

FINANCIAL MARKETS

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CFTC

CFTC Proposes Rule to Amend Regulation 160.30

On November 12, the Commodity Futures Trading Commission (CFTC) published a proposed rule that would amend CFTC Regulation 160.30 by establishing specific requirements for policies and procedures to protect customer records and information (Detailed Requirements). The Detailed Requirements were inadvertently deleted in a 2011 amendment to the regulation.

The Detailed Requirements are consistent with section 501 of the Gramm-Leach Bliley Act, pursuant to which part 160 of the CFTC’s regulations was adopted. The Detailed Requirements clarify that the policies and procedures must be reasonably designed to:

- Insure the security and confidentiality of customer records and information;
- Protect against any anticipated threats or hazards to the security or integrity of customer records and information; and
- Protect against unauthorized access to or use of customer records or information that could result in substantial information to any customer.

The proposed rule has a 30-day comment period following publication in the Federal Register.

The Proposed Rule is available [here](#).

Effective Date for Amendments to NFA’s Promotional Material Rules and Interpretive Notices

On November 13, the National Futures Association (NFA) issued Notice to Members 1-19-25, announcing that amendments to NFA Compliance Rule 2-29 and NFA Compliance 2-36 will become effective on January 1, 2020. Compliance Rules 2-29 and 2-36 and related Interpretive Notices establish requirements for an NFA Member’s communications with the public and use of promotional material.

NFA recently amended Compliance Rules 2-29 and 2-36 to clarify their applicability, better reflect current technology and business practices and address the use of hypothetical performance in promotional material by Commodity Pool Operator (CPO) Members operating pursuant to a CFTC Regulation 4.7 exemption.

NFA amended Compliance Rule 2-29 to accomplish the following:

- Clarify that the scope is limited to Futures Commission Merchant (FCM), including an FCM dually registered as a swap dealer with respect to its FCM activities, introducing broker, CPO and commodity trading advisor Members;
- Expand the scope to specifically apply to all commodity interest (not just futures-related) activities;
- Update the definition section to replace the term "futures" with the term "commodity interest" and specify that promotional material includes communications disseminated through electronic communications;
- Specify that a Member must submit to NFA for review and approval all forms of audio and video promotional material that make specific trade recommendations or discuss profit achieved in the past or that can be achieved in the future; and
- Modify existing relief available to CPO Members operating pursuant to a CFTC Regulation 4.7 exemption to require those Members to generally comply with the Rule's hypothetical performance disclaimer requirements, including certain requirements set forth in the NFA Interpretive Notice entitled "Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results" (e.g. requirements related to extracted performance and composite performance).

NFA also amended Compliance Rule 2-36(g) to specify that forex dealer members (FDM) and Associates of FDMs must comply with certain provisions of Compliance Rule 2-29 and related Interpretive Notices. Finally, NFA made corresponding amendments to the related NFA Interpretive Notices.

The Notice is available [here](#).

UK DEVELOPMENTS

NCA Publishes SAR Annual Report

On November 11, the UK Financial Intelligence Unit (UKFIU) of the National Crime Agency (NCA) published its 2019 annual report on the functioning of the Suspicious Activity Report (SAR) regime.

The UKFIU noted an increase in the number of SARs and defense against money laundering (DAML) requests:

- 478,437 SARs were received and processed by the NCA during 2018-2019, a 3.13 percent increase from the previous year;
- 34,543 DAML requests were received, a 52.72 percent increase from the previous year; and
- £131,667,477 was denied to criminals as a result of DAML requests, a 153.66 percent increase from the previous year.

In connection with these increases in volume, the UKFIU noted an increased headcount from 80-118 staff and a planned six-year IT transformation program. In addition, there are planned improvements to information sharing and confidentiality following the publication of the Home Office's Economic Crime Plan in July 2019.

For the 2019/20 financial year, the UKFIU is developing "targeted outreach" to certain sectors (lawyers, accountants, challenger banks and Fintech companies) to try and improve the number and quality of SARs. The UKFIU will also work with their counterparts in Australia and the Philippines to "improve understanding of the financial flows associated with online child sexual abuse and exploitations."

The annual report is available [here](#).

FCA Supports SEC "No Action" Extension for MiFID II

On November 4, the US Securities and Exchange Commission extended their October 26, 2017 "no-action" letter in relation to the research provisions in the Markets in Financial Instruments Directive II (MiFID II), so that it expires on July 3, 2023 rather than on July 3, 2020.

On November 8, the UK Financial Conduct Authority (FCA) published a statement in support of this extension.

The MiFID II research unbundling requirements mean that broker-dealers can only receive payments for research in hard cash or through research accounts. However, in the US, it is only possible to receive hard cash for research if the broker-dealer registers as an investment advisor. This “no-action” letter means that US-based broker-dealers can comply with MiFID II research unbundling requirements without facing enforcement action from the SEC for being an unregistered investment advisor.

In the same statement, the FCA reiterated its intention to conduct further work in 2020/21 to assess compliance with the new rules. (For more information, please see the September 27 edition of *Corporate and Financial Weekly Digest*).

The SEC statement is available [here](#).

The FCA statement is available [here](#).

ESMA Publishes Technical Advice for Third-Country CCPs

On November 11, the European Securities and Markets Authority (ESMA) published three sets of technical advice on tiering, comparable compliance and fees charged to third-country central counterparties (TC-CCPs). The advice is directed towards the European Commission (EC) and concerns the revised European Market Infrastructure Regulation (EMIR 2.2).

The EC will develop Delegated Acts for implementation of the technical advice, which are expected to be published in early 2020.

ESMA's Technical Advice on Tiering

Under EMIR 2.2, TC-CCPs will be categorized based on whether they are systemically important (Tier 2) or not important (Tier 1). A firm would also be in Tier 2 if it was likely to become systemically important.

In this technical advice, ESMA set out the criteria it will use to determine if a firm is Tier 1 or Tier 2. These criteria include:

- the nature, size and complexity of TC-CCPs business in the European Union (EU);
- the risk profile of the TC-CCP;
- the structure of the business in the EU, such as the clearing membership structure and other relationships or interdependencies; and
- the impact that failure of or disruption to the TC-CCP would have on financial markets and the broader financial system.

The technical advice is available [here](#).

ESMA's Technical Advice on Comparable Compliance

A Tier 2 TC-CCP will have to comply with both EMIR and its home country requirements. In this technical advice, ESMA explains that a Tier 2 TC-CCP can evidence that its compliance with their home country regime also satisfies the requirements under EMIR by submitting a “reasoned request” to ESMA, who will pass the request onto the ESMA third country CCP College to be assessed.

The technical advice is available [here](#).

ESMA's Technical Advice on Fees Charged to TC-CCPs

The final technical advice sets out the specific “recognition” (i.e. application) fees and annual fees to be charged to TC-CCPs under EMIR 2.2. Like all ESMA fees, they will be calculated as a proportion of ESMA's costs to supervise the firms. The fees will be different for Tier 1 and Tier 2, and there are specific provisions for 2019 and 2020 while EMIR 2.2 is implemented.

The technical advice is available [here](#).

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UK DEVELOPMENTS

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