Katten
Corporate & Financial Weekly Digest

June 5, 2020 | Volume XV, Issue 22

BROKER-DEALER

CBOE Exchange Proposes to Temporarily Extend the Filing Deadline for Certain Supervision-Related Reports

On June 1, Cboe Exchange, Inc. (Cboe) filed with the Securities and Exchange Commission a proposed rule change to amend Rule 8.16 and Rule 9.2 to temporarily extend the filing deadline for certain supervision-related reports, which Cboe previously extended from April 1 to June 1 and from June 1 to June 30.

The proposed amendments are made in connection with the coronavirus (COVID-19) pandemic, which has placed stress on market participants' information technology infrastructure and the required deployment of significant resources, including to implement and continuously adapt business continuity plans. In addition, the proposed amendments are consistent with the temporary relief recently reissued by the Financial Industry Reporting Authority (FINRA), extending the deadline for member firms to submit their supervision-related reports (FINRA Rule 3120 Report and FINRA Rule 3130 certification) from the initial extension deadlines of June 1 to June 30.

The proposed rule changes will become effective upon filing in the Federal Register. A copy of the proposed rule is available here.

FINRA Shares Practices to Transition to a Remote Work Environment during COVID-19

On May 28, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 20-16 to share common themes observed through discussions with small, mid-size and large firms about the steps they reported taking to transition their associated persons and supervisory procedures to a remote work environment during the coronavirus (COVID-19) pandemic.

Challenges flagged by member firms included implementing business continuity plans (BCPs), closing branches and offices and supporting customers with these changes. Firms that relied on web-based tools, electronic document management systems and cloud-based services and regularly tested their remote connectivity, capacity, work processes and trading capabilities believed they faced fewer difficulties transitioning to a remote work and supervisory environment. In addition, some firms that had been making continuous updates to their BCPs and maintained hot (fully live and connected) disaster recovery sites also concluded that they experienced a smoother transition.

In addition, member firms generally acknowledged the challenges relating to remote supervision but also reported that they were relatively prepared to remotely supervise their associated persons using existing methods of supervision, such as supervisory checklists, surveillance tools, incident trackers, email review and trade exception reports. In particular, certain firms that already maintained comprehensive remote supervision capabilities reported they easily transitioned to supervising their associated persons in the new remote work environment.

The Notice is not intended to create new obligations, nor does it relieve firms of any existing obligations under federal securities laws and regulations. Instead, FINRA encouraged member firms to consider whether the practices described in the Notice would enhance their supervisory and compliance programs. The Notice is available here.

CFTC

CFTC Unanimously Approves Final Rule Regarding CPO Registration Exemption

At its open meeting on June 4, the Commodity Futures Trading Commission (CFTC) unanimously approved a final rule prohibiting persons from seeking to claim a Commodity Pool Operator registration exemption under CFTC Rule 4.13 who are, or whose principals are, subject to any of the statutory disqualifications listed in Section 8a(2) of the Commodity Exchange Act (CEA). The rule is intended to align the treatment of exempt CPOs and their principals with that of CPOs seeking to register with the CFTC, which are typically denied registration where they are subject to such a statutory disqualification. The final rule will require any person claiming an exemption under Rule 4.13 to represent that, subject to limited exceptions, neither the claimant nor any of its principals has in their background a CEA Section 8a(2) disqualification that would require disclosure if the claimant sought registration with the CFTC. In adopting the final rule, the CFTC confirmed that "family offices" as defined in the regulation, which are not required to file a claim for exemption from registration, are similarly not required to represent that neither the family office nor any of its principals are subject to a statutory disqualification

The final rule will be effective 60 days after publication in the Federal Register.

The press release, and access to the Voting Draft of the approved rule, is available here.

NFA Issues Notice to Members Regarding Obligations Guaranteed by FCMs, FDMs and IBs

On June 2, the National Futures Association (NFA) issued Notice I-20-23 to advise member futures commission merchants (FCMs), forex dealers members (FDMs) and introducing brokers (IBs) that the Joint Audit Committee had recently issued Regulatory Alert #20-01 to remind these registrants of the appropriate net capital treatment of guaranteed obligations and liabilities of subsidiaries or affiliates. Pursuant to CFTC Regulation 1.17(f)(4), the full amount of any guaranteed obligation or liability of a subsidiary or affiliate that is not reported through consolidation of the subsidiary or affiliate must be reflected in the computation of adjusted net capital.

Notice I-20-23 is available here.

