Katten
Katten Muchin Rosenman LLP

Corporate & Financial
Weekly Digest

December 21, 2018 Volume XIII, Issue 49

DUE TO THE CHRISTMAS HOLIDAY, *CORPORATE & FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON DECEMBER 28. THE NEXT ISSUE WILL BE DISTRIBUTED ON JANUARY 4, 2019.

BROKER-DEALER

SEC Adopts Transaction Fee Pilot for NMS Stocks

On December 19, the US Securities and Exchange Commission announced that it had voted to conduct a Transaction Fee Pilot in national market system (NMS) stocks, following a recommendation from the Equity Market Structure Advisory Committee. The SEC is initiating the Pilot to study the effects of exchange transaction fee and rebate pricing models on order routing behavior, execution quality and market quality generally, and to assess whether further regulatory action is required in this area.

The Transaction Fee Pilot will apply to all stock exchanges. While one test group will restrict the ability of exchanges to offer rebates and linked pricing, the other group will test a fee cap of $0.0010. The SEC intends to issue a list of pilot securities approximately one month before the Transaction Fee Pilot begins.

More information and a fact sheet are available here.

DERIVATIVES

See "CFTC Issues Staff Letters Related to Eurex Clearing AG" in the CFTC section.

SEC Proposes Risk Mitigation Rules for Uncleared Security-Based Swaps

On December 19, the US Securities and Exchange Commission voted to issue proposed rules that would require the mandatory use of certain risk mitigation techniques by security-based swap dealers and major security-based swap participants (collectively, SBS Entities). Under the proposed rules, SBS Entities will be required to:

- Reconcile outstanding security-based swaps with applicable counterparties on a periodic basis;
- Engage in certain forms of portfolio compression exercises, as appropriate; and
- Execute written security-based swap trading relationship documentation with each of its counterparties prior to, or contemporaneously with, executing a security-based swap transaction.

The SEC says that it has attempted to harmonize the proposed rules with similar existing rules adopted for swaps by the Commodity Futures Trading Commission, but nevertheless found a number of instances where it concluded that it was appropriate to diverge from the CFTC rules. The SEC invites particular comment on those divergences, which it describes in detail in the proposed rules.

The comment period for the proposed rules will end 60 days after publication of the NPR in the *Federal Register*.

The press release and a fact sheet concerning the proposed rules are available here.

The 240-page text of the proposed rules are available here.

ISDA Publishes 2018 Benchmark Supplement Protocol

On December 10, the International Swaps and Derivatives Association (ISDA) introduced its latest market protocol, the 2018 Benchmark Supplement Protocol, which is designed to give market participants an efficient means to incorporate terms from the ISDA Benchmark Supplement into their existing and/or future derivative transactions. The Benchmark Supplement, published in September, enables parties to include certain triggers and generic fallbacks in transactions which reference benchmarks and incorporate one or more of the following ISDA definitional booklets:

- 2006 ISDA Definitions
- 2002 ISDA Equity Derivatives Definitions
- 1998 FX and Currency Option Definitions
- 2005 ISDA Commodity Definitions

The Benchmark Supplement was produced primarily in order to address certain requirements under the EU Benchmarks Regulation. However, parties may also choose to incorporate the Benchmarks Supplement in light of the International Organization of Securities Commissions' "Statement on Matters to Consider in the Use of Financial Benchmarks," or if they otherwise consider that doing so will enhance the contractual robustness of relevant transactions.

Parties can amend their contracts to incorporate the Benchmark Supplement by adhering to the new Protocol and exchanging questionnaires that detail the exact scope of the incorporation.

The text of the Protocol is available here.

A helpful FAQ concerning the Protocol is available here.

CFTC

CFTC Issues Staff Letters Related to Eurex Clearing AG

On December 20, the US Commodity Futures Trading Commission's Division of Clearing and Risk (DCR) and Division of Swap Dealer and Intermediary Oversight (DSIO) issued several staff letters related to Eurex Clearing AG (Eurex) for the purpose of (1) authorizing Eurex to clear and settle swaps on behalf of US persons and (2) facilitating such clearing activities on behalf of cleared swaps customers as defined in Part 22 of the CFTC's regulations. Set forth below is a description of each letter.

