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DERIVATIVES

See "CFTC Extends Time-Limited No-Action Relief for Entities Submitting Swaps for Clearing With Certain DCOs" in the CFTC section and "Supreme Court Limits Scope of Dodd-Frank Whistleblower Protections" in the Litigation section.

CFTC

CFTC and UK Financial Conduct Authority Sign Cooperation Arrangement on Financial Technology Innovation

On February 19, the Commodity Futures Trading Commission and the UK Financial Conduct Authority (FCA) signed the "Cooperation Arrangement on Financial Technology Innovation," which memorializes the intention of the CFTC and FCA to collaborate and support their respective financial technology (FinTech) initiatives—LabCFTC and FCA Innovate. The arrangement intends to support these FinTech initiatives through an information-sharing arrangement focused on FinTech market trends and developments. In addition, the arrangement, among other things, intends to facilitate referrals of FinTech companies that are interested in entering the others' market.

The text of the arrangement is available here.

For more information, see "FCA and CFTC Enter Into Cooperation Agreement on FinTech" in the UK Developments section.

CFTC Extends Time-Limited No-Action Relief for Entities Submitting Swaps for Clearing With Certain DCOs

On February 20, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) published Staff Letter 18-03, which extends the time-limited no-action relief provided in Staff Letter 16-85 for entities submitting swaps for clearing by derivatives clearing organizations (DCOs) operating under (1) exemptive orders issued by the CFTC; or (2) no-action relief granted by the CFTC's Division of Clearing and Risk (Relief DCOs). (For a complete discussion of the relief provided by Staff Letter 16-85, please refer to the January 6, 2017 edition of *Corporate & Financial Weekly Digest*).

The relief provided by Staff Letter 16-85 expired on January 31. Subject to certain terms and conditions, the Staff Letter extends such time-limited no-action relief in two areas. First, market participants that are not acting as a DCO or central counterparty, but are a counterparty to a swap cleared by a Relief DCO (Relief DCO Counterparty) will be relieved from certain reporting obligations, including, but not limited to, the obligation to report swap continuation data for alpha swaps that have been accepted for clearing by a Relief DCO. Relief from these reporting obligations will expire on the earlier of: (a) February 19, 2021; (b) the effective date of any CFTC regulation altering the reporting obligations of any entities with respect to the reporting of "Relief DCO Original Swaps" or "Relief DCO Clearing Swaps" (as such terms are defined in the Staff Letter); or (c) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Relief DCO. Second, DMO will not recommend enforcement action against entities reporting swaps, which, at the time they are executed, are intended by the counterparties to be cleared by a Relief DCO pursuant to Parts 43 and 45 of the CFTC's regulations (Relief ITBC Swaps). Such relief will continue until the earlier of: (a) February 19, 2021; (b) the effective date of any CFTC regulation altering or amending the "Clearing indicator" or "Clearing venue" PET data fields in Part 45 of the CFTC's regulations, or the "Cleared or Uncleared" data field in Part 43 of the CFTC's regulations; or (c) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Relief DCO.

Staff Letter 18-03 is available here.

LITIGATION

Supreme Court Limits Scope of Dodd-Frank Whistleblower Protections

On February 21, the US Supreme Court decided *Digital Realty Trust, Inc. v. Somers* (583 U.S. ____ (2018)), which resolved a circuit split related to whether the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (Dodd-Frank) extend to individuals who have not reported a securities law violation to the Securities and Exchange Commission and, therefore, falls outside of Dodd-Frank's definition of a "whistleblower."

Paul Somers alleged that Digital Realty Trust, Inc. (Digital Realty) terminated his employment shortly after reporting suspected securities-law violations to the company's senior management. Somers filed a case in the US District Court for the Northern District of California (District Court) alleging that his termination amounted to whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss the claim on the grounds that Somers did not qualify as a "whistleblower" for purposes of Dodd-Frank because (1) the statute defines a "whistleblower" as someone "who provides . . . information relating to a violation of the securities laws to the [SEC];" and (2) Somers failed to report the allegations to the SEC prior to his termination. The District Court denied Digital Realty's motion and the Ninth Circuit affirmed on the grounds that Dodd-Frank's whistleblower protections should be read to protect employees regardless of whether they provide information to the SEC.

Reversing the District Court and the Ninth Circuit, Justice Ruth Bader Ginsburg, writing for the Court, explained that Dodd-Frank's whistleblower retaliation provisions do not extend to an individual who has not reported alleged securities law violations to the SEC. Citing Dodd-Frank's definition of a "whistleblower," the Court determined that the statute explicitly required an individual to report such violations to the SEC in order to receive whistleblower protections. The Court found this interpretation of the whistleblower definition to be corroborated by Dodd-Frank's intended purpose of motivating individuals to report securities law violations directly to the SEC.