Regulatory Alert #20-01 is available here.

NFA Issues Notice to Members on Recent changes to Self-Examination Questionnaire

On June 2, the National Futures Association (NFA) issued Notice I-20-22 identifying recent rule amendments that are now reflected in NFA's Self-Examination Questionnaire. Among other minor changes, the questionnaire reflects recent amendments to the following:

- Interpretive Notice 9019 — Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed introducing brokers (IBs) (effective January 1);
- Compliance Rules 2-29 and 2-36 and related Interpretive Notices regarding communications with the public and promotional material (effective January 1); and
- Compliance Rules 2-8 and 2-30 and Interpretive Notice 9029 — NFA Compliance Rule 2-10: The Allocation of Bunched Orders for Multiple Accounts (effective March 1).

NFA has also published Self-Examination Questionnaire Revision Notes, a comprehensive document specifying the recent changes to the Questionnaire.

Notice I-20-22 is available here, and the Self-Examination Questionnaire Revision Notes is available here.

NFA Proposes Amendments to Interpretive Notice Regarding AML Programs

On May 28, the National Futures Association (NFA) submitted to the Commodity Futures Trading Commission (CFTC) proposed amendments to NFA Interpretive Notice 9045 (Interpretive Notice) regarding the anti-money laundering (AML) Programs that introducing brokers (IBs) (and futures commission merchants) are required to implement. The Interpretive Notice provides that the AML programs adopted by IBs must include, inter alia, written

customer identification program (CIP) procedures designed to allow the IB to form a reasonable belief that it knows the true identity of each customer.

The proposed amendment to the Interpretive Notice incorporates recent guidance from the CFTC, found in CFTC Letter No. 19-18, which provides that voice broker IBs that negotiate/facilitate block futures and cleared swap transactions do not have customers or accounts for purposes of the CIP requirements. The limited relief from maintaining CIP procedures does not otherwise relieve IBs from the requirement to adopt and implement an AML program. In particular, these IBs are required to conduct suspicious activity reviews and comply with all other applicable NFA requirements using the information available to them.

Absent additional review by the CFTC, the 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 Amendments to Interpretive Notice on Disclosures for Security Futures Contracts

On May 28, the National Futures Association (NFA) submitted to the Commodity Futures Trading Commission (CFTC) proposed amendments to NFA Interpretive Notice 9050 regarding risk disclosure statements for security futures contracts. NFA Compliance Rule 2-30(b) and Interpretive Notice 9050 require NFA Members and Associates, who are registered as brokers or dealers under Section 15(b)(11) of the Securities Exchange Act of 1934, to provide a uniform disclosure statement for security futures products (SFPs) to a customer at or before the time the Member approves the account to trade SFPs. The proposed amendments update the Risk Disclosure Statement section of the Interpretive Notice to account for a recent amendment to CFTC Regulation 41.25, which, among other things:

- increases the default maximum level of equity-based SFP limits and provides guidance as to when a designated contract market (DCM) may adopt position limits for non-equity based SFPs;
- modifies the criteria for setting a higher position limit and position accountability level based on estimated deliverable supply;
- adjusts the time during which position limits or position accountability must be in effect; and
- provides that a DCM may exercise discretion in applying limits to either a trader's net position or a trader's position on the same side of the market.

Absent additional review by the CFTC, the 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.

EU DEVELOPMENTS

London Weekly Fireside Chat

Katten is continuing our weekly, 15-minute fireside chat series, now as a podcast featuring London partners Carolyn Jackson, Nathaniel Lalone and Neil Robson. In this week's edition, Nathaniel Lalone discusses "the good, the bad, and the ugly" of the European Union's new FRANDT requirements for clearing firms, and Carolyn Jackson addresses new European guidance requiring trading venue authorization for multilateral systems for executing repos and securities financing transactions.

The recording from the June 3 podcast is available here.

ESMA Updates MiFID II Q&As on Market Structures

On May 29, the European Securities and Markets Authority (ESMA) published an updated version of its Q&As on MiFID II and MiFIR market structures topics (the Q&A).

The updated Q&A clarifies the authorization requirements of multilateral systems facilitating the execution of repurchase agreement transactions under MiFID II (Q&A 9b on multilateral and bilateral systems).

For an in depth discussion on this topic, please see the London Fireside Podcast available here.

The Q&A is available here.