Although the CFTC granted Eurex registration as a derivatives clearing organization (DCO) by order dated February 1, 2016, the order provided that Eurex could not clear or settle swaps on behalf of US persons until Eurex demonstrated that it could comply with the straight-through-processing requirements of CFTC Regulation 39.12(b)(7). By Staff Letter 18-30, DCR determined that Eurex is able to comply with the requirements of CFTC Regulation 39.12(b)(7) and authorized Eurex to commence the clearing and settling transactions on behalf of US persons that are:

(1) Clearing members;

(2) US persons that are affiliates of a clearing member; and

(3) Customers of a futures commission merchant (FCM).

Staff Letter 18-30 also approved several rules submitted by Eurex.

Staff Letter 18-31, issued jointly by DCR and DSIO, provided no-action relief permitting Eurex and its clearing member FCMs to maintain customer securities as margin for cleared swap transactions with Clearstream Banking AG, a central securities depository based in Germany (CBF), notwithstanding that (1) CBF does not maintain regulatory capital in excess of $1 billion, as required by CFTC Regulations 1.49(d)(3) and 22.9, and (2) any US dollar-denominated securities held at CBF would appear to be contrary to CFTC Regulation 1.49(e)(1)(i), which provides that US dollar-denominated assets held to meet US dollar obligations to customers must be held in the US.

The no-action relief set forth in Staff Letter 18-31 is subject to certain conditions, including, but not limited to, each FCM clearing member of Eurex obtaining an acknowledgment letter from CBF in accordance with CFTC Regulations 1.20 and 22.5 upon opening an account with CBF to hold customer securities as margin for cleared swap transactions. The relief contained in Staff Letter 18-31 is limited to CBF's holding of customer-owned securities as margin for customer swap transactions cleared through Eurex. Such relief does not extend to CBF's holding of customer margin for futures contracts.

Staff Letter 18-32 modifies previous no-action relief provided in Staff Letter 16-05, which permitted Eurex to obtain from Deutsche Bundesbank, and provide the CFTC with, an executed version of the acknowledgment letter as required under CFTC Regulation 22.5, in a form other than that which is set forth in Appendix B to CFTC Regulation 1.20. After reviewing proposed changes to the Bundesbank form with respect to the specific information that could be requested by certain CFTC personnel, DCR determined that the new language was sufficiently broad to cover the items contemplated by the more general language previously included as part of the form.

Staff Letter 18-30 is available here.

Staff Letter 18-31 is available here.

Staff Letter 18-32 is available here.

UK/BREXIT DEVELOPMENTS

FCA Updates Webpage on Preparing for Brexit

On December 13, the UK Financial Conduct Authority (FCA) published a press release advising that it has updated its webpage on "preparing your firm for Brexit."

The FCA expects that, by now, firms will have considered the issues it has previously highlighted in relation to Brexit. It has updated its webpage to follow up on some key areas:

- Contract continuity: The FCA reminds firms doing business in the European Economic Area (EEA) under a passport that they need to consider how they will continue to service customers with existing contracts after Brexit.

- Execution of firms' contingency plans: The FCA reminds firms they should consider their clients' best interests when executing their contingency plans.

- Data sharing: The FCA reminds firms of the importance of considering whether they transfer personal data between the UK and EEA. The FCA expects firms to consider what contingency plans may be necessary.

- Customer communications: The FCA reminds firms of the importance of considering what communications to customers will be necessary to explain how Brexit might affect them.

The FCA's press release is available here and the updated webpage is available here.

FCA Publishes Finalized Guidance on Financial Crime Systems and Controls for Insider Dealing and Market Manipulation

On December 13, the UK Financial Conduct Authority (FCA) published finalized guidance on financial crime systems and controls relating to insider dealing and market manipulation (FG18/5).

In March 2018, the FCA consulted on an update to its *Financial Crime Guide* for firms, with an additional chapter on insider dealing and market manipulation, as well as a number of minor amendments to reflect recent regulatory changes.

Following such consultation, Part 1 of the *Financial Crime Guide* has been renamed as ”Financial Crime Guide: A firm's guide to countering financial crime risks” (FCG). The FCG includes the new section on insider dealing and market manipulation. Part 2 of the *Financial Crime Guide* has been renamed as “Financial Crime Thematic Reviews” (FCTR).

The updates in FCG include material on customer due diligence and enhanced customer due diligence. The new section on insider dealing and market manipulation contains guidance on:

- governance;
- risk assessment;
- policies and procedures; and
- ongoing monitoring.

The *FCA Handbook* has also been amended to reflect the updated FCG and FCTR.

FG18/5 can found here.

