# MARKET SOLUTIONS

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## In This Issue



### MARKET SOLUTIONS

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*Market Solutions* is a quarterly newsletter about the activities of the Financial Markets Association as well as legislative/regulatory developments of interest to FMA members. The opinions expressed in this publication are those of the authors, not necessarily those of the Association and are not meant to constitute legal advice. *Market Solutions* is provided as a membership service of the **Financial Markets Association**, 333 2nd Street, NE - #104, Washington, DC 20002, *dp-fma@starpower.net*, 202/544-6327, *www.fmaweb.org*. Please let us have your suggestions on topics you would like to see addressed in future issues.



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# The Department of Labor Conflict of Interest Rule: Some Modest Predictions

*By Jeffrey S. Holik and Vincent Hsia*
*Shulman Rogers Gandal Pordy and Ecker, P.A.*

## Background

On April 8, 2016, the Department of Labor finalized a rule to address conflicts of interest in retirement advice.[1] In a nutshell, the rule requires any investment adviser receiving compensation for making individualized investment recommendations to a retirement plan participant or Individual Retirement Account owner to put their client's best interest first. The rule defines who is a fiduciary investment adviser, while accompanying prohibited transaction class exemptions ("PTEs") allow broker-dealers and others that provide investment advice to continue to receive a variety of common forms of transaction-based compensation as long as they are willing to adhere to standards aimed at ensuring that their advice is impartial and in the best interest of their customers.[2] Compliance obligations will take effect beginning next year.[3]

The rule has been in development for more than seven years and has sparked great controversy from the get-go. An initial proposal published by DOL in 2010[4] was withdrawn in the face of withering industry criticism. DOL persevered and issued a new proposal last year. More than 2,000 comments were received and the Agency held a series of public hearings. Based on these inputs, DOL made numerous changes in the final rule, including revisions to address some of the most contentious requirements from the proposal. For example, DOL eliminated several of the more onerous conditions[5] from the so-called best interest contract exemption ("BIC"), which permits advisers to continue to get otherwise prohibited compensation if they pledge in a written contract to act in the client's best interest and adopt policies and procedures designed to ensure that the advice provided is in the client's best interest. The final rule also eliminates biases against proprietary products.

To no one's surprise, industry groups have not abandoned efforts to scuttle the rule. President Obama has vetoed a congressional resolution passed in both houses that would have blocked DOL from implementing the rule. Most recently, industry groups have filed several lawsuits challenging the rule in the courts. It remains to be seen whether this effort will have any success.

Meanwhile, the industry appears to have decided not to "wait and see" whether the rule will be overturned. Most firms engaged in retail brokerage sales and distribution are committing substantial internal and external resources to assess

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# Legislative/Regulatory Actions

*This column was written by lawyers from Morrison & Foerster LLP to update selected key legislative and regulatory developments affecting financial services and capital markets activities. Because of the generality of this column, the information provided herein may not be applicable in all situations, and should not be acted upon without specific legal advice based on particular situations.*

In this issue, we provide updates from the banking regulators, the CFTC, and the CFPB; address FinCEN's new customer due diligence requirements; and provide a summary of two white papers published by Treasury and the OCC on online marketplace lending and responsible innovation.

## BANKING REGULATORS

*Federal Reserve Publishes Guidance for Assessing Risk Management at Banks, Bank Holding Companies, and Foreign Banking Organizations with Less Than $50 Billion in Assets*

On June 8, 2016, the Federal Reserve issued a supervisory guidance for assessing risk management at supervised institutions with total consolidated assets of less than $50 billion, including foreign banking organizations ("FBOs") with combined U.S. assets of less than $50 billion. The Guidance addresses (i) the elements of risk management; (ii) the responsibilities of an institution's board of directors and senior management; (iii) the requirements for an institution's risk management policies and procedures; (iv) risk monitoring and management information systems; and (v) internal controls.

The Guidance supersedes previous Board guidelines issued in 1995 for all supervised institutions with total consolidated assets less than $50 billion, including state member banks, bank holding companies, and savings and loan holding companies.[1] In addition, the Guidance also extends applicability to U.S. operations of FBOs with total consolidated U.S. assets of less than $50 billion, which were not subject to the 1995 Guidelines.

In its Guidance, the Board points out that managing risk is fundamental to the business of banking and that an institution's failure to establish a management structure for adequately identifying, measuring, monitoring, and controlling risks is considered unsafe-and-unsound conduct. The principles of sound risk management should address all types of risks an institution faces, including credit risk, market risk, liquidity risk, operational risk, compliance risk, and legal risk. The Guidance provides guidelines for examiners to assess the overall effectiveness of an institution's risk management and its systems to identify, measure, monitor, and control such risks.

Of particular interest for FBOs is the Federal Reserve's interpretation of the term "board of directors" for non-U.S. institutions. In a footnote, the Federal Reserve states that for FBOs the "board of directors" means the "equivalent governing body of the U.S. operations of the FBO." How the Guidance relates to the risk-management requirements of the enhanced prudential standards under Regulation YY, in particular with regard to the U.S. risk committee requirement, should be considered.

The Guidance and the accompanying letter from the Federal Reserve are accessible at *http://www.federalreserve.gov/bankinforeg/srletters/sr1611a1.pdf and http://www.federalreserve.gov/bankinforeg/srletters/sr1611.pdf,* respectively.

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## *DoL Conflict of Interest Rule…*

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the rule, evaluate business options, alternatives and opportunities, and begin to make decisions about a business strategy and compliance plan.

### The Path Ahead

DOL estimates that the new rule will save middle class families billions of dollars every year.[6] It is axiomatic that to some extent these savings will come at the expense of the regulated industry. The most immediate impacts of the rule appear likely to center on broker-dealer compensation practices and on the fee and revenue sharing arrangements between fund sponsors and the financial institutions that offer investment advice to retail retirement clients. Another major impact will be felt by the insurance industry, which has traditionally offered retirement investors relatively expensive, and in many cases highly complex, products such as variable annuities and variable life insurance. These products have long been the subject of scrutiny and criticism by securities regulators and consumer advocates. It will become more difficult to justify recommending the current generation of these products to retirement savers under the fiduciary standards of the new rule.

> *"Most firms engaged in retail brokerage sales and distribution are committing substantial internal and external resources to assess the rule, evaluate business options, alternatives and opportunities, and begin to make decisions about a business strategy and compliance plan."*

It is simply not possible at this early time to determine with any certainty the full extent to which the DOL rule will affect the retail brokerage model for retirement advice. The sheer magnitude and complexity of the rule has the legal community working overtime to digest the new requirements and begin the process of identifying the risks and opportunities presented by various compliance strategies. This evaluative process is still very much in its beginning stages and is likely to continue right up to the compliance deadline next spring.

### Predictions

Notwithstanding all of the many open and unanswered questions, it is not too early to begin thinking about how the rule is likely to affect advisers and the retirement advice they give. Last year, we offered the opinion that the proposed rule would be adopted in spite of the substantial opposition mounted by the industry and among some members of Congress.[7] Now, we offer some additional predictions.

*1. The fiduciary standard of care is here to stay for retirement accounts and probably will be the standard for all retail brokerage advice.*

In the final analysis, it would be surprising if anything less than a fiduciary standard of care were to apply for retirement advice. Since the Employee Retirement Income Security Act first became law in 1974, traditional pension plans have given way to IRAs and 401(k)s as the primary means of ensuring retirement security for most people in the U.S. Today, individuals need personalized investment advice; financial products and markets have become much more complex and retail investors now have options for investment that did not exist or were not common just a few short years ago. As a matter of sound government policy, it makes sense for advisers to be required to act in a customer's best interest when it comes to saving for retirement.

Given the current court challenges, we cannot rule out the possibility that the rule could be impacted or even derailed in the short term. But even that possibility must be viewed in the larger context. The SEC is working on its own fiduciary rule, one that would apply not only to retirement assets but also more broadly to all retail brokerage accounts; SEC Chair White said recently that a proposal will be forthcoming in 2017.[8] It is noteworthy that the brokerage industry itself has embraced the concept of acting in the best interests of its retail customers.[9] A paradigm shift to fiduciary standards in the retail retirement market appears to be inevitable.

*2. FINRA is likely to play a role overseeing broker-dealer compliance with the rule.*

DOL does not have jurisdiction to enforce prohibited transaction restrictions for IRAs. The sole source of prohibited transaction enforcement powers with respect to IRAs is the Internal Revenue

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## *DoL Conflict of Interest Rule…*

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Service's authority to seek excise taxes for prohibited transactions. The IRS has only rarely brought such enforcement actions. To remedy this perceived deficiency, DOL designed the BIC exemption in a way that will ensure the availability of private, contract-based enforcement rights by IRA owners. The BIC creates a private right of action enabling investors to sue advisers and even initiate class action suits for breach of the standards of conduct established by DOL.

