Katten
Corporate & Financial Weekly Digest

March 26, 2021 | Volume XVI, Issue 12

BROKER-DEALER

SEC Issues Amendments, Seeks Public Comment on Holding Foreign Companies Accountable Act

On March 24, the Securities and Exchange Commission adopted interim final amendments to implement congressionally mandated submission and disclosure requirements of the Holding Foreign Companies Accountable Act (HFCA Act).

The HFCA Act became law on December 18, 2020. Among other things, Section 2 of the HFCA Act amended Section 104 of the Sarbanes-Oxley Act of 2002 to require that the SEC identity each "covered issuer" that has retained a registered public accounting firm to issue an audit report where that firm has a branch or office located in a foreign jurisdiction, and the Public Company Accounting Oversight Board (PCAOB) has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. The interim final amendments adopting release seeks comment on this requirement.

The interim final amendments will apply to registrants that the SEC identifies as having filed an annual report on Forms 10-K, 20-F, 40-F or N-CSR with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. Before any registrant will have to comply with the interim final amendments, the SEC must implement a process for identifying such a registrant. Thus, the SEC is seeking public comment on this identification process.

Consistent with the HFCA Act, the amendments will require any such identified registrant to submit documentation to the SEC establishing that the registrant is not owned or controlled by a governmental entity in that foreign jurisdiction, and will also require disclosure in a foreign issuer's annual report regarding the audit arrangements of, and governmental influence on, such a registrant. The SEC is seeking public comment on these submission and disclosure requirements. The HFCA Act requires the SEC to issue rules within 90 days of the date of enactment to establish the manner and form in which registrants must comply with the documentation submission requirement. The SEC is issuing the interim final amendments to comply with this 90-day deadline.

The SEC staff is actively assessing how best to implement other requirements of the HFCA Act not subject to the 90-day deadline, including the identification process and the trading prohibition requirements.

Press Release regarding the SEC's interim final amendments to implement congressionally mandated submission and disclosure requirements of the HFCA Act.

SEC Responds to Investor Demand by Bringing Together Agency Information About Climate and ESG Issues

On March 22, the Securities and Exchange Commission launched a new page on its website to bring together agency actions and the latest information about climate and environmental, social and governance (ESG) investing. In response to increased investor demand for this information, the page will appear on the front page of SEC.gov and will be updated as the agency continues to respond to investors.

The ESG page currently includes statements, announcements and bulletins by the SEC regarding the SEC's various ESG initiatives.

The SEC page on ESG investing.

FINRA CAT Production Readiness Certification Deadline

Consolidated Audit Trail, LLC (CAT) and Financial Industry Regulatory Authority CAT, LLC (FINRA) remind industry members and CAT reporting agents that the deadline to request Production Readiness Certification for the CAT CAIS LTID Production Environment is Friday, April 9. The CAT Customer and Account Information System (CAIS) Large Trader Identification Number (LTID) Test and Production Environments are open. The CAIS LTID Production Go-Live date for Phase 2a, 2b and 2c reportable activity for Large Industry Members is April 26.

Detailed information regarding the certification process is available in the CAT Customer and Account Information System (CAIS) Industry Member Onboarding Guide.

Contact the FINRA CAT Helpdesk at help@finracat.com or (888) 696-3348 with any questions.

FINRA Requests Comment on Proposed Amendments to Margin Rule 4210

On March 14, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 21-11 (Notice), which seeks comment on proposed amendments to Rule 4210 (Margin Requirements) that would clarify and incorporate into the rule current interpretations regarding when issued and other extended settlement transactions and provide relief to facilitate the application of the rule to these transactions. Comments must be received by May 14.

Rule 4210 protects member firms against customer credit risk by generally requiring firms to collect margin when they extend credit to their customers. Extensions of credit covered by the rule include transactions in which member firms permit customers to make partial or delayed payment on securities purchases (or partial or delayed delivery of securities sold). FINRA examinations revealed some uncertainty in firms' understanding about what constitutes delayed payment or delivery for purposes of the margin rules. This uncertainty regarding whether a payment or delivery should be considered delayed may be due, in part, to the fact that Federal Reserve Board (FRB) Regulation T allows transactions to be booked into a customer's cash account based on the customer's agreement to make full cash payment for securities purchased (or deposit securities sold) promptly (i.e., within the standard settlement cycle) but then allows two additional business days to resolve any issues with a customer's payment before requiring a broker-dealer to cancel or liquidate the customer's purchase of non-exempted securities (or obtain an extension of time). To have a clear and uniform standard to eliminate potential uncertainty regarding whether a payment or delivery is considered delayed, the proposed amendments include a definition of "extended settlement transaction" and add a new paragraph (f)(3)(C) to Rule 4210 requiring all extended settlement transactions (or net positions resulting from extended settlement transactions) to be margined as though they were in margin accounts, except for the specifically excepted transactions or positions described therein.

