of the alternative investment funds (AIFs) that they manage, and Article 16(1) AIFMD, which exempts managers of closed-ended unleveraged AIFs from conducting liquidity stress tests.

ESMA's response is that, should the AIFM chose to conduct liquidity stress tests for unleveraged closed-ended AIFs, it should report the results in the appropriate field as with any fund. However, if the AIFM does not conduct such tests, then they can say the question is "Not Applicable" and indicate in that field that the relevant fund is a closed-ended unleveraged AIF.

The updated Q&A is available [here](#).

## **ESMA Updates MiFID Q&A**

On December 4, the European Securities and Markets Authority (ESMA) updated its Questions and Answers (Q&A) on the application of the Markets in Financial Instruments Regulation (MiFIR) and the Markets in Financial Instruments Directive (MiFID II).

The updates addressed the following topics:

- ex-post costs and charges disclosure requirements in the context of portfolio management. This is the requirement under Article 50(9) of the MiFID II Delegation Regulation to provide annual aggregated ex-post information on total costs and charges;
- the interaction between the requirement in Article 50(9) above and the requirement in Article 60 of the MiFID II Delegated Regulation to make periodic statements. ESMA explained that Article 60 is more narrow than Article 50(9), and therefore an Article 60 statement would have to be expanded to meet the Article 50(9) requirements; and
- conflicting national product intervention measures under Article 42 of MiFIR. ESMA explained that firms have to adhere with measures in the Member States in which they are authorized and wherever their clients are based, and for any cross-border activity they must comply with the stricter measures. Firms also must be mindful of any specific rules on territorial scope that the national competent authority may have included in the measures.

The updated Q&A 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/EU DEVELOPMENTS

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\* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

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