But will FINRA remain completely on the sidelines? We don't think so. In exercising its examination responsibilities, it is almost inconceivable that FINRA would turn a blind eye to material gaps in a broker-dealer's BIC program, for example if a firm had not adopted any written policies and procedures designed to ensure that its advisers comply with the best interest standards. FINRA Conduct Rule 2010 confers broad authority to regulate unethical business-related conduct and in theory could be used to address a member's failure to perform contractual obligations owed to a customer. Another possible hook is FINRA's supervision rule, 3110. The BIC requires firms to establish policies and procedures designed to mitigate the impacts of conflicts of interest; material failures to supervise adherence to the policies and procedures would seem to be a natural place for FINRA to assert itself. To date, FINRA has remained silent about the role it plans to play enforcing the rule. That is likely to change well before the compliance date.

> *"The most immediate impacts of the rule appear likely to center on broker-dealer compensation practices and on the fee and revenue sharing arrangements between fund sponsors and the financial institutions that offer investment advice to retail retirement clients."*

*3. Beware the BIC!*
In response to industry comments, DOL made the BIC much more user-friendly. Most industry commentators believe that the final BIC exemption is easier to implement and will be significantly less expensive to operate under than the 2015 proposed rule. That said, the advice here is to be careful, very careful in signing customers up to a best interest contract if the intention is to continue operating under a "business as usual" approach.

The BIC permits firms to continue to employ current compensation and fee practices, as long as they 1) meet specific conditions intended to mitigate conflicts of interest, and 2) provide investment advice that is in the best interests of their customers. This appears to be a fundamental contradiction in terms. How can a firm continue to pay its advisers differential compensation for the products they recommend and expect them to act exclusively in a customer's best interest? DOL has made clear that financial institutions may not give their advisers financial incentives to make recommendations that are not in the customer's best interest. It remains to be seen how firms can effectively manage these conflicting concepts without making significant changes to current compensation structures.

Firms which plan to use the BIC should carefully evaluate current compensation arrangements. They would also be well advised to consider paring back the approved product menu to focus sales to retirement investors on products that meet the highest due diligence standards and which are relatively lower in cost. Firms which simply plan to repackage their existing sales practices under a BIC label could find themselves in deep trouble when the next market downturn occurs.

*4. The bark of the private right of action may prove to be worse than the bite.*
Industry doomsayers worry that the mere mention of the term "fiduciary duty" will tilt the litigation playing field in favor of customers. Perhaps this is so. But another perspective to consider is that broker-dealers will continue to benefit from the inherent advantages conferred by the mandatory arbitration of customer claims. Although the rule prohibits firms from requiring customers to waive the right to participate in class action litigation, most claims will continue to be resolved through FINRA arbitration. The arbitration forum has historically

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## *DoL Conflict of Interest Rule…*

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been favorable to the industry for a variety of reasons including: less expensive than court, no written findings and conclusions, and little to no precedential value from unfavorable outcomes. Overall, it remains to be seen whether firms operating under the BIC will face materially greater liability than they do today.

> *"In the final analysis, it would be surprising if anything less than a fiduciary standard of care were to apply for retirement advice."*

*5. Adviser training and solid documentation will be more important than ever.*
One of the major challenges broker-dealers face today is properly training the sales force to assure that advisers understand the products they recommend and can explain them clearly to customers. This is especially difficult when a firm offers a large number of complex products to retail investors. With the advent of a fiduciary standard of care, the stakes will be much higher. Firms would be well advised to enhance the rigor of current product training programs. It will also become more important for advisers and firms to carefully document the basis for investment recommendations should the need to defend them arise in the future.

### Summing Up

The DOL conflict of interest rule represents a watershed moment for retail retirement investing. The rule promises to have a profound and lasting effect on the business model for delivering retirement advice. Investors who transact on the basis of fiduciary recommendations will have the right to enforce the best interest requirement against advisors and firms based on specific standards, and they will have access to much more detailed information about how the adviser and the firm will be compensated. DOL's revisions to the final rule ameliorated some of the transition and implementation burdens on financial institutions, particularly for compliance with the BIC. But in extending the scope of ERISA's fiduciary duties to IRAs, the rule is a fundamental game changer for the retirement investing arena. ■

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[1] 81 Fed. Reg. 20,946 (April 8, 2016).

[2] Links to the full package of rulemaking materials, including a Fact Sheet, the Regulatory Impact Analysis, and FAQs, is located on the DOL website – *https://www.dol.gov/ebsa/regs/conflictsofinterest.html*. Altogether, the package comprises more than 1,000 pages.

[3] The final rule took effect on June 7, 2016, 60 days after its publication. DOL set a general "applicability date," i.e., a compliance deadline, of April 10, 2017, with an extended deadline for full compliance with the major PTEs of January 1, 2018.

[4] 75 FR 65,263 (Oct. 22, 2010).

[5] Among other things, DOL eliminated the requirement that advisers provide detailed investment projections and certain annual disclosures to investors. DOL expanded applicability of the BIC to all products. The final rule also provided flexibility for firms in the timing of when the contract with clients must completed.

[6] Fact Sheet, U.S. Department of Labor, Employee Benefits Security Administration, *https://www.dol.gov/ebsa/newsroom/fs-conflict-of-interest.html*.

[7] "A Fiduciary Standard for Brokerage Firms May be Inevitable," Law360, June 30, 2015, *http://www.law360.com/articles/672026/a-fiduciary-standard-for-brokerage-firms-may-be-inevitable*.

[8] See "SEC Plans to Propose Fiduciary Rule Next April," Investment News, May 19, 2016, *http://www.investmentnews.com/article/20160519/FREE/160519907/sec-plans-to-propose-fiduciary-rule-next-april*.

[9] SIFMA has advocated for a uniform fiduciary standard of care since 2009. See *http://www.sifma.org/issues/private-client/fiduciary-standard/position/*.

## *Legislative/Regulatory Actions*

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*Federal Reserve Proposes Revisions to Form FR Y-7Q to Incorporate Capital Adequacy Standard Reporting Requirements for Foreign Banking Organizations with More than $50 Billion in Total Consolidated Assets*

On April 4, 2016, the Federal Reserve proposed a revision to Form FR Y-7Q to incorporate the capital adequacy standard reporting requirements for FBOs in Subparts N and O of Regulation YY. Certain new reporting items will be effective when FBOs file their September 30 FR Y-7Q later this year.

Section 165 of the Dodd-Frank Act established new requirements for all large global banks that operate in the United States. Regulation YY, in implementing this provision, requires FBOs with total consolidated assets of more than $50 billion to certify that they meet capital adequacy standards on a consolidated basis consistent with the regulatory capital framework published by the Basel Committee on Banking Supervision, as amended from time to time. Such FBOs must report to the Federal Reserve, concurrent with filing Form FR Y-7Q, regarding their compliance with these standards, beginning July 1, 2016.

Revisions have been proposed to Form FR Y-7Q to allow FBOs to comply with the capital reporting requirements under Regulation YY. The proposal would add Part 1B to Form FR Y-7Q, which would contain fourteen new data items.

Eleven of the proposed data items would be effective on September 30, 2016: (1) common equity tier 1 capital; (2) additional tier 1 capital; (3) tier 1 capital (sum of items 1 and 2); (4) tier 2 capital; (5) total risk-based capital (sum of items 3 and 4); (6) capital conservation buffer; (7) countercyclical capital buffer; (8) other applicable capital buffer(s): (a) GSIB/DSIB buffer, (b) pillar II buffer, (c) "other" buffer; and (9) compliance with restrictions on capital distributions and discretionary bonus payments associated with a capital buffer.

Three additional proposed data items would be effective on March 31, 2018: (1) home-country capital measure used in the numerator of the leverage ratio as set forth in the Basel Capital Framework; (2) home-country exposure measure used in the denominator of the leverage ratio as set forth in the Basel Capital Framework; and (3) minimum home country leverage ratio (if different from the leverage ratio in the Basel Capital Framework, as applicable).

For our client alert on the proposed changes, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160411FederalReserveFormFRY_7Q.pdf*.

*FDIC Extends Comment Period for Proposed Deposit Account Recordkeeping Rule*

On February 26, 2016, the FDIC solicited comments from the general public and industry regarding a proposal to establish recordkeeping requirements for FDIC-insured institutions with at least $2 million in deposit accounts. The FDIC has extended the comment period through June 25, 2016.