The proposed amendments also propose to (1) provide clarity for transactions in when issued securities, (2) codify a current interpretation that the limit on net capital deductions apply to all capital charges taken in lieu of collecting margin, including capital charges on when issued transactions and other extended settlement transactions under existing and proposed exceptions from the generally applicable margin requirements, and (3) make other related clarifications, including with respect to the definition of "customer" in FINRA Rule 4210(a)(3), specify that extensions of credit include extended settlement transactions, repurchase transactions or non-purpose securities borrow transactions, and add supplementary material stating that Regulation T good faith accounts are treated as margin accounts under the rule.

Regulatory Notice 21-11, which includes the proposed amendments and information regarding how to submit a comment.

FINRA Reminds Member Firms of Obligations for Customer Order Handling, Margin Requirements and Effective Liquidity Management Practices During Extreme Market Conditions

On March 18, the Financial Industry Regulatory Authority (FINRA) published Regulatory Notice 21-12 (Notice), which reminds member firms of their obligations during extreme market conditions with respect to handling customer orders, maintaining appropriate margin requirements and effectively managing their liquidity.

FINRA is reminding member firms that they should maintain strong procedures, thoughtfully crafted in advance, to reasonably ensure they can continue to provide investors access to the securities markets during times of extreme market volatility, as in the past several months. These procedures include order handling procedures designed to maintain best execution for customers; margin procedures to prevent a firm from becoming overextended from lending in support of customer trades; and liquidity management practices to ensure the firm is able to continue to provide customers with access to the markets despite abnormal liquidity demands.

The Notice focused on reminding member firms of (1) the principles of fair dealing, and that the duty of best execution requires the fair, consistent and reasonable treatment of customer orders at all times, (2) the importance of informing customers about member firms' order handling procedures, particularly during volatile market periods and that member firms should look to prior guidance from FINRA that addresses the kinds of disclosures firms should consider making in connection with their fair dealing obligations, and (3) considering the need for additional margin consistent with Rule 4210 and reviewing FINRA's guidance on sound liquidity practices that firms can use to meet their obligations to maintain reasonable funding and liquidity risk management.

FINRA Regulatory Notice 21-12.

CFTC

NFA Issues Notice Regarding Effective Date of Interpretive Notice on Use of Third-Party Service Providers

On March 24, the National Futures Association (NFA) issued Notice I-21-13 to advise member firms that the Interpretive Notice entitled, "NFA Compliance Rules 2-9 and 2-36: Members' Use of Third-Party Service Providers" (Interpretive Notice) will become effective September 30.

The Interpretive Notice requires each member firm outsourcing regulatory functions to adopt and implement a supervisory framework over its outsourcing function to mitigate outsourcing-related risks. Member firms with existing supervisory framework for their third-party service providers are not required to implement a new framework, but should ensure such framework meets the requirements of the Interpretive Notice. The supervisory framework must address the following:

- Initial risk assessment;
- Onboarding due diligence;
- Ongoing monitoring;
- Termination; and
- Recordkeeping.

Additionally, the NFA is in the process of developing a supplement to the Self-Examination Questionnaire to help member firms understand the requirements of the Interpretive Notice.

NFA Notice I-21-13, which includes a link to the Interpretive Notice.

UK DEVELOPMENTS

Post-Brexit Financial Services in United Kingdom — Bank of England Commentary Published

On March 23, the United Kingdom's House of Commons Treasury Committee published the Bank of England's (BoE) 'written evidence'/responses to a UK Government inquiry into the post-Brexit future of financial services in the United Kingdom (the Response).

The Response's commentary is structured as follows:

- Part one covers questions relating to the future regulatory framework for the United Kingdom.
- Part two covers questions relating to the United Kingdom's position as a global financial center, and its relationships with other jurisdictions.
- Part three discusses how the UK regulatory regime can support innovation, competition and proportionality.

Points of note include:

- Strong standards are at the center of the BoE's approach to UK regulation.
- Leaving the European Union provides the United Kingdom with an opportunity to tailor its approach to financial services policy and regulation. This should consider how regulation can facilitate innovation, so that the United Kingdom can seize opportunities from new areas of growth and productive investment in financial services as they emerge, especially as such features are also supportive of long-term resilience. This could include digitization of the economy and FinTech.
- Regulation should promote competition.
- "Safe openness" for those firms from other jurisdictions who are seeking to access the UK market, based on international collaboration and standards, will be a key element in the United Kingdom's future success. This approach ensures that the BoE can support openness, while mitigating the risks through regulatory assessments of deference, regulatory and supervisory co-operation, and a commitment to common international standards.
- The BoE agrees with the UK Government that there are significant benefits from a model where the technical details of regulatory standards are set by expert, independent regulators. Such a model puts a particular weight on the regulators acting in a transparent and accountable way. The UK Parliament will have a vital ongoing role in any future framework, as it is the body that holds the regulators to account for achieving their objectives. The BoE is committed to helping Parliament fulfil this role.

The BoE 'written evidence/responses to a UK Government inquiry into the post-Brexit future of financial services in the United Kingdom.

UK FCA Launches New Whistleblowing Initiative

On March 24, the United Kingdom's Financial Conduct Authority (FCA) announced the launch of a campaign to encourage individuals to report wrongdoing — i.e., whistleblowing.