FCA Publishes *Market Watch* Newsletter With Review of MAR Implementation

On December 17, the UK Financial Conduct Authority (FCA) published issue 58 of its *Market Watch* newsletter. In this issue, the FCA details its findings on a review of the implementation of the Market Abuse Regulation (MAR).

Among the topics discussed are:

- Market soundings: The FCA comments on different approaches to contacting investors in receipt of market soundings, record-keeping and cleansing following a sounding.
- Insider lists: The FCA notes different approaches to the production of insider lists and comments on the use of other types of lists.
- Obligations for issuers: The FCA comments on possible systems and controls for the identification and disclosure of inside information, including the use of disclosure committees and seeking the views of advisers.

The FCA intends to continue to work closely with market participants to ensure a consistent, effective implementation of MAR.

Market Watch 58 is available here.

EU/BREXIT DEVELOPMENTS

ESMA Provides Update on Assessment of Third-Country Trading Venues Under MiFID II and MiFIR

On December 20, the European Securities and Markets Authority (ESMA) published a press release providing an update on its assessment of third-country trading venues (TCTVs) for the purposes of post-trade transparency and position limits under the revised Markets in Financial Instruments Directive (MiFID II) and Markets in Financial Instruments Regulation (MIFIR).

In December 2017, ESMA published two revised opinions on TCTVs in the context of MiFID II/MiFIR clarifying that:

- EU investment firms trading instruments within the scope of MiFID II on TCTVs meeting a certain set of criteria are not required to make transactions public in the EU; and

- Commodity derivatives contracts traded on TCTVs meeting a certain set of criteria are not considered economically equivalent over-the-counter (EEOTC) contracts for the purposes of the position limit regime.

(For further information on the revised opinions, please see the January 5 issue of *Corporate & Financial Weekly Digest*.)

ESMA received requests to assess more than 200 TCTVs against the criteria set out in the opinions. ESMA states that it has not yet reviewed a sufficient number of TCTVs to publish a comprehensive list and that it is important for all TCTVs to receive the same treatment in order to maintain a level playing field. ESMA has therefore decided to delay publication of the lists until a more significant number of TCTVs have been assessed.

Consequently, pending the publication of the lists, EU investment firms are not required to make public their transactions concluded on TCTVs, and commodity derivatives contracts traded on TCTVs will not be considered EEOTC contracts.

The press release is available here.

European Commission Implements "No-Deal" Contingency Action Plan in Specific Sectors

On December 19, the European Commission (EC) published a communication, along with a number of legislative measures, detailing its "no-deal" Brexit contingency plans for certain sectors, including financial services. The measures are limited to those areas identified by the EC as where a no-deal scenario would create "major disruption for citizens and businesses" in the remaining EU Member States (EU27).

The EC has published the communication in light of the uncertainty in the United Kingdom surrounding the ratification of the Withdrawal Agreement as agreed between the European Union and the UK on November 25 (for further information see the November 16 issue of *Corporate & Financial Weekly Digest*). The EC has started implementing its "no deal"' Contingency Action Plan in order to deliver on its commitment to adopt all necessary "no deal" proposals by the end of the year, as outlined in its second preparedness communication of November 13.

In relation to financial services, the EC states that, after examining the risks linked to a no-deal scenario in the financial sector, and taking into account the views of the European Central Bank and the European Supervisory Authorities, it has concluded that only a limited number of contingency measures are necessary to safeguard financial stability in the EU27. These measures are designed to mitigate financial stability risks only in those areas where preparedness actions from the market alone are insufficient to address these risks by the withdrawal date. The EC has therefore adopted the following acts that will apply from the date of the UK's withdrawal from the EU, if the Withdrawal Agreement is not ratified:

- Commission Implementing Decision (C(2018) 9139)—This will allow the European Securities and Markets Authority to temporarily recognize central counterparties established in the UK. The decision will expire 12 months after the date of the UK's withdrawal.

- Commission Implementing Decision (C(2018) 9138)—This will allow UK central securities depositories to continue providing notary and central maintenance services temporarily to EU operators. The decision will expire 24 months after the date of the UK's withdrawal.

- Commission Delegated Regulation (C(2018) 9047) and Commission Delegated Regulation (C(2018) 9122)—These Regulations will exempt over-the-counter derivatives contracts that are being novated from a UK counterparty to an EU27 counterparty from margining and clearing obligations under the European Market Infrastructure Regulation for a period of 12 months.

The European Commission's communication 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 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
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@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/EU/BREXIT DEVELOPMENTS		
John Ahernp	+44.20.7770.5253	john.ahern@kattenlaw.co.uk
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@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

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