The proposed rules are designed to facilitate the payment of insured deposits when large insured banks fail. The proposal would require insured banks with $2 million or more in deposit accounts to maintain complete data on each depositor's ownership interest by right and capacity for all of its deposit accounts. These banks would also be required to develop the capability to calculate the insured and uninsured amounts for each deposit owner; the FDIC would use this data to make deposit insurance determinations in the event of a failure.

Each covered bank would be required to: (1) collect the information needed to allow the FDIC to determine promptly the deposit insurance coverage for each owner of funds on deposit at the covered institution; and (2) ensure that its IT system is capable of calculating the deposit insurance available

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## *Legislative/Regulatory Actions*

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to each owner of funds on deposit in accordance with the FDIC's deposit insurance rules set forth in 12 C.F.R. Part 330.

The bank's IT systems would need to facilitate the FDIC's deposit insurance determination by calculating deposit insurance coverage for each deposit account and adjusting account balances within 24 hours after the appointment of the FDIC as receiver.

The proposed rules set forth a number of potential exceptions. However, these exceptions may not be viable alternatives for many or most brokered deposits. For a discussion of the proposed rules in our "Structured Thoughts" newsletter, please visit *http://www.mofo.com/~/media/Files/Newsletter/2016/03/160331StructuredThoughts.pdf*.

*Proposed Rules on Executive Compensation for Banks and Broker-Dealers*

In April and May of 2016, six federal agencies, including the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Agency, and Securities and Exchange Commission, released a re-proposal of rules on executive compensation under Section 956 of the Dodd-Frank Act. The proposed rules would apply to "covered financial institutions" with at least $1 billion in assets, including: banks and bank holding companies; broker-dealers; investment advisors; and credit unions. Comments on the proposed rules are due July 22, 2016.

The proposed regulations establish tailored requirements based on a covered financial institution's asset size. Level 1 requirements apply to institutions with assets of $250 billion or more, Level 2 applies to institutions with assets of $50 billion to $250 billion, and Level 3 applies to institutions with assets of $1 billion to $50 billion.

In general, the proposed rules provide that covered financial institutions may not have incentive-based compensation plans that (1) encourage inappropriate risks by providing executive officers, employees, or directors who receive incentive-based compensation with excessive compensation, fees, or benefits; or (2) could lead to material financial loss for the institution. An incentive-based compensation arrangement will be deemed to encourage inappropriate risks that could lead to material financial loss for the institution unless the arrangement: (1) appropriately balances risk and reward; (2) is compatible with effective risk management and controls; and (3) is supported by effective governance. Much of the proposed rules would only apply for senior executive officers and employees at covered financial institutions that qualify for the Level 1 and Level 2 requirements.

The proposed rules would require all covered financial institutions to annually document the structure of incentive-based compensation arrangements and to retain such documents for a seven year period. The proposed rules would also require the board of directors of each institution to conduct oversight, approve incentive-based compensation arrangements for senior executive officers, and approve material exceptions or adjustments to incentive based compensation for senior executive officers.

For our client alert providing a more detailed look at the proposed requirements as released by the NCUA, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160425ExecCompChart.pdf*.

## BSA/AML

*FinCEN Finalizes Customer Due Diligence Rule for Legal Entity Customers*

On May 11th, 2016, the Financial Crimes Enforcement Network, a bureau of the Department of the Treasury, published a Final Rule on customer due diligence after a four-year rulemaking process. The Final Rule requires covered financial institutions, including banks, money services businesses, broker-dealers, mutual funds, and commodities brokers, to enhance their customer due diligence procedures by collecting and verifying information about the beneficial owners of the legal entity customers of the financial institution. The Final Rule also adds a "fifth pillar" to the minimum requirements of an anti-money laundering compliance program by explicitly requiring financial institutions to develop and update customer risk profiles and customer information and to conduct ongoing AML monitoring. Covered financial institutions must comply with the Final Rule by May 11, 2018.

Under the Final Rule, financial institutions must now establish and maintain written procedures

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designed to identify and verify beneficial owners of legal entity customers. To determine who is a beneficial owner, financial institutions must use both an ownership test and a control test. Under the ownership test, financial institutions must collect information pertaining to individuals who, directly or indirectly, have at least a 25 percent interest in the equity of the legal entity customer. Under the control test, financial institutions must collect and verify information for a single individual who has significant responsibility to control, manage, or direct a legal entity customer, such as a CEO, President, or similar executive officer or senior manager.

At a minimum, financial institutions must use the risk-based verification procedures required under FinCEN's 2003 rules governing customer identification programs, except that financial institutions can rely on reproductions instead of original documentation. In addition, financial institutions may rely on the information provided by its legal entity customer as long as the financial institution does not have any knowledge of facts that would call into question the validity of such information.

Financial institutions are not required to collect beneficial owner information for certain legal entity customers, including banks, bank holding companies, certain pooled investment vehicles, state-regulated insurance companies, financial market utilities (as designated by the Financial Stability Oversight Council), and foreign financial institutions (to the extent a foreign regulator collects beneficial owner information relating to the ownership of the foreign financial institution).

In addition to these exclusions, the Final Rule exempts certain activities. For example, financial institutions do not need to collect beneficial owner information for credit accounts opened at the point of sale that can be used solely to purchase goods and services from the retailer, such as private-label credit cards, so long as the credit limit does not exceed $50,000.

For our client alert on the proposed changes, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160516FinCEN.pdf*.

## CFTC UPDATE

*CFTC Issues Final Rules Regarding the Cross-Border Application of Its Uncleared Swaps Margin Requirements*

On May 24, 2016, the Commodity Futures Trading Commission, in a much anticipated action, approved the issuance of final rules regarding the cross-border application of its uncleared swaps margin requirements that it adopted on December 16, 2015. The Final Rules are closely aligned with the cross-border rules for uncleared swaps margin that the Prudential Regulators (the Federal Reserve, the OCC, the FDIC, the Farm Credit Administration, and the FHFA) adopted in October of 2015 for swap dealers and major swap participants subject to their supervision. The CFTC's Final Rules apply to swap dealers and major swap participants for which there is no Prudential Regulator (e.g., non-bank swap dealers and major swap participants). The CFTC's Final Rules, which were published in the *Federal Register* on May 31, 2016, are scheduled to become effective on August 1, 2016. For more information regarding the Final Rules, please see our client alert at *http://www.mofo.com/~/media/Files/ClientAlert/2016/06/160607CFTCFinalRuleUnclearedSwaps.pdf*.

*CFTC: Proposed Supplement to December 2013 Position Limits*

On May 26, 2016, the CFTC approved a proposed supplement to its December 2013 proposal to establish position limits on 28 core physical commodity contracts and economically

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## *Legislative/Regulatory Actions*

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equivalent futures, options, and swaps. The Supplemental Proposal would provide for a new process for exchanges to recognize certain positions in commodity derivatives contracts as "non-enumerated" bona fide hedges (not already enumerated in CFTC regulations) or enumerated anticipatory bona fide hedges, as well as to exempt from CFTC position limits certain spread positions, in each case subject to CFTC review. In addition, the Supplemental Proposal would amend the definition of "bona fide hedging" for physical commodities and certain other definitions contained in the 2013 Position Limits Proposal, and would also delay the requirement that designated contract markets and swap execution facilities establish and monitor position limits on swaps where the DCM or SEF lacks access to sufficient swap position information. The Supplemental Proposal, which was published in the *Federal Register* on June 13, 2016, will be open for public comment until July 13, 2016. For more information regarding the Supplemental Proposal please see our client alert at *http://www.mofo.com/~/media/Files/ClientAlert/2016/06/160616CFTCApprovesSupplementalProposal.pdf*.

## CFPB UPDATE

*Payday Lending Proposed Rule Released*

On June 2, 2016, the CFPB released a proposal that will result in the first federal rulemaking focusing specifically on the short-term lending industry, which traditionally has been governed by state law. In another first, the CFPB used its UDAAP (Unfair, Deceptive, or Abusive Acts and Practices) authority under the Dodd-Frank Act as the basis for its 1,334-page Proposed Rule. Previously, this UDAAP authority has been used for enforcement actions but not rulemaking.

The Proposed Rule would cover both open- and closed-end payday loans, auto title loans, deposit advance products, and certain "high-cost" installment loans. Moreover, the Proposed Rule would apply to any "lender" that regularly makes "covered loans" for personal family or household purposes, including bank and nonbank lenders, as well as FinTech and marketplace lenders. "Covered loans" would include all loans with contractual durations of 45 days or less, and loans with durations of more than 45 days that have a total cost of credit in excess of 36 percent, and either a non-purchase security interest in the consumer's vehicle or a right for the lender to obtain repayment through the consumer's deposit account, payroll deduction or direct access to the consumer's paycheck.