The campaign, which the FCA refers to as "In confidence, with confidence," encourages individuals working in the UK financial services sector to report potential wrongdoing to the FCA and reminds them of the confidentiality processes in place.

In parallel, the FCA has published materials for firms to share with employees and a digital toolkit for industry bodies, consumer groups and whistleblowing groups to encourage individuals to have confidence to step forward.

The FCA's website has been updated to provide more information for potential whistleblowers, and the FCA Whistleblowing Team (which the FCA has announced it has bolstered with additional headcount) is developing a confidential web form, increasing the ways in which whistleblowers can make disclosures.

The FCA's whistleblowing webpage sets out information on:

- When someone should speak to the FCA.
- How the FCA protects whistleblowers' identities — noting that individuals can choose to remain anonymous, but if someone does share any information about themselves, the FCA will keep this safe.
- What the FCA will do with a whistleblower's information. Every report the FCA receives is reviewed, and the FCA will protect individual whistleblowers' identities.
- Whistleblowers that report to the FCA will have a dedicated case manager. They can meet with the FCA to discuss their concerns and can receive optional regular updates throughout the investigation.

The FCA's press release regarding the campaign reminds firms that culture and governance remain a key priority for the FCA, and its whistleblowing rules require firms to have effective arrangements in place for employees to raise concerns and to guarantee these concerns are handled appropriately and confidentially.

The FCA press release on its campaign to encourage whistleblowing.

The FCA's whistleblowing webpage.

COVID-19: FCA extends Flexibility on RTS 27 Reports and 10 Percent Depreciation Notifications

On March 19, the Financial Conduct Authority (FCA) published a statement announcing that it is establishing temporary measures on RTS 27 reports on execution quality. Commission Delegated Regulation (EU) 2017/575 contains regulatory technical standards (RTS) specifying the content, format and periodicity of the data published by execution venues on the quality of execution of transactions. The FCA refers to these RTS as RTS 27.

The next set of these reports will be based on pre-Brexit data, so the information is likely to be of limited use for market participants and may be misleading. The FCA is preparing a consultation on the RTS 27 reporting obligation, with a view to abolishing it, due to concerns about the value of these reports and the burden of producing them. On this basis, the FCA will not take action against firms who do not produce RTS 27 reports for the rest of 2021. It expects to have concluded its policy consideration for the future of these reports by the end of 2021.

The FCA also announced a further extension to a temporary COVID-19 measure applying supervisory flexibility over 10 percent depreciation notifications. The temporary measure will be extended until the end of 2021, while the FCA consults later this spring on changes to the notification requirement. The requirements apply to firms that provide portfolio management services or hold retail client accounts that include positions in leveraged financial instruments or contingent liability transactions.

The FCA informed firms in September 2020 that it would apply supervisory flexibility over 10 percent depreciation notifications until the end of March 2021.

The FCA statement announcing that it is establishing temporary measures on RTS 27 reports on execution quality.

FCA Confirms No Current Revisions to Temporary Transitional Power Applying to UK's Derivatives Trading Obligation

On March 24, the Financial Conduct Authority (FCA) published a statement announcing that it has not observed market or regulatory developments that warrant a change in its use of the Temporary Transitional Power (TTP) applying to the United Kingdom's derivatives trading obligation (DTO). Therefore, the FCA will continue to use the TTP to modify the application of the DTO as previously set out in its statement on December 31, 2020.

The FCA's approach is driven by its objectives and aims to support UK-based firms to continue to conduct a variety of international business and serve their global clients, while upholding its G20 commitment in respect of OTC derivatives trading.

The FCA will continue to monitor market and regulatory developments and review its approach if necessary. If the FCA observes the need for change, it will provide sufficient notice to market participants to ensure any changes can be smoothly implemented.

The FCA expects firms and other regulated persons to be able to demonstrate compliance with the UK DTO.

The FCA's latest statement announcing that it has not observed market or regulatory developments that warrant a change in its use of TTP applying to the United Kingdom's DTO.

The FCA's previous statement on the use of TTP to modify the United Kingdom's DTO.

EU DEVELOPMENTS

ESMA Publishes Statement Announcing Supervisory Approach to MiFID II Position Limits for Commodity Derivatives

On March 19, the European Securities and Markets Authority (ESMA) published a statement announcing a new Directive relating to its supervisory approach to position limits for commodity derivatives under the Markets in Financial Instruments Directive (MiFID II) (the Statement).

The Directive will amend MiFID II and is expected to help the European Union's economic recovery from the COVID-19 pandemic by reducing the scope of commodity derivatives that are subject to position limits. The new provisions will start to apply in early 2022.

In preparation for the new provisions, ESMA expects national competent authorities to not prioritize their supervisory actions relating to:

- entities holding positions in commodity derivatives, other than agricultural commodity derivatives, with a net open interest below 300,000 lots over a one-year period; and
- positions that are objectively measurable resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in Article 2(4) of MiFID II.

ESMA's statement announcing a new Directive to its supervisory approach to position limits for commodity derivatives under MiFID II.

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

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UK/EU DEVELOPMENTS

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