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Corporate & Financial
Weekly Digest

January 13, 2017 Volume XII, Issue 2

BROKER-DEALER

2017 Examination Priorities Announced by the SEC

On January 12, the Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) released its 2017 examination priorities, which seek to address: (1) the protection of retail investors; (2) risks related to elderly and retiring investors; and (3) market-wide risks.

As part of its efforts to protect retail investors, OCIE indicated it will focus on: (1) registered investment advisers and broker-dealers that provide investment advice through automated or digital platforms and that offer wrap fee programs; (2) the compliance of exchange-traded funds with the Securities Exchange Act of 1934, as amended, and the Investment Company Act of 1940, as amended; (3) multi-branch and never-before-examined advisers; (4) financial industry employees with a track record of misconduct; and (5) conflicts of interest associated with the recommendation of mutual funds.

In order to assess risks that pertain to elderly and retiring investors, OCIE will analyze: (1) investment advisers and broker-dealers that offer retirement accounts; (2) the manner in which public pension plans manage conflicts of interest and fiduciary duties; and (3) registrants' interactions with senior investors.

In order to seek to maintain fair, orderly and efficient markets, OCIE will review: (1) compliance with the SEC's new rules governing money market funds; (2) cybersecurity policies and procedures and compliance with Regulation SCI; (3) certain clearing agencies and national exchanges; and (4) broker-dealers with regard to best execution and the establishment of appropriately tailored anti-money laundering programs.

OCIE's 2017 examination priorities are available here, and the SEC's press release, with respect to such priorities, is available here.

CFTC

CFTC Proposes To Amend Recordkeeping Requirements

On January 12, the Commodity Futures Trading Commission approved for publication in the *Federal Register* proposed amendments to Regulation 1.31, which contains the recordkeeping requirements under the Commodity Exchange Act and CFTC regulations. The CFTC proposes to eliminate certain outdated terms and provisions, add new definitions, and update language to reflect advances in information technology. The CFTC intends the proposed rule to be technology-neutral so that the regulation may withstand technological advancements in the future.

Comments on the proposed rules must be received within 60 days following publication of the proposed amendments in the *Federal Register*.

The CFTC proposed rule is available here.

NFA Issues Notice to Members Regarding CPO/CTA Exemption Affirmations

On January 11, National Futures Association (NFA) issued Notice I-17-02, which reminds NFA members of their obligations with respect to commodity pool operators (CPOs) and commodity trading advisors (CTAs) exempt from registration. The Commodity Futures Trading Commission requires any person claiming an exemption from 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 Regulation 4.5, or an exemption from CTA registration under Regulation 4.14(a)(8) to affirm the applicable notice of exemption annually within 60 days of the calendar year end. Failure to complete the affirmation process is considered a request to withdraw from the exemption and, therefore, entities that do not affirm may be required to be registered with the CFTC and become NFA Members.

Members that take reasonable steps to determine the registration and membership status of a previously exempt person will not violate NFA Bylaw 1101 or Compliance Rule 2-36(d) if that member transacts customer business between January 1 and March 31 with a previously exempt person under the circumstances described in the notice.

The full notice is available here.

NFA Announces Effective Date for Forex Transactions Requirements

The Commodity Futures Trading Commission recently approved National Futures Association's (NFA) amendment to NFA Compliance Rule 2-36. The amendment requires forex dealer members to supply customers and NFA with certain transaction execution data upon customer request. More information about the amendment is available in the December 2 edition of the *Corporate & Financial Weekly Digest*.

Notice I-17-01 explains that the amendment will go into effect on March 31.

Notice I-17-01 is available here.

ICE Endex Receives FBOT Registration

On January 11, the Commodity Futures Trading Commission announced that it had issued an Order granting ICE Endex Markets B.V. (ICE Endex) registration as a Foreign Board of Trade (FBOT). As an FBOT, ICE Endex may provide its members and other participants in the United States with direct access to its electronic order entry and trade matching system.