The Proposed Rule follows a CFPB report on online payday lending released on April 20, 2016. The Report discussed the use by online lenders of ACH to initiate electronic debit transactions to collect payment from a borrower's deposit account and the potential fees charged by the account-holding depository institution in connection with such electronic debit transactions. The CFPB alleged in the Report that borrowers often face unanticipated costs in connection with their online short-term loans due to overdraft or bank fees charged when borrowers have insufficient funds in their bank accounts to cover the loan payment sought.

For our client alerts on the Proposed Rule, the Report, and the lawmakers' views regarding the potential pre-emption of state law, and please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/06/160603CFPBsPaydayLendingRulemaking.pdf, http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160422OnlineShortTermLending.pdf*, and *http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160411CFPBShortTermLending.pdf*, respectively.

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*CFPB Poised to Regulate Small Business Lending*

On April 12, 2016, the CFPB announced that Grady Hedgespeth would assume the position of Assistant Director for the Office of Small Business Lending. In filling this position, the CFPB has initiated preliminary steps toward promulgating data reporting rules as required by Section 1071 of the Dodd-Frank Act. Specifically, Section 1071 amends the Equal Credit Opportunity Act to require that financial institutions collect and report information concerning credit applications made by women- or minority-owned businesses and by small businesses. The stated purpose of Section 1071 is to "facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities for women-owned, minority-owned and small businesses." In particular, Section 1071 requires lenders to collect data elements, such as the race, gender, and ethnicity of the principal owners of the business, the gross annual revenues of the business, the action taken on an application, and the loan type and purpose. Now that the CFPB has hired an executive to establish a foundation for the rulemaking, industry participants should begin to watch for a notice of proposed rulemaking under Section 1071.

For our client alert on Section 1071, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160524CFPBPoisedtoExpandRegulation.pdf.*

*CFPB Proposes Prohibiting Pre-Dispute Arbitration Clauses with Class Action Prohibitions*

On May 5, 2016, the CFPB released its long-awaited Notice of Proposed Rulemaking regulating pre-dispute arbitration clauses banning class actions in agreements between financial services providers and consumers. Specifically, the Proposed Rule would bar class action waivers and impose reporting requirements for individual arbitrations pursued in connection with pre-dispute arbitration agreements. In addition, the Proposed Rule would require all arbitration agreements in contracts of covered providers to contain a statement that the agreement may not be used to prevent the consumer from initiating or participating in class actions. The Proposed Rule also could cause covered providers who include pre-dispute arbitration agreements in their contracts to submit to the CFPB a host of details regarding their individual arbitrations.

The Proposed Rule is a product of a Dodd-Frank Act requirement that the CFPB prepare a study on the use of pre-dispute arbitration clauses in consumer financial products and services, and that authorized the CFPB to propose a rule regarding the arbitration clause, consistent with the findings of the CFPB's study.

For our client alert on the Proposed Rule, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160512CFPBArbitration.pdf.*

*TRID Amendments on the Horizon*

On April 28, 2016, CFPB Director Richard Cordray sent a letter to mortgage industry trade groups indicating that the CFPB plans to propose amendments to the TILA-RESPA Integrated Disclosure (TRID) rule this July. According to the Cordray letter, the CFPB is likely to release a Notice of Proposed Rulemaking in late July that would incorporate some of the existing informal Bureau guidance on TRID into the regulatory text and commentary in order to provide greater certainty and clarity. The letter also indicates that the comment period will be brief in order to allow the CFPB to adopt a final, clarifying rule relatively promptly.

For our client alert on this announcement, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160502CFPBTRIDRule.pdf.*

*Judge Refuses to Enforce CFPB CID*

On April 21, 2016, in a strongly worded opinion, Judge Richard J. Leon of the United States District Court for the District of Columbia ruled that the CFPB did not have authority to issue or enforce a civil investigative demand ("CID") against the Accrediting Council for Independent Colleges and Schools ("ACICS"). The CFPB had issued the CID requesting a broad range of information, requiring ACICS to designate a company representative to appear and give oral testimony regarding ACICS's policies, procedures, and practices for school accreditation. The CID also directed ACICS to identify the post-secondary educational institutions that ACICS had accredited since January 2010, as well as the individuals affiliated with ACICS who conducted those reviews. Judge Leon found that the

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## *Legislative/Regulatory Actions*

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accreditation of for-profit schools was beyond the scope of the CFPB's mandate to prevent a covered person or service provider from engaging in unfair, deceptive, or abusive acts or practices in connection with any offering of consumer financial products or services and, therefore, outside the scope of the Bureau's authority. The case is significant because it represents the first time a court has ruled against the CFPB in an action involving the scope of the agency's jurisdiction.

For our client alert on the ruling, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160427CFPBCIDChallenge.pdf.*

## WHITE PAPERS

*Treasury Issues White Paper Reviewing Online Marketplace Lending*

On May 10, 2016, the U.S. Department of the Treasury issued a white paper, entitled "Opportunities and Challenges in Online Marketplace Lending", that reviews the online marketplace lending industry and provides Treasury's recommendations to the private sector and the federal government on how to encourage "safe growth" in the industry. The Treasury White Paper also summarizes the approximately 100 responses to Treasury's July 20, 2015 request for information on the online marketplace lending industry. According to Treasury, the publication of the Treasury White Paper is the next step in a "multi-stage process led by Treasury, in consultation with regulatory partners, to understand this market… and to inform appropriate policy responses." The Treasury White Paper outlines recommendations to the industry and regulators to facilitate safe growth of online marketplace lending, including more robust small business borrower protections and effective oversight, and greater transparency for investors and borrowers. For more information on the Treasury White Paper, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160513TreasuryOnlineMarketplaceLending.pdf.*

*OCC Identifies Principles Related to Responsible Innovation*

On March 31, 2016, the OCC released a white paper on financial technology innovation, which lays out a preliminary framework for "responsible innovation" by and among national banks. The OCC White Paper articulates principles the OCC will follow when evaluating innovative products, services, and processes and identifying potential risks associated with such innovation. The principles include supporting "responsible innovation" and streamlining the process for obtaining OCC guidance; fostering an internal culture receptive to innovation; leveraging internal OCC experience and expertise to support bank supervisory efforts; encouraging responsible innovation that provides fair access to financial services and fair treatment of consumers; promoting safe and sound operations by understanding and monitoring emerging risks; encouraging banks of all sizes to integrate responsible innovation into their strategic planning, consistent with the bank's long-term strategic planning criteria; promoting ongoing industry dialogue; and collaborating with other regulators as it relates to responsible innovation. For more information on the OCC White Paper, please visit *http://www.mofo.com/~/media/Files/ClientAlert/2016/04/160406OCCFintechFramework.pdf.* ■

[1] The 1995 Guidelines for "Rating Risk Management at State Member Banks and Bank Holding Companies (SR 95-51(SUP))" directed examiners to provide separate supervisory ratings for the risk management process, including internal controls, of all state member banks and bank holding companies. The 1995 Guidelines remain applicable to state member banks and bank holding companies with $50 billion or more in total assets until further notice.

*Julian E. Hammar, Jeremey R. Mandell, Amanda J. Moll, and Mark R. Sobin contributed to this column.*

## 2016 Examination Priorities

**SEC**

*http://www.sec.gov/news/pressrelease/2016-4.html*

**FINRA**

*https://www.finra.org/sites/default/files/2016-regulatory-and-examination-priorities-letter.pdf*

# Watch For

OCC News Release 2016-69 (June 17, 2016) – The four federal financial institution regulatory agencies issued a joint statement regarding the new accounting standard, Accounting Standards Update No. 2016-13, Financial Instruments – Credit Losses (Topic 326): Measurement of Credit Losses on Financial Instruments, issued by the Financial Accounting Standards Board. The joint statement also provides initial supervisory views regarding the standard's implementation. The new accounting standard applies to all banks, savings associations, credit unions, and financial institution holding companies, regardless of asset size. The standard allows for various expected credit loss estimation methods and is scalable. The standard will become effective in 2020 for financial institutions required to file financial statements with the SEC or the appropriate federal banking agency under the federal securities laws. The new accounting standard will take effect in 2021 for all other financial institutions. Early adoption is permitted, but no earlier than in 2019.