ESMA Publishes Report on FRANDT Commercial Terms for Clearing Services

On June 2, the European Securities and Markets Authority (ESMA) published a final report setting out technical advice to the European Commission (EC) on the fair, reasonable, non-discriminatory and transparent (FRANDT) commercial terms for the provision of clearing services (the Report).

In the Report, ESMA sets out how conditions under which the commercial terms for the provision of clearing services are to be determined as FRANDT. In doing so, ESMA aims to balance the need to improve clearing clients' access to clearing services and ensure that these services are provided on FRANDT compliant terms, while also ensure that the requirements are proportionate and within their mandate.

ESMA notes that the requirements covered in the technical advice address concerns of clearing clients and clearing service providers and aim to:

1. facilitate comparability of the information disclosed;
2. address the process of onboarding clearing clients;
3. standardize the information disclosed to clients bilaterally; and
4. encourage further standardization of contractual terms.

EMIR Refit introduced a requirement for clearing members and clients who provide clearing services to do so under FRANDT terms by June 2021. The EC was mandated to develop a delegated act specifying the conditions under which commercial terms are to be considered to be FRANDT terms and asked ESMA to provide technical advice on the FRANDT terms as input for developing the delegated act.

The Report has now been sent to the EC.

The Report is available here.

ESG: ECON and ENVI Publish Recommendation for Second Reading of Taxonomy Regulation

On June 2, the European Parliament's Economic and Monetary Affairs Committee (ECON) and its Environment, Public Health and Food Safety Committee (ENVI) published a recommendation for second reading of the proposed Taxonomy Regulation on the establishment of a framework to facilitate sustainable investment (the Recommendation). The Taxonomy Regulation now requires adoption by the European Union (EU) Parliament before it comes into force upon publication in the Official Journal of the EU.

The Recommendation is available here.

ESMA Updates Opinions on Transparency and Position Limits for Third-Country Trading Venues

On June 3, the European Securities and Markets Authority (ESMA) published updated versions of its opinions on transparency (Transparency Opinion) and position limits (Position Limits Opinion) for third-country trading venues (TCTVs) under MiFID II and MiFIR.

The Transparency Opinion:

The Transparency Annex to the Transparency Opinion includes a list of 137 TCTVs from 25 countries. Most have a positive assessment for all the instruments available on the venue, while several have a partially positive assessment (the assessment is limited to a subset of instruments).

Firms concluding transactions on TCTVs absent from the list should make those transactions post-trade transparent via an approved publication arrangement (APA) by October 3. ESMA clarifies that firms are subject to the same obligations for transactions executed on TCTVs with a partially positive assessment, but only for the instruments exempted from the positive assessment.

The Position Limits Opinion:

The Position Limits Annex includes a list of seven TCTVs from four countries. All TCTVs on this list have a fully positive assessment. ESMA notes that this means commodity derivatives traded on TCTVs on this list should not be considered as economically equivalent OTC contracts for the purposes of the position limits regime. ESMA confirms that each assessment of these TCTVs has been individually approved by ESMA prior to inclusion on the general list.

Although ESMA considers that this exercise has been finalized, it remains open to future submissions from TCTVs, should they have European Union market participants who consider that an assessment would be relevant.

ESMA's Transparency Opinion is available here, and the Transparency Annex is available here.

ESMA's Position Limits Opinion is available here, and Position Limit Annex is available here.

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

For more information, contact:

FINANCIAL MARKETS AND FUNDS		
Henry Bregstein	+1.212.940.6615	henry.bregstein@katten.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@katten.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@katten.com
Gary DeWaal	+1.212.940.6558	gary.dewaal@katten.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@katten.com
Mark D. Goldstein	+1.212.940.8507	mark.goldstein@katten.com
Jack P. Governale	+1.212.940.8525	jack.governale@katten.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@katten.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Susan Light	+1.212.940.8599	susan.light@katten.com
Richard D. Marshall	+1.212.940.8765	richard.marshall@katten.com
Fred M. Santo	+1.212.940.8720	fred.santo@katten.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@katten.com
Robert Weiss	+1.212.940.8584	robert.weiss@katten.com
Allison C. Yacker	+1.212.940.6328	allison.yacker@katten.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@katten.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@katten.com
EU DEVELOPMENTS		
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@katten.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@katten.co.uk
Neil Robson	+44.20.7776.7666	neil.robson@katten.co.uk

* Click here to access the *Corporate & Financial Weekly Digest* archive.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.
©2020 Katten Muchin Rosenman LLP. All rights reserved.

Katten katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at katten.com/disclaimer.