ICE Endex, located in Amsterdam, is subject to the oversight of the Netherlands Authority for the Financial Markets.

The CFTC press release is available here.

UK DEVELOPMENTS/BREXIT

Law Society Publishes Response to Consultation on the Regulatory Perimeter

On January 10, the Law Society of England & Wales (Law Society) published its response to HM Treasury's September 2016 consultation (Consultation) on amending the definition of "financial advice" for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) (the UK legislation that defines which activities are regulated and with regard to which types of instruments, known in UK regulatory terminology as "the regulatory perimeter"). The Consultation's aim was to bring the definition in the RAO in line with the definition set out in the Revised Markets in Financial Instruments Directive (MiFID II).

In its response, the Law Society calls for reconsideration of the regulatory perimeter under the Financial Services and Markets Act 2000 (FSMA) in light of the legislative changes needed to implement Brexit. The Law Society suggests that Brexit (in "whatever shape it takes") provides an opportunity to review those parts of the RAO where there is overlap between activities that are regulated under EU law and UK legislation.

The Law Society acknowledges that the RAO is a very complicated piece of legislation, but suggests that there may be scope to simplify the following areas:

- The "by way of business" test and, in particular, whether the test in article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 provides any meaningful additional investor protection;
- The regulated activities of dealing as principal, dealing as agent and arranging deals in investments, as specified in the RAO. The Law Society comments that it is difficult to see the extent to which they provide meaningful additional investor protection;
- The definition of "collective investment scheme" and whether this definition, and the restriction on their promotion/ marketing, is necessary given the EU concepts of UCITS and alternative investment funds;
- The territorial scope of the regulatory perimeter, particularly in relation to the activities of deposit-taking and insurance; and
- The financial promotion regime. The Law Society's comments may be read as criticism of these complex rules: "an entire chapter of [the FCA's guidance manual on the regulatory perimeter] is required to make the financial promotion regime . . . comprehensible and, to the extent it is, workable". The Law Society comments that there is no clear exemption for reverse solicitation or to allow the solicitation of expatriates by regulated businesses from their home jurisdictions—which appears to be at odds with the principles in the AIFM Directive and UCITS Directives.

The Consultation and the Law Society's responses are available here and here.

EU DEVELOPMENTS

ESMA Publishes Follow-Up Report on Peer Review of Best Execution

On January 11, the European Securities and Markets Authority (ESMA) published its follow-up report (Follow-Up Report) to its peer review on best execution of European Economic Area (EEA) national regulators. Best execution refers to the obligation under article 21 of the Markets in Financial Instruments Directive (MiFID) for investment firms to execute orders on terms most favorable to their clients, taking into account factors such as price, costs and speed. ESMA conducted its peer review on how national regulators supervised and enforced these provisions for 29 countries in the EEA from January 1, 2011 to December 31, 2012, and published its findings in 2015 (Initial Report).

The Initial Report found that the level of implementation of best execution provisions, as well as the level of convergence of supervisory practices by regulators, was relatively low. In particular, 15 regulators were found not to have applied or only partly applied criteria considered by ESMA to be essential for ensuring effective best execution. As part of ESMA's continued vigilance regarding investor protection, it revisited those 15 regulators in September 2016, in countries such as Denmark and Greece, to evaluate what progress had been made; the findings of which are set out in the Follow-Up Report. Among those countries that did not originally meet the relevant standards, ESMA found that there had been clear improvements in the level of attention paid to the supervision of best execution requirements, and in general, regulators were adopting a more proactive supervisory approach to monitoring compliance. Nevertheless, ESMA stressed in the Follow-Up Report that it considers "only a regular and proactive supervision can ensure an appropriate level of investor protection" in relation to best execution.

The Initial Report and Follow-Up Report are available here and here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

For more information, contact:

FINANCIAL SERVICES

Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com

UK/BREXIT/EU DEVELOPMENTS

David A. Brennand	+44.20.7776.7643	david.brennand@kattenlaw.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@kattenlaw.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@kattenlaw.co.uk

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