June 16, 2016 – The MSRB reminds municipal advisors that MSRB Rule G-42 on duties of non-solicitor municipal advisors and related amendments to MSRB Rule G-8 on recordkeeping become effective on June 23, 2016. The new rule establishes core standards of conduct for municipal advisors that engage in municipal advisory activities, other than municipal advisory solicitation activities.

MSRB Notice 2016-17 (June 15, 2016) – The MSRB filed a proposed rule change with the SEC to revise the content outline for the Municipal Advisor Representative Qualification Examination (Series 50). The content outline for the Series 50 has been amended to reflect changes to the laws, rules and regulations covered by the examination and, among other things, incorporate the functions and associated tasks performed by a municipal advisor representative. The MSRB filed the revisions to the Series 50 content outline for immediate effectiveness and proposes to implement the revised Series 50 examination on September 12, 2016.

CFTC Press Release 7390-16 (June 14, 2016) – The CFTC is requesting public comment on a rule amendment certification filing by ICE Futures U.S. which would clarify that parties to a block trade may engage in pre-hedging or anticipatory hedging of the position that they believe in good faith will result from the consummation of the block trade, except for an intermediary that takes the opposite side of its own customer order. Comments must be submitted on or before July 14, 2016.

CFTC Press Release 7389-16 (June 14, 2016) – The CFTC approved a final rule that amends existing swaps reporting regulations in order to provide additional clarity to swap counterparties and registered entities regarding their reporting obligations for cleared swap transactions; and to improve the efficiency of data collection and maintenance associated with the reporting of the swaps involved in a cleared swap transaction. The Final Rule adopts as proposed changes to Part 45 proposed in the *Federal Register* on August 31, 2015 (80 F.R. 52544) and will become effective 180 days following publication in the *Federal Register*.

CFTC Press Release 7388-16 (June 10, 2016) – The CFTC's Division of Market Oversight and Division of Clearing and Risk issued a no-action letter extending the relief provided in CFTC Letter No. 15-24, which expires on June 15, 2016. That no-action letter provides relief from certain CFTC regulations to permit swap execution facilities and designated contract markets to correct clerical or operational errors that caused a swap to be rejected for clearing and thus become void. The no-action letter also permits SEFs and DCMs to correct clerical or operational errors discovered after a swap has been cleared. The no-action letter extends relief to the earlier of 11:59 pm (Eastern Time) June 15, 2017 or the effective date of revised CFTC regulations that establish a permanent solution to addressing clerical or operational errors. The relief is subject to the terms and conditions in the letter.

Federal Reserve Press Release (June 10, 2016) – The FRB and FDIC permitted 84 firms with limited U.S. operations to file reduced content resolution plans for their next three resolution plans. The decision is intended to increase clarity and reduce burden by creating more certainty around future filing requirements. The first of these reduced content plans must be submitted to the agencies by December 31, 2016. To file reduced content plans for the next three years, the firms must maintain less than $50 billion in U.S. assets and not experience any material events.

CFTC Press Release 7387-16 (June 9, 2016) – The CFTC proposed amending CFTC regulation 50.4(a) to require certain additional interest rate swaps to be

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cleared by market participants through a registered derivatives clearing organization or a DCO that has been exempted from registration under the CEA. The scope of proposed expanded regulation 50.4(a) would make the CFTC's clearing requirement consistent with those proposed or finalized in 2015 or 2016 by the CFTC's counterparts in Australia, Canada, the European Union, Hong Kong, Mexico, and Singapore. The proposed rule will be open for public comment for 30 days after publication in the *Federal Register*.

Federal Reserve Press Release (June 8, 2016) – The FRB and FDIC announced that four foreign banking organizations will be required to submit their next resolution plans on July 1, 2017. Previously, the four FBOs—Barclays PLC, Credit Suisse Group, Deutsche Bank AG, and UBS—were required to submit their next plans on July 1, 2016. However, the agencies jointly determined the 2016 annual resolution plan filing requirement will be satisfied by the submission of 2017 resolution plans.

SEC Press Release 2016-111 (June 8, 2016) – The SEC announced that it has adopted rules that will establish timely and accurate trade acknowledgment and verification requirements for security-based swap entities that enter into SBS transactions. The rules are designed to promote the efficient and effective operation of the SBS market. The final rules are effective 60 days after publication in the *Federal Register*. These rules also establish a separate compliance date, which is based on the compliance date of the registration rules for SBS entities previously adopted by the Commission.

OCC Bulletin 2016-18 (June 7, 2016) – The FFIEC issued a statement, in light of recent cyber attacks, to remind financial institutions of the need to actively manage the risks associated with interbank messaging and wholesale payment networks. Financial institutions should review their risk management practices and controls over information technology and wholesale payment systems networks, including authentication, authorization, fraud detection, and response management systems and processes. The statement emphasizes that participants in interbank messaging and wholesale payment networks should conduct ongoing assessments of their ability to mitigate risks related to information security, business continuity, and third-party provider management.

FINRA Regulatory Notice 16-21 (June 6, 2016) – The SEC approved an amendment to NASD Rule 1032(f) that expands the scope of persons required to register as a Securities Trader. Specifically, beginning January 30, 2017, each associated person who is primarily responsible for the design, development or significant modification of an algorithmic trading strategy relating to equity, preferred or convertible debt securities, or who is responsible for the day-to-day supervision or direction of such activities, must pass the Series 57 exam and register as a Securities Trader.

Federal Reserve Press Release (June 3, 2016) – The FRB approved an advance notice of proposed rulemaking inviting comment on conceptual frameworks for capital standards that could apply to systemically important insurance companies and to insurance companies that own a bank or thrift. The standards would differ for each group. The Board also approved a proposed rule to apply enhanced prudential standards to systemically important insurance companies designated by the Financial Stability Oversight Council. As required under the Dodd-Frank Act, these standards would apply consistent liquidity, corporate governance, and risk-management standards to the firms. These firms would also be required to employ both a chief risk officer and chief actuary to help ensure that firm-wide risks are properly managed. The enhanced prudential standards would only apply to systemically important insurance companies, reflecting the heightened risk these firms pose to financial stability. Comments on both the ANPR and proposed rule are due by August 2, 2016.

CFTC Press Release 7381-16 (June 2, 2016) – The CFTC will reopen the comment period for specific elements of Regulation Automated Trading. This is being done in conjunction with a CFTC staff roundtable on Regulation AT on June 10, 2016. The additional comment period is intended to obtain public input solely on the specific topics listed in the agenda for the roundtable and that arise during the roundtable (See CFTC Press Release 7377-16 for agenda). The comment period will be reopened as of June 10, 2016, and will close on June 24, 2016.

Federal Reserve Press Release (June 2, 2016) – The FRB announced that results from the latest supervisory stress tests conducted as part of the Dodd-Frank Act will be released on Thursday, June 23, and the related results from the Comprehensive Capital Analysis and Review, will be released on Wednesday, June 29. The

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instructions, scenarios, and further information regarding the 2016 Dodd-Frank Act stress tests and CCAR are available on the Board's website.

May 31, 2016 – The MSRB will make available the permanent Municipal Advisor Representative Qualification Examination (Series 50) beginning September 12, 2016. As provided for under MSRB Rule G-3, municipal advisor representatives are required to take and pass the Series 50 in order to engage in municipal advisory activities. The score required to pass the Series 50 exam is 71 percent. To facilitate the transition to the new exam requirement, the MSRB is providing a one-year grace period, ending on September 12, 2017, during which individuals will be able to take the exam while continuing to engage in municipal advisory activities. Also, on or before July 1, 2016, the MSRB will make available a revised Series 50 content outline to reflect municipal advisor rules that were established by the MSRB since the outline was first published in 2015. The content outline includes topics covered on the exam, sample questions and a list of reference materials to assist municipal advisor professionals in preparing for the exam. Notification of the availability of the revised outline will be posted on ***MSRB.org*** and sent to municipal advisors' primary regulatory contact.

FINRA Regulatory Notice 16-20 (May 27, 2016) – Beginning August 1, 2016, firms that report information to OATS will be required to include on their reports the identity of U.S.-registered broker-dealers that are not FINRA members and broker-dealers that are not registered in the U.S. but have received an SRO-assigned identifier. The identities may be reported using either the broker-dealer's Central Registration Depository number or an SRO-assigned identifier. FINRA will provide a list of all acceptable CRD numbers for firms to use to facilitate compliance with the new requirements.

FINRA Regulatory Notice 16-19 (May 26, 2016) – FINRA encourages firms to review their practices regarding stop (or stop-loss) orders, with an emphasis on educating investors regarding the risks and benefits of stop orders and special considerations around the use of stop orders during volatile market conditions.