The text of the decision is available here.

UK DEVELOPMENTS

FCA and CFTC Enter Into Cooperation Agreement on FinTech

On February 19, the UK's Financial Conduct Authority (FCA) and the United States Commodity Futures Trading Commission (CFTC) (collectively the Regulators) published a press release announcing that they have signed a Cooperation Agreement on the same date with each other on financial technology (FinTech) innovation.

The Cooperation Agreement aims to:

1. foster the use of technology for more effective and efficient regulation and oversight of financial markets and participants (RegTech);
2. enhance the sharing of information (e.g., market developments and trends) between the Regulators, with a view to fulfill their respective regulatory mandates and advance the understanding and utilization of FinTech and RegTech in the United States and UK; and
3. facilitate the referral to each other of UK and US FinTech companies interested in entering each other's market.

The support offered by the Regulators includes, but is not limited to:

1. helping FinTech companies understand the regulatory framework in the relevant Regulator's jurisdiction and the potential application of the regulatory framework to the relevant FinTech business;
2. assisting FinTech companies with the pre-authorization application phase by discussing the application process and any regulatory issues that have been identified;
3. allocating staff from each Regulator to provide guidance with respect to the Regulator's authorization application; and
4. assisting with enquiries that identify ambiguity in existing rules or regulations that may hinder beneficial innovation.

The Cooperation Agreement is the first agreement of its kind between the CFTC and a non-US counterpart. CFTC Chairman J. Christopher Giancarlo stated that the FCA's FinTech initiative, Project Innovate, is the "gold standard for thoughtful regulatory engagement with emerging technological innovation" and that the Cooperation Agreement demonstrates the Regulators' "cross-Atlantic commitment to facilitating market-enhancing innovation and sharing best practices in FinTech engagement." FCA Chief Executive Andrew Bailey also noted that the Regulators will be hosting a joint event in London to demonstrate how firms can engage with them, details of which have yet to be announced.

The press release is available here and the Cooperation Agreement is available here.

FCA Publishes "Dear CEO" Letter on Quality of Prudential Regulatory Returns

On February 19, the UK's Financial Conduct Authority (FCA) published a "Dear CEO" letter that it recently sent to IFPRU investment firms and BIPRU firms (as defined below) concerning the quality of information submitted to the FCA in prudential regulatory returns.

An IFPRU investment firm is an FCA-regulated firm that has its head office in the UK and is not a BIPRU firm, (i.e., not engaged in investment activities or services under the revised Markets in Financial Instruments Directive (MiFID II)). This designation includes the majority of proprietary trading firms.

A BIPRU firm is a firm authorized by the FCA to provide investment services (i.e., the execution of orders on behalf of clients or portfolio management, or the investment services of receiving and transmitting orders and/or providing investment advice, which will include all UK alternative investment fund managers with MiFID top-up permissions/collective portfolio management investment firms (CPMI firms)).

The FCA uses the returns to assess prudential risk and understand firms' business models, financial positions and risk exposures. The information contained in the returns also forms a key part of firms' risk management frameworks. Therefore, the way in which the FCA assesses the quality of firms' risk management is influenced by the quality of data submitted in the returns.

In its Dear CEO letter, the FCA has identified a number of common issues that result in returns containing inaccurate or incomplete data (or both), which hinders the use of data submitted. Common issues identified by the FCA are firms:

1. failing to complete the underlying templates within the common reporting (COREP) submissions due to inadequate understanding of the prudential rules and inconsistent completion of COREP returns;
2. failing to submit certain returns, such as the financial reporting return;
3. incorrectly calculating the total sum of risk exposures across various risk categories, for example market and credit risk, which can lead to an inaccurate figure for firms' capital requirements;
4. reporting using incorrect units;
5. not reporting cumulatively (i.e., on a year-to-date basis) on the FCA's FSA002, used for detailing firms' Income Statements.

The FCA notes that while the errors may seem minor in isolation, they can materially distort data aggregated and used by the FCA when it is analyzing a sector or group of firms.

The FCA has therefore asked the chief executive officers of IFPRU investment firms and BIPRU firms to review their firms' regulatory reporting practices to ensure that they are fit for purpose, comply with the relevant reporting provisions and produce materially accurate data.

As of October 1, the FCA will review a sample of firms' returns. If it finds that firms continue to submit materially inaccurate, incomplete and/or poor quality data, the FCA will consider taking further steps to improve the standards of returns.

The FCA's Dear CEO letter is available here.

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

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UK DEVELOPMENTS

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