CFTC Press Release 7374-16 (May 26, 2016) – The CFTC voted unanimously to issue for public comment a supplement to its December 2013 position limits proposal that will modify the procedures proposed for persons seeking exemptions from speculative position limits for non-enumerated bona fide hedging. Further, the proposal would define procedures for recognition of certain anticipatory bona fide hedge positions. In connection with these changes, the CFTC proposes to further amend certain relevant definitions, including to clearly define the general definition of "bona fide hedging position" for physical commodities under the standards in Commodity Exchange Act section 4a(c). Separately, the CFTC proposes to delay the requirement to establish and monitor position limits on swaps for DCMs and SEFs that lack access to sufficient swap position information. All other aspects of the December 2013 Position Limits Proposal would remain the same. The supplemental notice of proposed rulemaking will be open for public comment for 30 days after publication in the *Federal Register*.

CFTC Press Release 7370-16 (May 24, 2016) – The CFTC adopted a rule implementing a cross-border approach to the CFTC's margin requirements for uncleared swaps. Published in January 2016, the CFTC's margin rule applies to CFTC-registered swap dealers and major swap participants for which there is no Prudential Regulator. The Final Rule is closely aligned with the cross-border margin requirements already adopted by the Prudential Regulators. The Final Rule generally requires CSEs to comply with the CFTC's margin requirements for all uncleared swaps in cross-border transactions, with a limited exclusion for certain non-U.S. CSEs. The exclusion is not available to non-U.S. CSEs that are consolidated with a U.S. parent. In certain circumstances, the Final Rule would allow CSEs to comply with comparable margin requirements in a foreign jurisdiction as an alternative means of complying with the CFTC's margin rule for uncleared swaps (substituted compliance) to the extent that the CFTC determines that the foreign jurisdiction's requirements are comparable to the CFTC's (comparability determination). The Final Rule includes special provisions to accommodate swap activities in jurisdictions that do not have a legal framework to support custodial arrangements or that do not have netting arrangements that comply with the CFTC's margin rule. Finally, the Final Rule establishes a process for requesting comparability determinations, including eligibility and submission requirements, as well as the standard of review the CFTC would apply in assessing the comparability of a foreign jurisdiction's margin requirements. In light of the impending September 1, 2016 compliance date for the CFTC's

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margin rule, the CFTC encourages persons requesting a comparability determination to promptly submit their request.

OCC Bulletin 2016-17 (May 19, 2016) – The OCC is issuing this bulletin to highlight actions that national banks and federal savings associations should take and factors that banks should consider based on the SEC's revised money market fund rules in effect now and going into effect. Although these rules directly apply only to MMFs, the rules indirectly affect: banks that make MMFs available to their customers through their fiduciary and custody activities; bank programs that automatically sweep funds between deposit accounts and MMFs; and banks that invest in MMFs. Banks involved in any of these activities will likely be affected by compliance, liquidity, operational, and strategic risks related to the SEC's revised rules.

OCC News Release 2016-56 (May 16, 2016) – Six federal agencies are inviting public comment on a proposed rule to prohibit incentive-based compensation arrangements that encourage inappropriate risks at covered financial institutions. The deadline for comments on the proposed rule, which was submitted for publication in the *Federal Register*, is July 22, 2016. The proposed rules would apply to covered financial institutions with total assets of $1 billion or more.

FINRA Regulatory Notice 16-18 (May 16, 2016) – The SEC approved the adoption of FINRA Rule 2273 (Educational Communication Related to Recruitment Practices and Account Transfers), which establishes an obligation to deliver an educational communication in connection with firm recruitment practices and account transfers. The rule becomes effective November 11, 2016.

FINRA Information Notice (May 16, 2016) – As announced in Regulatory Notice 15-28, as part of the transition to CE Online, FINRA is phasing out test center delivery of the Regulatory Element of Continuing Education. This change will become effective on July 1, 2016. As of that date, the option to complete the Regulatory Element at a Pearson VUE or a Prometric testing center will no longer be available, and participants with an open Regulatory Element window must complete their session using the FINRA CE Online System® with the exception of participants who, pursuant to the Americans with Disabilities Act (ADA), may need accommodations in completing their CE session due to a disability.

May 11, 2016 – The MSRB filed with the SEC amendments to its proposal to update MSRB requirements for procedures for municipal securities dealers related to the close-out of open inter-dealer fail transactions. Proposed amendments to MSRB Rule G-12 would require that open transactions be closed out no later than 20 calendar days after settlement date, and make other changes designed to accelerate and modernize the close-out process. The changes seek to reduce dealer and systemic risk, and the likelihood and duration that dealers are required to pay "substitute interest" to customers.

May 9, 2016 – The MSRB recently published a brief overview of the duties and obligations under new MSRB Rule G-42. A companion document for underwriters addresses implications of the rule for underwriters and provides an overview of the rule itself to assist dealers acting as underwriters in understanding the regulatory framework that applies to municipal advisors. Rule G-42 establishes requirements for many aspects of the relationship between a municipal advisor and its client by addressing the disclosure of conflicts of interest, documentation of the relationship, recommendations and conduct that is specifically prohibited.

FINRA Regulatory Notice 16-17 (May 5, 2016) – In light of recent disciplinary actions against firms, FINRA reminds firms of their obligations under FINRA Rule 2360(b)(5) to report large options positions to the Large Options Positions Reporting (LOPR) system, in a manner prescribed by the U.S. options exchanges and FINRA. This Notice provides an overview of the options reporting requirements and consolidates and summarizes previously issued guidance.

CFTC Press Release 7365-16 (May 2, 2016) – The CFTC approved a final rule to amend a requirement that swap dealers and major swap participants exchange the terms of swaps with their counterparties for portfolio reconciliation so that SDs and MSPs need only exchange the "material terms" of swaps. This requirement is found in CFTC Regulation 23.500(i). The final rule also amends the definition of "material

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terms" in CFTC Regulation 23.500(g). The final rule benefits SDs, MSPs, and their counterparties by enabling them to focus on reconciling data fields that impact swap valuation and counterparty obligations, without impairing the CFTC's ability to oversee and regulate the swaps markets.

MSRB Notice 2016-15 (May 2, 2016) – The MSRB received approval from the SEC on April 29, 2016 to amend MSRB Rules G-12, on uniform practice, and G-15 on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers, to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle ("T+2") and technical conforming amendments. The MSRB will announce the compliance date of the amendments in a notice to be published on the MSRB website, which date will correspond with the broader industry transition to a T+2 regular-way settlement, which is dependent upon the SEC making corresponding amendments to Exchange Act Rule 15c6-1(a). The SEC's approval sets the stage for the MSRB to coordinate with fellow regulators and the industry in order to transition to a shortened settlement cycle.

April 29, 2016 – The MSRB reminds brokers, dealers, municipal securities dealers and municipal advisors that amendments to MSRB Rule G-20 on gifts, gratuities and non-cash compensation and related amendments to MSRB Rule G-8 on recordkeeping become effective on May 6, 2016. The amendments, among other things, extend the restrictions regarding gift giving and the related recordkeeping requirements currently applicable to brokers, dealers and municipal securities dealers to municipal advisors. The changes also include a new provision to prohibit expressly the seeking or obtaining of reimbursement by a dealer or municipal advisor of certain entertainment expenses from the proceeds of an offering of municipal securities.

FINRA Regulatory Notice 16-15 (April 27, 2016) – On July 18, 2016, new FINRA Rule 6732 (Exemption from Trade Reporting Obligation for Certain Transactions on an Alternative Trading System) becomes effective. Rule 6732 provides FINRA staff with the authority to grant a member alternative trading system an exemption from the TRACE trade reporting obligations of Rule 6730 (Transaction Reporting) for transactions occurring on an ATS that meet specified conditions. The rule text is available in the online FINRA Manual.

OCC Bulletin 2016-13 (April 27, 2016) – The OCC is issuing this bulletin to remind national banks and federal savings associations of their obligations related to the maintenance of records, records retention, and examiner access to records. The OCC has become aware of communications technology recently made available to banks that could prevent or impede OCC access to bank records through certain data deletion or encryption features. Use of communications technology in this manner is inconsistent with the OCC's expectations regarding data retention and availability.

SEC Press Release 2016-75 (April 21, 2016) – The SEC issued an order modifying and extending the pilot period of the National Market System Plan to Address Extraordinary Market Volatility, commonly known as the limit up-limit down plan. The order is effective immediately. The pilot period will expire on April 21, 2017.

FINRA Regulatory Notice 16-13 (April 20, 2016) – The staff of the SEC's Division of Trading and Markets has issued a revised no-action letter setting forth conditions under which broker-dealers may treat certain foreign equity securities as having a "ready market" under SEA Rule 15c3-1(c)(11)(i) and subject to the haircuts under SEA Rule 15c3-1(c) (2)(vi)(J). The February 2016 letter replaces the previous SEC staff no-action letter, issued in November 2012 that addressed this subject matter.

FINRA Regulatory Notice 16-12 (April 18, 2016) – This Notice provides guidance on firm responsibilities to supervise the sale of pension income stream products by their associated persons.

SEC Press Release 2016-73 (April 18, 2016) – The SEC announced the release of an online tool to help companies calculate registration fees for certain form submissions to EDGAR, the SEC's electronic database of financial reports and other filings. The new tool is intended to improve the accuracy of fee calculations and minimize the need for corrections.

April 15, 2016 – The MSRB reminds municipal advisors that amendments to MSRB Rule G-44(d) regarding annual certification requirements related to compliance policies and supervisory procedures become effective on April 23, 2016. Under this

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provision, municipal advisors are required to have their chief executive officer or equivalent officer annually certify that the municipal advisor has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable rules. The annual certification should be maintained with the municipal advisor's records.

SEC Press Release 2016-71 (April 15, 2016) – The SEC adopted final rules implementing a comprehensive set of business conduct standards for security-based swap dealers and major security-based swap participants. The final rules require security-based swap entities to comply with a range of provisions designed to enhance transparency, facilitate informed customer decision-making, and heighten standards of professional conduct. The rules also establish supervision and chief compliance officer requirements. In addition, the rules address the cross-border application of these requirements and the potential availability of substituted compliance. The final rules will become effective 60 days after publication in the *Federal Register*. These rules also establish a separate compliance date, which generally is based on the compliance date of the registration rules for security-based swap entities.

MSRB Notice 2016-14 (April 12, 2016) – The MSRB has received guidance from the staff of the SEC's Office of Municipal Securities regarding accounts established pursuant to the Achieving a Better Life Experience Act of 2014. Consistent with that guidance, the MSRB is issuing interpretative guidance under MSRB Rule D-12, on the definition of "municipal fund security." This interpretive guidance provides, in part, that interests in ABLE accounts may be municipal fund securities, as defined by Rule D-12, and that a broker, dealer or municipal securities dealer that effects transactions in ABLE programs may be subject to all MSRB rules, unless such dealer is specifically exempted from the MSRB rule.

MSRB Press Release (April 7, 2016) – The MSRB is seeking comment on draft rule amendments to MSRB Rule G-15 (on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers) to support the practical implementation of its rule that generally prohibits dealers from selling bonds below a stated minimum denomination. The amendments seek to clarify exceptions that are consistent with the rule's original intent to protect investors. Comments should be submitted no later than May 25, 2016.

FINRA Regulatory Notice 16-11 (April 5, 2016) – The SEC has approved FINRA's proposal to amend the instructions to the Derivatives and Other Off-Balance Sheet Items Schedule to expand the application of the OBS to certain non-carrying/non-clearing firms that have significant amounts of off-balance sheet obligations. Subject to a de minimis exception, the OBS must be filed by (1) all FINRA member firms that selfclear their proprietary transactions or clear transactions for others or carry customer accounts; and (2) all other FINRA member firms that have, pursuant to Rule 15c3-1 under the Securities Exchange Act of 1934, a minimum dollar net capital requirement equal to or greater than $100,000 and at least $10 million in reportable items pursuant to the OBS. Newly filing firms must file with FINRA their initial OBS disclosing off-balance sheet information as of June 30, 2016, on or before August 2, 2016. Carrying or clearing firms that were subject to the OBS's reporting requirements before the recently approved expansion shall continue to file on a quarterly basis, as required, without interruption.

FINRA Regulatory Notice 16-10 (April 4, 2016) – FINRA and the MSRB are providing guidance to remind firms of their obligations in connection with privately placing municipal securities directly with a single purchaser and of the use of bank loans in the municipal securities market.

Federal Reserve Press Release (April 1, 2016) – The Federal Reserve Board finalized a rule to include certain U.S. general obligation state and municipal securities in the range of assets large banking organizations may use to satisfy regulatory requirements designed to ensure that these banking organizations have the capacity to meet their liquidity needs during a period of financial stress. The final rule will be effective on July 1, 2016.

MSRB Press Release (March 28, 2016) – The MSRB is seeking public comment on a potential approach to enhance investor and public access to information about the direct purchase and bank loan transactions of municipal securities issuers. In concept, the MSRB is considering whether to require municipal advisors to disclose information about the bank loans and direct

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purchases of their municipal entity clients to the MSRB's EMMA. Comments should be submitted no later than May 27, 2016.

CFTC Press Release 7343-16 (March 16, 2016) – CFTC approved a final rule that removes reporting and recordkeeping requirements for trade option counterparties that are neither swap dealers nor major swap participants, including commercial end-users that transact in trade options in connection with their businesses. The final rule will become effective upon publication in the *Federal Register*.

## Available Publications

May 24, 2016 – The MSRB is publishing an *Investor's Guide to 529 College Savings Plans* for anyone considering investing in a plan. Potential 529 plan investors can learn more about the plans' benefits, risks and expenses, and who can make or receive contributions. The Guide also covers special considerations for senior investors.

OCC Bulletin 2016-14 (April 29, 2016) – The FFIEC has released a new appendix, "Mobile Financial Services," to the "Retail Payment Systems" booklet of the *FFIEC Information Technology (IT) Examination Handbook*. This new appendix E focuses on risks associated with activities and devices for mobile financial services. The appendix emphasizes an enterprise-wide risk management approach for effectively managing and mitigating existing and evolving risks. Additionally, the appendix contains work program objectives to assist examiners in determining the state of risk and controls at an institution or third-party provider. "Retail Payment Systems" is one of the 11 booklets in the *FFIEC IT Examination Handbook*.

# *Who's News*

**Cindy Keenum Brown**, formerly COO at Sterne Agee, has joined Regions Bank as Project Manager in their Capital Markets Division.

**Stephen L. Cohen**, Associate Director of Enforcement at the SEC, is planning to leave the agency later this month.

**Susan Collet** has been named Head of Legislative Affairs at the MSRB. Previously, Ms. Collet served as President of H Street Capitol Strategies, LLC.

**Tammy Engle**, formerly CCO at Nelnet Capital LLC, has joined Matrix Financial Solutions as Vice President, Operations.

**Michael Gross**, formerly a Senior Litigation Counsel at FINRA, has joined Ulmer & Berne LLP as a Partner in their Boca Raton office.

**Terry Hankins**, formerly Senior Compliance Consultant at Northern Trust Asset Management, has joined Bank of the West as Compliance Manager.

**Christopher R. Hetner** has been named Senior Advisor to the SEC Chair for Cybersecurity Policy. He is the current Cybersecurity Lead for the Technology Control Program within the SEC's Office of Compliance Inspections and Examinations.

**Donna Murphy** has been named Deputy Comptroller for Compliance Risk at the OCC.

**Jim Shorris**, formerly EVP, Deputy General Counsel for Regulatory Affairs at LPL Financial and former Executive Director of FINRA Enforcement, has joined Citizens Financial Group as SVP/CCO Enterprise Regulatory Programs.

# Program Update

## 2016 Legal and Legislative Conference

**Registrations are now being accepted for** FMA's 25th annual **Legal & Legislative Conference** set to take place **November 3–4** at the **Hyatt Regency Washington on Capitol Hill** (site of the 2015 program) here in Washington, DC. This annual program is a high-level forum for **banking and securities attorneys** as well as **senior compliance officers/risk managers, internal auditors** and **regulators**. The day and a half program provides participants with an opportunity to share information on current legal and regulatory developments as well as network with peers and have "face time" with regulators. **Be sure to ask for the first-timers or the 2-for-1 registration discount.**

The Program Planning Committee is currently developing an agenda focusing on current areas of regulatory and Congressional/agency scrutiny and activity. Members include: **Anthony Cipiti, Jr.** *(Nationwide Financial Legal);* **Gail Bernstein** *(WilmerHale);* **Michael Halloran** *(Pillsbury Winthrop Shaw Pittman LLP);* **Jason Fincke** *(U.S. Bank);* **and Ernesto Lanza** *(Greenberg Traurig, LLP).*

The working agenda currently features these panels:

- **General Counsels: FRB, OCC, FDIC, FINRA, CFTC, SEC & MSRB**
- **DoL Fiduciary Rule**
- **FinTech Regulatory Landscape**
- **Derivatives**
- **Cybersecurity**
- **AML / BSA / OFAC**
- **Capital and Liquidity**
- **SEC Division Reports: Enforcement, Corporation Finance, Investment Management, Trading and Markets, OCIE, and Economic and Risk Analysis**

If you would like to volunteer to speak on any of these topics…or suggest other noted leaders in these fields as panelists…please contact Dorcas Pearce and she will advise the program planning committee of your interest/input. The e-brochure will be distributed mid- to late July and will also be featured on FMA's website – ***www.fmaweb.org.***

**CLE and CPE accreditation…as well as first timer, govt/regulatory and 2-for-1team discounts…will be available, so be sure to budget for (and plan to attend) the 2016 Legal & Legislative Issues Conference.**

Contact Dorcas Pearce at ***dp-fma@starpower.net*** or 202/544-6327 if you have questions and/or wish to register. Online registration is also an option.

Thanks to everyone who took the time to respond to FMA's April survey asking for their most critical topical suggestions as well as speaker recommendations and volunteers.

ATTENTION SPONSORS! FMA is actively pursuing sponsorship opportunities regarding this conference. Please contact FMA if your firm would like to support this event.

*(Continued on page 20)*

# Program Update *(continued from page 19)*

## 2016 Securities Compliance Seminar

**FMA's 25th Securities Compliance Seminar** took place **April 20–22**, 2016 at the InterContinental Chicago Hotel (on the Magnificent Mile) in **Chicago, Illinois**. This annual program was a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys and regulators.

Congratulations to the Program Planning Committee for developing varied agenda topics and securing noted industry leaders and regulators as speakers. Members included: **Mark Carberry** *(J.P. Morgan);* **James Connors**, *CAMS, CRMA (Wells Fargo Audit Services);* **Eric Hamilton** *(Kuehl Capital Corp / Hamilton Associates, P.C..);* **Matthew Hardin** *(Hardin Compliance Consulting LLC);* **Annie Hsu** *(BNP Paribas);* and **Vaughn Swartz** *(Rabobank)*.

The agenda featured these sessions and peer discussions:

### Pre-Seminar Interactive Workshop
- Christine Kaufman ■ Impact Consultants, Inc.

### Key 2016 Legislative and Regulatory Initiatives
- Jeffrey Holik ■ Shulman, Rogers, Gandal, Pordy & Ecker, P.A.
- Michele Meyer ■ Promontory Financial Group, LLC
- Tanya Solov ■ Illinois Securities Department

### Cybersecurity Risk Oversight: Leveraging the "Three Lines of Defense"
- Steve Bridges ■ JLT Specialty USA
- Rebecca Chmielewski ■ Federal Reserve Bank of Chicago
- James Enstrom ■ Chicago Board Options Exchange
- Kristofer Swanson ■ Charles River Associates
- Liisa Thomas ■ Winston & Strawn LLP

### Internal Audit Hot Topics and Emerging Risks
- Gina Adelphia ■ Northern Trust Corporation
- Neil Bohlen ■ Wells Fargo Audit Services
- Jason Cahaly ■ Bank of America

### AML Fifteen Years Later: Where Are We?
- Doug Hoffman ■ First National Bank of Omaha
- Kaitlin Lemmo ■ Protiviti
- Matt Shull ■ Federal Reserve Bank of Chicago

### Regulatory Forum—Securities
- Cynthia Friedlander ■ FINRA
- Daniel Gregus ■ SEC
- Donald Litteau ■ FINRA
- Michael Post ■ MSRB

### Retail Securities Hot Topics
- Bill Reilly ■ Oyster Consulting, LLC
- Jeffrey Suhanic ■ PNC Investments, LLC
- Ed Wegener ■ FINRA

### Compliance Risk Management: Culture of Compliance
- Susan Ameel ■ Deloitte & Touche LLP
- Donald Litteau ■ FINRA
- Andrew Mannarino ■ Citadel Securities, LLC

### Institutional Compliance
- Steve Brown ■ PricewaterhouseCoopers Advisory Services LLC
- Michael Foley ■ Katten Muchin Rosenman LLP
- James Rabenstine ■ Nationwide Financial Services

### Registered Investment Advisers
- James Downing ■ BMO Harris Financial Advisors
- Jeannie Lewis ■ William Blair & Company, L.L.C.
- David Porteous ■ Faegre Baker Daniels LLP

### Regulatory Forum—Banking
- James Gallagher ■ Comptroller of the Currency
- Komi Ketedji ■ Federal Reserve Bank of Chicago
- William Orange ■ Federal Deposit Insurance Corporation

### Social Media & Advertising
- Joanna Belbey ■ Actiance, Inc.
- Angela Bourgeois ■ Sigma Financial Corporation/Parkland Securities, LLC
- Al Raymond ■ Deloitte & Touche LLP

### The Evolving Role of Compliance / CCO Liability
- Yoon-Young Lee ■ WilmerHale
- Vaughn Swartz ■ Rabobank
- Andrew Tino ■ PNC Financial Services Group

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# Program Update *(continued from page 20)*

## Peer Groups

**Broker-Dealer Compliance Hot Topics**
- Jeffrey Holik ■ Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

**Internal Audit Hot Topics**
- Jason Cahaly ■ Bank of America

**The Evolving Role of Compliance / CCO Liability (2 sessions)**
- Michele Meyer ■ Promontory Financial Group, LLC
- Joanna Belbey ■ Actiance, Inc.

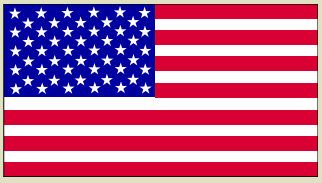
**Compliance Risk Management (2 sessions)**
- Matthew Hardin ■ Hardin Compliance Consulting LLC
- Steve Brown ■ PricewaterhouseCoopers Advisory Services LLC

**Informal networking group dinners** took place Wednesday and Thursday evenings. They provided a great opportunity for attendees to unwind and compare notes on sessions/speakers from earlier in the day. Thanks to dinner "captains" James Connors and Sondra & Mike Bane who did a fantastic job hosting these events!

## CLE / CPE

**CLE & CPE accreditation (among others) was available.** If you need CLE/CPE accreditation and have **not** yet received your **CPE** certificate or **CLE** approval notification and/or certificate, please contact Dorcas Pearce right away at *dp-fma@starpower.net* or 202/544-6327.

**Happy 4th of July!**



## Pre-Seminar Workshop

**Christine Kaufman** (Impact Consultants, Inc.) led an optional, **interactive** pre-seminar interactive workshop on Wednesday, April 20 from 8:30–10:45 am. This workshop presented a unique opportunity to network with other compliance and audit professionals and provided an interactive format to address the questions and concerns of the participants. A myriad of topics were discussed based on the needs of the participants. This session was designed for persons new to the securities industry as well as seasoned compliance and audit personnel and provided an opportunity to get answers to specific questions about attendees' compliance and audit programs and for them to come away with new ideas and resources for making their jobs more manageable.

***Thanks to everyone who participated and contributed to the success of this annual spring program...committee members, speakers, attendees and sponsors.***

***FMA gratefully acknowledges these sponsors of FMA's 2016 Securities Compliance Seminar***

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# Program Update *(continued from page 21)*

## 2017 Securities Compliance Seminar

**Save these dates!**

FMA's **2017 Securities Compliance Seminar** is tentatively scheduled to take place **April 26-28** at a **new** hotel in Fort Lauderdale, Florida. Watch for the September issue of *Market Solutions* for details.

The Planning Committee will be assembled in the summer/early fall to begin work on program development. Contact Dorcas Pearce (***dp-fma@starpower.net*** or 202/544-6327) to volunteer… as a committee member, a general session panelist, workshop facilitator or peer discussion leader…or to share topical and/or speaker recommendations. Sponsor inquiries will also be welcome.

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# *Job Bank*

**Position Sought**

**Legal Consultant:** Available for temporary/part-time assignment with company seeking an experienced executive to fill open management position(s) or with special project needs.

Seasoned advisor to financial institutions (banking/capital markets/broker-dealer) with a focus on complex business problem solving, helping seize strategic opportunities and advising management and boards on federal/state regulatory matters, corporate governance, crisis management and corporate communications issues.

Functioned during 35-year public and private company career in Executive and General Counsel roles advising business lines and managing control functions, including as Director of Risk Management. Also advise and liaison with corporate boards.

B.A. from Yale University; J.D. from Georgetown University Law Center. Licensed in New York, New Jersey and North Carolina.

Contact Stephen Antal at *antals@bellsouth.net* or 704/877-1663. Will travel as required.